

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,) Case No. S161781
)
v.)
) Superior Court No.
JUSTIN HEATH THOMAS,) RIF086792
)
Defendant and Appellant.)
)
_____)

**SUPREME COURT
FILED**

APR - 7 2017

Appeal from the Superior Court of the State of California

Jorge Navarrete Clerk

In and For the County of Riverside

Deputy

Honorable Terrance R. Boren, Judge

APPELLANT'S REPLY BRIEF

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California Supreme Court

DEATH PENALTY

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Honorable Terrance R. Boren, Judge

APPELLANT’S REPLY BRIEF

I

**THE JUDGMENT OF GUILT SHOULD BE REVERSED
BECAUSE THE TRIAL COURT ERRONEOUSLY
ADMITTED EVIDENCE OF HARTWELL’S MURDER,
AND JUSTIN’S ALLEGED PLAN TO MURDER THE
MICHAEL AGUON AND HIS GIRLFRIEND.¹**

¹ Counsel has omitted the constitutional and statutory basis of the claims in the headings in the interest of brevity. These omissions are not intended to be a waiver of any claim.

Justin argued in the Opening Brief the trial court erred by admitting evidence pertaining to Hartwell's death, and his alleged plan to kill Michael Aguon and his girlfriend,² because: (1) the evidence was admitted to prove Justin's intent when he shot Noriega, but the intent of the shooter was never in dispute; (2) numerous extraneous and prejudicial facts concerning Hartwell's death were admitted into evidence; and (3) the prejudicial impact of the evidence outweighed its probative value. (AOB at pp. 58-83.) Respondent argues the evidence was properly admitted because: (1) any issue pertaining to admission of the Aguon incident was waived because of the lack of an objection in the trial court; (2) it was probative of Justin's motive to kill Noriega; (3) it was relevant to whether Justin killed Noriega with premeditation and deliberation; (4) it was relevant to Brown's credibility; and (5) the probative value of the evidence outweighed its prejudicial effect. Finally, respondent argues that any error was harmless. (RB at pp. 44-70.) These arguments must be rejected.

1. THIS COURT CAN REVIEW ON THE MERITS WHETHER THE TRIAL COURT ERRED BY ADMITTING THE INCIDENT WITH MICHAEL AGUON AND CHRISTINE.

The issue of the admissibility of uncharged criminal conduct by appellant was first litigated when appellant was in pro per status. Justin did not object to the admission of evidence of Hartwell's murder during the April 20, 2007, hearing. (2Aug. RT 253-254, 259.)

² For ease of reference, the evidence pertaining to Hartwell's death, and appellant's alleged plan to kill the Aguons, will be referred to as the "other crimes evidence" when collective reference is made to the evidence.

The prosecutor then discussed with the trial court the incident with the Aguon and Christine in which Maximilian Garcia would be a witness. (2Aug. RT 255.)³ A few pages later, the prosecutor again referred to the incident with Aguon and Christine. (2Aug. RT 257.) The trial court made a few comments regarding the similarity of the incidents. (2Aug. RT 257-258.) Justin then argued, “I believe that would be prejudicial because there is no police reports indicating threats were made in that manner.” (2Aug. RT 258.) Justin was unable, after further inquiry by the trial court, to offer any other legal reason the evidence should be excluded. (2Aug. RT 257-258.)

Justin’s prejudice objection was sufficient to preserve for review whether the trial court erred under Evidence Code section 352 by admitting evidence of the incident with Aguon and Christine. Section 352 does not require any particular form of objection. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435.) The objection must alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought. (*People v. Partida, supra*, 37 Cal.4th at p. 435.) Justin’s objection alerted the trial court that he sought exclusion of the other crimes evidence based on its prejudicial nature. That was sufficient.

Counsel was reappointed for Justin. On October 10, 2007, the trial court again addressed the admissibility of the uncharged criminal conduct. (2`RT 1005-1023.) Defense counsel objected to the admission of the Hartwell murder. (2RT 1004-1005.) The trial court

³ Garcia testified before the jury that Justin allegedly planned to kill Aguon and Christine because he believed they were going to report him to the police. (9RT 2331-2334.)

ruled the Hartwell murder was admissible. (2RT 1023.) There was no discussion of the Aguon incident. This subsequent discussion between the attorneys and the trial court regarding the admissibility of the Hartwell murder did not negate the earlier objection made by Justin to the admission of the Aguon incident. Hence, this Court can review on the merits whether the trial court erred by admitting evidence of the incident with the Aguons.

