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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ENRIQUE RODRIGUEZ,

Defendant and Appellant.

B233450

(Los Angeles County  
Super. Ct. No. BA342161)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Affirmed as modified.

Stephen Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Gary A. Liberman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Jose Enrique Rodriguez, of first degree murder by lying in wait. (Pen. Code,<sup>1</sup> §§ 187, subd. (a), 190.2, subd. (a)(15).) He was sentenced to life without the possibility of parole plus a consecutive one year for personal use of a knife. (§ 12022, subd. (b)(1).) On appeal, defendant argues there was insufficient evidence to support the lying-in-wait special circumstance finding. We disagree. We modify the judgment to impose a \$40 court security fee (§ 1465.8, subd. (a)(1)) and affirm the judgment as modified.

## II. THE EVIDENCE

### A. Antonio Perez's Testimony

On June 12, 2008, defendant stabbed his girlfriend, Monica Reynoso, to death in the Moctezuma Bar. Antonio Perez was in his house across the street from the bar the evening Ms. Reynoso was stabbed. He was periodically looking out the window to see whether his wife was arriving home. Around 5:50 p.m., Mr. Perez saw a car matching defendant's automobile parked across the street. A man and a woman were sitting in the car talking for "quite" some time. The man was in the driver's seat. The woman was in the front passenger seat. Mr. Perez could hear their voices. At one point they were speaking louder than the volume on his television. Mr. Perez testified, "Both of them were just out of control." Mr. Perez had to partially close his window. This was because Mr. Perez's six-month-old son was napping. Mr. Perez saw the man strike the woman in the cheek with a closed fist. It was a hard blow directly to her face. She grabbed her left cheek with both hands. A few minutes later, the woman got out of the car and walked away. The man paused for a couple minutes then drove away in the opposite direction. Twenty-five minutes later, Mr. Perez saw the woman hiding behind an electrical pole. Mr. Perez saw the man walking in the woman's direction. The man had gotten out of his

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<sup>1</sup> All further statutory references are to the Penal Code except where otherwise noted.

car. The woman walked at a fast pace towards the bar. Mr. Perez lost sight of her. Mr. Perez could not remember whether the man looked like defendant. Mr. Perez was unable to identify anyone in a photographic line-up later presented to him.

### B. Irma Telles's Testimony

The bartender at the Moctezuma Bar, Irma Telles, had known defendant as a customer for about two years. Ms. Reynoso was also a bar customer. According to Ms. Telles, defendant and Ms. Reynoso had been in a relationship with each other for two to three years. On the evening of her murder, Ms. Reynoso came into the bar around 7 p.m. She drank a beer and ate some food. At some point, Ms. Telles received a telephone call from defendant. Ms. Telles told defendant Ms. Reynoso was not there. Ms. Telles made this misrepresentation at Ms. Reynoso's request. Five to 10 minutes later, defendant walked in through the front door and went towards the pool table in the back of the bar. Ms. Reynoso left through the front door. After saying hello to Ms. Telles, defendant also walked out the front door. About 10 minutes later, Ms. Reynoso returned. At some point Ms. Reynoso moved from the bar to a chair closer to the front door. Trinidad Ramirez was also in the bar that evening. Mr. Ramirez arrived sometime after defendant first came and left. After Ms. Reynoso moved nearer to the front door, an unidentified man sat next to her. Mr. Ramirez joined them, sitting next to the unidentified individual. Ms. Telles, Ms. Reynoso, Mr. Ramirez and the fourth person were talking among themselves. Defendant reentered through the back door. He walked up to Ms. Reynoso and pulled out a knife. According to Ms. Telles, Ms. Reynoso said, "What?" Defendant then stabbed her below her rib cage. Defendant said nothing before stabbing her. Ms. Reynoso fell to the ground.

Ms. Telles did not hear anyone laugh or see anyone gesture. Ms. Telles could not remember how many times defendant stabbed Ms. Reynoso. Ms. Telles started to scream. Mr. Ramirez stood up. Defendant lunged at Mr. Ramirez and stabbed him in the face. Defendant fled. According to Ms. Telles, defendant went out through the back

door. At no point in the evening did Ms. Telles see Ms. Reynoso hugging or showing any affection towards Mr. Ramirez. There were between five and ten patrons and two employees in the bar at the time.

