

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))

**SUPREME COURT
FILED**

MAY 22 2013

Frank A. McGuire Clerk

Deputy

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

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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Court of California

DEATH PENALTY

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THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING SPANISH SPEAKING JURORS TO CONSIDER THEIR OWN TRANSLATION OF APPELLANT'S RECORDED STATEMENT

An important part of the prosecution's case in chief was a video recording in which appellant made a statement in Spanish regarding his involvement in the killings. (Exhibit 85A.) The prosecution played the video tape for the jurors in open court and provided the jurors with an English translation of the recording. (Exhibit 85B; 50 RT 9829-30; 4 SCT 1037-38.)

Both the prosecution and defense relied on portions of this recording in arguing crucial issues to the jurors. Based on the recorded statement the prosecution argued that appellant admitted he personally shot the victims with the .38 caliber handgun. (52 RT 10246.) On the other hand the defense relied on the video statement to argue that appellant did not intend rob or murder the victims and that it was Antonio Sanchez and the others who committed the robbery and killings.¹

Accordingly, it was important to assure that all the jurors relied solely on the English transcript of the video recording which was prepared by a certified court interpreter. Otherwise Spanish speaking jurors – whose own translation of the video statement differed from the English transcript – might have relied on their own translation instead of the interpreter's. However, the instructions given by the judge regarding the video statement

¹ Defense counsel argued, based on the recording, that appellant did not know about Antonio Sanchez' alleged plan to rob and kill the victims: "What did Danny Covarrubias say in that video tape? He said he didn't know. 'We didn't know what was going to happen.' That's the absolute truth. He didn't know what was going to happen that evening." (52 RT 10270.)

failed to assure that the jurors would *only* consider the English transcript and not their own translation of the Spanish statements.

Before allowing the recording to be played for the jurors the judge admonished them as follows:

We're going to play a videotape. And you have in your hands a translation of that tape. Some of you -- again, some of you may have some proficiency in Spanish. Others of you may have no proficiency in Spanish. You should rely on the transcription, and you should not -- none of you, if you happen to have some proficiency in Spanish, should anoint yourselves as any kind of an expert so as to provide aid independently of the evidence *to other jurors* as to what is or is not being said on the tape. That comports with the general rule that the jury is to rely upon the evidence that is presented in court and not upon evidence from outside sources. [Emphasis added.] (50 RT 9827.)

Thus, although the judge's instruction admonished Spanish speaking not to talk "*to other jurors*" about their own translation of the recording, the admonition did not preclude Spanish speakers from *themselves* considering their own translations of the Spanish in the recording.² Moreover, nothing in the later jury instructions cured the faulty admonition. To the contrary, the only instruction regarding the question of whether or not the Spanish speaking jurors were bound by the English translation specifically addressed situations

² The failure of defense counsel to correct the judge's erroneous instruction did not waive the claim for two reasons.

First, no objection to an instruction is necessary where, as here, the defendant's substantial right to a jury trial is affected. (Pen. Code §1259.

Second, "because the court undertook to instruct the jury [on this issue] ... a "proper consideration of the evidence" [citation] required that the instructions given be accurate." (*People v. Malone* (1988) 47 Cal. 3d 1, 49.) Under long-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) The trial court is under an affirmative duty to give, sua sponte, correctly phrased instructions. (*People v. Stewart* (1976) 16 Cal.3d 133, 140.) "[A] court may give only such instructions as are correct statements of the law. [Citation]." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1275.)

“[w]hen a witness has testified through a certified court interpreter.”³ Thus, under the common sense maxim “expressio unius est exclusio alterius” the jurors were free to rely on their own translation of the video statement since that evidence was not a “*witness*” testifying “*through a court interpreter*.”⁴

This error, by allowing jurors to rely on their own translation of important evidence, “undermined one of the fundamental tenets of our justice system—that a defendant’s conviction may be based only on the evidence presented at trial [Citation]” (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303) and violated appellant’s state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. The error also violated appellant’s state created rights and abridged the Due Process Clause (14th Amendment) of the United States Constitution by

³ Instead of only giving the standard CALJIC instruction regarding the testimony of a “**witness ... through an interpreter**” the court should also have expressly addressed the English transcription of a Spanish recording. For example Ninth Circuit’s model criminal instruction 2.8 which states: “You are about to [hear] [watch] a recording in the [specify the foreign language] language. A transcript of the recording has been admitted into evidence. The transcript is an official English-language translation of the recording. [] Although some of you may know the [specify the foreign language] language, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript even if you would translate it differently.” (Ninth Circuit Manual of Model Criminal Jury Instructions (2010) Criminal Cases, Jury Instruction No. 2.8; Judicial Council of Cal. Crim. Jury Instns. (2011) Bench Notes to CALCRIM No. 121, p. 22.)

⁴ When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error. (See *People v. Dewberry* (1959) 51 Cal.2d 548, 557; *People v. Salas* (1976) 58 Cal.App.3d 460, 474.) “Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius*, the deductive concept is commonly understood” (*People v. Castillo* (1997) 16 Cal.4th 1009, 1020 [conc. opn. of Brown, J.]; see also *U.S. v. Crane* (9th Cir. 1992) 979 F.2d 687, 690 [maxim *expressio unius est exclusio alterius* “is a product of logic and common sense”].)

arbitrarily violating appellant's state created rights. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

The judgment should be reversed because a substantial danger exists that if the jury included Spanish-speaking members (more than a reasonable probability since the trial was held in Salinas), some of them may have interpreted the recording for themselves. Allowing the jurors to select for themselves the versions of defendant's statement on which to base their verdict was equivalent to allowing these jurors to consider evidence not presented at trial. And, because it is "impossible to ascertain whether some of the jurors did in fact stray from the English translation provided by the state-certified interpreter and, if so, whether defendant was prejudiced ... [a] showing of prejudice ... is not required." (*People v. Arancibia* (2013) 213 Cal. App. 4th 1465, 1471) An error is per se reversible when it "interferes in a fundamental way with the full exercise of a constitutional right such as the right to trial by jury under the Sixth Amendment. [Citations.]" (*Ibid.*) Accordingly, the judgment should be reversed.

CONCLUSION

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

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Dated: May 3, 2013

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CERTIFICATION OF WORD COUNT FOR SUPPLEMENTAL BRIEF

As attorney of record herein, and pursuant to California Rules of Court, Rule 8.630, I hereby declare and certify that foregoing appellant's second supplemental brief contains 1508 words in *WordPerfect* computerized format.

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 3, 2013, at Santa Rosa, California.

Thomas Lundy
Attorney for Appellant
DANIEL COVARRUBIAS.