2. EVIDENCE PERTAINING TO HARTWELL’S DEATH, AND THE PLAN TO KILL MICHAEL AGUON AND CHRISTINE, WAS NOT ADMISSIBLE UNDER EVIDENCE CODE SECTION 1101.

i. THE ADMISSION OF THE OTHER CRIMES EVIDENCE MAY NOT BE AFFIRMED BASED ON THEORIES NOT RELIED UPON BY THE TRIAL COURT WHEN IT RULED THE EVIDENCE WAS ADMISSIBLE.

The trial court, when it ruled the other crimes evidence was admissible, did not cite Brown’s credibility, Justin’s motive, or the issue of premeditation and deliberation, as the basis to admit the evidence. (2RT 1022-1023.) Respondent nevertheless argues the other crimes evidence was admissible for those reasons. Respondent relies on the rule that a trial court’s ruling that is correct in law will be upheld on appeal even if the trial court’s reason for its ruling was erroneous. (RT at p. 52, fn. 71.) This argument must be rejected because it is fundamentally unfair in the context of this case. The trial court expressly admitted the other crimes evidence only to prove intent. (2RT 1022-1023.) Remarkably, respondent does not make a single argument that the other crimes evidence was admissible to prove intent. Every argument made by respondent to support the admissibility of the other crimes evidence is based on some theory of admissibility other than intent.

The rule that the trial court's ruling will be upheld on appeal, despite an erroneous reason for the ruling, should not be applied to an evidentiary ruling which requires the trial court to evaluate the relevance of the proffered evidence in the context of other evidence and the parties' theories. The trial court determines the admissibility of evidence under Evidence Code section 1101 by evaluating the relevance of the proffered evidence in light of the other evidence, the parties' offers of proof, and their theories of the case. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 406 [in ruling upon the admissibility of evidence of uncharged acts, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose].) The trial judge is best situated to evaluate the evidence and perform this weighing process. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917-918.)

The trial court concluded the other crimes evidence was admissible to prove intent after evaluating the evidence and the parties' theories of the case. (2RT 1022-1023.) This Court cannot conclude the trial court would have reached the same conclusion if the prosecutor's theory of admissibility for the other crimes evidence was to prove Justin's motive, that he acted with premeditation and deliberation, or Brown's credibility.

It is fundamentally unfair for respondent to manufacture on appeal reasons to uphold the trial court's ruling admitting the other crimes evidence which were not offered in the trial court. The proponent of evidence has the burden of establishing its admissibility. (*People v. Morrison* (2004) 34 Cal.4th 698, 724.) This Court must assume the prosecutor cited every

theory of admissibility he believed appropriate when he argued for the admission of the other crimes evidence. (2RT 1022; 2 Aug. RT 235-258; 1CT 271-286.) The prosecutor's failure to cite the theories of admissibility now offered by respondent deprived Justin of the opportunity to argue to the trial court why the evidence was either not admissible under those theories or should be excluded under section 352.

The cases cited by respondent are distinguishable. None of those cases applied the rule that a correct ruling will be affirmed, despite the trial court citing the wrong reason for its ruling, in the context of evidence offered under a specific and narrow theory of relevance. In *People v. Zapien* (1993) 4 Cal.4th 929, the prosecutor admitted testimony from the preliminary hearing pursuant to Evidence Code section 1291. The trial court judge erroneously stated the preliminary hearing testimony would be admissible even if the defendant's motive to cross examine the witness at the hearing was different from his motive to cross examine the witness at trial. This Court concluded it did not need to resolve whether this comment meant the trial court misunderstood the legal standard. The preliminary hearing testimony was admissible because the motive to cross examine was the same at each hearing. (*People v. Zapien, supra*, 4 Cal.4th at p. 974.) The issue regarding the admissibility of the preliminary hearing testimony did not depend on the relevance of that testimony to the defendant's innocence or guilt. *People v. Zapien* dealt with a procedural issue of admissibility and not a relevance issue.

D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 19, applied the above

rule of law to the legal standard the trial court applied to a ruling on a summary judgment motion. The case did not deal with an admission of evidence issue. In *People v. Jones* (2012) 54 Cal.4th 1, defendant was found guilty of murder, rape, and sodomy. The trial court admitted evidence of a different sexual assault pursuant to Evidence Code section 1101 to show the defendant's intent. The trial court declined to admit the prior incident pursuant to Evidence Code section 1108 because this Court had not yet resolved the constitutionality of the statute. This Court ruled the evidence was admissible under section 1108, regardless of its admissibility under section 1101, because the only requirement for admissibility was that the prior offense, and charged offenses, were sex crimes. (*People v. Jones, supra*, 54 Cal.4th at p. 50.) *People v. Jones* does not apply to the instant case. The Hartwell murder and the incident with Aguon and Christine were not admissible merely because they met the definition of a certain type of crime.