### C. Trinidad Ramirez's Testimony

Mr. Ramirez had known Ms. Reynoso for eight or nine years. They had dated for about six months to a year. Their relationship had ended about eight months prior to Ms. Reynoso's death. Ms. Reynoso subsequently dated defendant. Mr. Ramirez testified he arrived at the Moctezuma Bar around 5 p.m. on June 12, 2008. Ms. Reynoso was already there. She was sitting in the corner, next to the music box. There were people around her. Mr. Ramirez sat in a different area of the bar, close to where the bartenders entered. Defendant entered the bar twice. Mr. Ramirez testified that the first time defendant came into the bar: "He came in and he searched everyone with his stare. He was looking for something." Defendant stood in the middle of the bar and looked all around. As soon as defendant came in, Ms. Reynoso exited through the front door. Mr. Ramirez did not think defendant saw Ms. Reynoso leave. Mr. Ramirez also thought Ms. Reynoso was trying to hide from defendant who also left through the front door. Ms. Reynoso returned two to three minutes later and sat near the music box. Later, Ms. Reynoso changed her seat. She sat next to a man who was sitting next to Mr. Ramirez.

About 15 to 20 minutes after he had first entered the bar, defendant returned. At that time, Ms. Reynoso was talking with the unidentified man. Mr. Ramirez was talking to Ms. Telles. Mr. Ramirez did not see defendant come in. Mr. Ramirez heard a bar employee yell. Mr. Ramirez turned around and saw defendant attacking Ms. Reynoso. Defendant was grabbing Ms. Reynoso's hair and attacking her with something he had in his hand. Mr. Ramirez saw defendant strike Ms. Reynoso once in the neck.

Mr. Ramirez said, "Hey," and defendant turned towards him and attacked Mr. Ramirez. Defendant slashed Mr. Ramirez's cheek. The injury required six or seven

stitches. Mr. Ramirez did not hear defendant say anything to Ms. Reynoso. Defendant did not say anything to Mr. Ramirez. All Mr. Ramirez heard was screaming. Defendant ran out through the back door, towards the parking lot. Mr. Ramirez did not remember Ms. Reynoso hugging him at any point that evening.

#### D. Edgar Rodriguez's Testimony

Mr. Rodriguez was also at the Moctezuma Bar that evening. He saw Ms. Reynoso there. Mr. Rodriguez did not know her, but he had seen her before. Mr. Rodriguez was in the back of the bar when defendant walked out. Defendant walked "a bit fast" out the back door and into the parking lot and towards the alley. He had something metal in his hand; it looked like a knife. About halfway down the alley, defendant got into a car and drove away.

#### E. Miguel Huesca's Testimony

Mr. Huesca saw a man run out the back door of the bar. The man had a large metal object in his hand. The man got into a car parked in the alley and drove away.

#### F. Juana Rodriguez's Testimony

Ms. Rodriguez was defendant's estranged wife and the mother of his children. They were legally married but had been separated since 2007. Ms. Rodriguez passed by the Moctezuma Bar at about 8 p.m. on June 12, 2008. She saw defendant standing outside the bar on the sidewalk smoking. He was facing the street. Ms. Rodriguez did not stop. Later that night, at about 9:30 p.m., defendant telephoned Ms. Rodriguez. He spoke very rapidly. He said he had fought with Ms. Reynoso. Ms. Rodriguez testified, "[He said] that we should be careful and that we should take care of each other." He also

said he had killed Ms. Reynoso. The following day defendant left a message. He said he had called the police.