In *People v. Smithey* (1999) 20 Cal.4th 936, the trial court admitted a hearsay statement declaring the victim/declarant's state of mind because the defense counsel had opened the door to its admission during cross-examination of a witness. The Attorney General conceded the hearsay statement was not admissible on that basis. However, the prosecutor had argued the statement to show the declarant's state of mind. This Court ruled the hearsay statement was admissible for the nonhearsay purpose of showing the declarant's state of mind and to impeach the defendant's testimony that he was friendly with the victim. (*People v. Smithey, supra*, 20 Cal.4th at p. 971-972.) In *People v. Smithey*, there was no

dispute the victim/declarant's hearsay statement was relevant. The only issue was its admissibility under the hearsay rule. Conversely, the admissibility of the Hartwell murder, and the incident with Aguons, depended on a precise theory of relevance. Hence, *People v. Smithey* is of no assistance to respondent.

ii. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE TO PROVE MOTIVE.

Respondent argues the other crimes evidence was admissible to prove Justin's motive to kill Noriega because Noriega had threatened to report Justin's drug dealing to law enforcement. There was no evidence Noriega had threatened to report Justin to the police. Indeed, that scenario was unlikely because Noriega was Justin's drug supplier. (6RT 1910.) Justin told Reeder he feared Noriega was a "narc." (7RT 2021-2022, 2143-2144; 8RT 2276.) Regardless, the other crimes evidence was not admitted to prove Justin had a motive to murder Noriega. It was expressly admitted to prove the shooter intended to kill Noriega. (2RT 1022-1023.)⁴

⁴ Respondent's attempt to treat intent and motive as interchangeable concepts is erroneous. Respondent argues Justin's motivation to silence potential "narcs" created a direct, logical nexus between the other crimes evidence and Noriega's death. Respondent is wrong. Motive and intent are distinct concepts. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) "Motive describes the reason a person chooses to commit a crime." (*People v. Hillhouse, supra*, 27 Cal.4th at p. 504.) Motive to commit a particular crime "is different from a required mental state such as intent or malice." (*Ibid.*) Intent in the context of section 1101, subdivision (b), refers to the defendant possessing the requisite state of mind to be guilty of a criminal offense. Respondent's assertion, "there was a direct logical nexus between the Noriega murder and the uncharged acts," (RB at p. 53), is speculation without evidentiary support because the murders were unrelated incidents separated by years.

Respondent's motive argument is really an argument that Justin acted pursuant to a common scheme or plan when he shot Noriega and committed the other crimes evidence. This Court cannot uphold the admission of the other crimes evidence to prove a common scheme or plan because: (1) the evidence was not admitted for that purpose; and (2) the legal standards for the admission of uncharged crimes to prove intent, and a common scheme or plan, are distinct.

"The least degree of similarity between the uncharged act and the charged offense is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "A greater degree of similarity is required in order to prove the existence of a common scheme or plan." (*Ibid.*) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id.*, at p. 403.) "This distinction, between the use of evidence of uncharged acts to establish the existence of a common design or plan, as opposed to the use of such evidence to prove intent or identity, is subtle but significant." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.)

People v. Ewoldt explained that uncharged crimes are ordinarily inadmissible to prove a common design or plan when it is undisputed that a crime was committed:

For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is

whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.

(People v. Ewoldt, supra, 7 Cal.4th at p. 406.)

In the instant case, it was undisputed Noriega was shot and killed. The only issue was the identity of the shooter. Under the above reasoning from *People v. Ewoldt*, the murder of Hartwell, and the incident with Aguons, were not admissible to prove Justin was the person who shot Noriega.

iii. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE TO BOLSTER BROWN'S CREDIBILITY.

Respondent argues: (1) Brown was a material witness to Noriega's murder; and (2) evidence of Hartwell's murder was admissible to bolster Brown's credibility. (RB at pp. 53-54.) The other crimes evidence was not admissible to support Brown's credibility. This theory of relevance was not set forth in the prosecutor's pretrial motion. (1CTP 271-286.) It was also not argued by the prosecutor in court. (2Aug. RT 254-259; 2RT 1022.) The trial court did not cite Brown's credibility as a reason for admitting the other crimes evidence. (2RT 1022-1023.) This theory of admissibility is purely an-after-the fact justification by the

Attorney General for the admission of the uncharged crimes which should be rejected by this Court.

The trial court could not have admitted the other crimes evidence to bolster Brown's credibility if the prosecutor had offered the evidence for that purpose. Under respondent's argument, section 1101 evidence is relevant if it corroborates to any degree the testimony of a prosecution witness. This reasoning must be rejected because it would in practical effect eliminate the restrictions imposed on the admission of other crimes evidence in section 1101, subdivisions (a) and (b).

Respondent cites *People v. Carpenter* (1995) 21 Cal.4th 1016, 1049, and *People v. Hawkins* (1995) 10 Cal.4th 920, 951-952, overruled on another point in *People v. Blakely* (2000) 23 Cal.4th 82, 89-91, in support of the argument the other crimes evidence was admissible to prove Brown's credibility. (RB at p. 53.) These cases are distinguishable.

In *People v. Carpenter*, the defendant was convicted of a series of murders and sexual assaults. The victims were murdered and assaulted in wooded areas. Physical evidence suggested two of the victims had been strangled with a narrow piece of cord or a wire. The defendant received the gun he used to shoot several of the victims from someone named Mollie Purnell. A witness testified that she went to the Purnell's home during a weekend and saw the defendant there. The defendant explained he was a professional thief and showed her a suitcase which he referred to as his "thief kit." It contained a firearm and woven wire similar to that used to kill two of the victims. The defendant argued the witness's testimony

about seeing a firearm and the woven wire was inadmissible. This Court concluded, “the court properly admitted the statement about the defendant’s being a ‘thief,’ offered not to prove its truth, but to indicate the circumstances in which the defendant showed the witness the gun and the suitcase. These circumstances were relevant to her credibility, which was a material issue.” (*People v. Carpenter, supra*, 21 Cal.4th at p. 1049.)

People v. Carpenter was not a section 1101 case. The testimony about the gun and the woven wire demonstrated the means by which the charged murders were committed. Here, the murder of Hartwell, and the incident with the Aguons, did not demonstrate anything about how Noriega was killed. Those incidents had no impact whatsoever on Brown’s credibility. She knew nothing about the uncharged crimes.

In *People v. Hawkins*, the defendant committed two murders during separate incidents. The second incident was at a market where the defendant killed a customer and shot the store manager who survived. The defendant was arrested six days after the second murder. Prior to being arrested, the defendant admitted to his brother his participation in the incident. The defendant said he was thinking of returning to the market to kill the surviving witness. The defendant’s brother discouraged him from doing so. They argued. The defendant then assaulted his brother with a knife and caused serious injury. The police arrived and took the brother’s statement which incriminated the defendant. (*People v. Hawkins, supra*, 10 Cal.4th at p. 950.)

The defendant objected under section 1101 to the admission of his assault on his

brother with the knife. The brother testified at the preliminary hearing the defendant had not said anything to him about the murders. This testimony contradicted the brother's statement to the police the day the defendant was arrested. The brother at trial inculpated the defendant. The defense counsel, during cross-examination, emphasized the contradiction between the brother's trial testimony and preliminary hearing testimony. The prosecutor, on redirect examination, elicited the defendant's assault against his brother to explain why the brother was afraid of the defendant and recanted his accusations when he testified at the preliminary hearing. This Court concluded the stabbing incident was admissible because it was relevant to the brother's credibility. (*People v. Hawkins, supra*, 10 Cal.4th at pp. 951-952.)

The instant case bears no similarity at all to *People v. Hawkins*. When Brown was arrested during 1994, she gave a statement to the police which inculpated Justin in Noriega's death. (6RT 1918-1919, 1821, 1923, 1945.) Hartwell's murder, and the incidents with the Aguons, had no bearing on Brown's motive to give truthful testimony when she testified during the Texas trial. There was no evidence those incidents influenced Brown's statement to the police. The section 1101 incident in *People v. Hawkins*, itself, involved the prosecution witness whose credibility was in question. Brown, conversely, had no connection to the section 1101 evidence admitted against Justin. Hence, the murder of Hartwell, and the incident with the Aguons, was not relevant to Brown's credibility.

iv. THE OTHER CRIMES EVIDENCE WAS NOT ADMISSIBLE TO PROVE PREMEDITATION AND DELIBERATION.

Respondent argues the other crimes evidence was admissible to prove premeditation