#### G. Maria Alvarado's Testimony

Ms. Reynoso's sister was Ms. Alvarado. On June 12, 2008, Ms. Reynoso stopped by Ms. Alvarado's house at about 3 p.m. Ms. Alvarado agreed to watch Ms. Reynoso's two-year-old daughter. Ms. Alvarado was taking care of the two-year-old so Ms. Reynoso could go out. The child had just been released from a hospital. After Ms. Reynoso left, at about 5 p.m., defendant arrived at Ms. Alvarado's house. He was looking for Ms. Reynoso. Defendant asked Ms. Alvarado, "Where is Monica?" When Ms. Alvarado said Ms. Reynoso was not there, defendant left, slamming a gate "real hard." Ms. Alvarado testified, "I know he was upset because the way he slammed it so hard." Ms. Alvarado telephoned Ms. Reynoso. Ms. Reynoso was told defendant had come looking for her. Later, defendant left a message on Ms. Alvarado's cellular telephone. Ms. Alvarado testified: "He said, okay, Maria, you don't want to do me the favor. Your sister wants to F me. I'm going to F her first. She wants to be whoring around, well, you guys are going to get it. And I hope you have this recorded."

#### H. Other Evidence

There were tire tracks behind the bar that matched defendant's vehicle. The distance from the tire marks to the back door was approximately 125 feet. The distance from the tire tracks to the front door of the bar was approximately 500 feet.

Detective Victor Marin interviewed defendant on June 13, 2008, around 4:35 a.m. Defendant was calm and responsive. Defendant told Detective Marin the following. He had been drinking the day Ms. Reynoso died. He had drunk about 11 beers before the incident. They had spoken on the telephone and argued about who was going to pick Ms. Reynoso's daughter up from the hospital. Defendant told Ms. Reynoso he could not

go until he finished work. She said, "If you don't do it now don't come at all."

Ms. Reynoso said she was going to stay at her brother's home in Moreno Valley. Then she hung up the telephone. Later, defendant had twice gone to the bar looking for Ms. Reynoso. Defendant did not believe she had gone to her brother's house. The first time he went to the bar was around 5 p.m. He walked in through the front door and asked a server named Cindy whether Ms. Reynoso was there. The server identified only as Cindy said no, so defendant left through the front door. He got into his car and drove to another bar Ms. Reynoso frequented. She was not at the other bar. Defendant did not have a knife with him at that point. Defendant returned to the Moctezuma Bar and parked his car in the rear alley. He armed himself with a dagger. It was approximately 12 inches long with a one-inch wide blade, sharp on both sides. Defendant placed the dagger in his waistband and walked to the front of the bar. He armed himself because he wanted to scare Ms. Reynoso. Defendant went to the front of the bar because he could not see the inside of the bar from the rear. Standing in the front, he could hear what was going on inside the bar. Defendant waited in front of the bar for approximately 30 minutes, listening. He was waiting to hear Ms. Reynoso's voice. Defendant moved back and forth from the window to the door. But he did not enter. Eventually, defendant heard Ms. Reynoso's voice. He walked into the bar. Defendant approached Ms. Reynoso and said, "Let's go." She said, "I'm not leaving." Then Ms. Reynoso said, "Who are you?" Defendant said: "Look at the way you are. It's been about three or four hours that your daughter was released from the hospital and now you are here."

Ms. Reynoso said: "What do you care? They're not your children." Then she smiled, turned around, and hugged Mr. Ramirez. Everyone in the bar started laughing. Ms. Reynoso was laughing which angered defendant. Ms. Reynoso said: "What are you going to do to me? Are you going to kill me?" Defendant retrieved the dagger and stabbed Ms. Reynoso one time in the chest or stomach. He looked at her face. Ms. Reynoso had a look on her face as if saying, "Why?" She raised her hands. It reminded defendant of when Ms. Reynoso used to scratch him. So he stabbed her one more time in the chest. Defendant did not feel anything when he stabbed Ms. Reynoso

the first time. After he stabbed her a second time, he felt nervous and panicked. Defendant ran out through the back door. He had no recollection of stabbing Mr. Ramirez. When he reached his car, he threw away the dagger. Defendant started the car and backed out through the alley.

### III. DISCUSSION

#### A. Lying In Wait

Defendant does not challenge his first degree murder conviction. Defendant argues, however, that the evidence was insufficient to support the lying-in-wait special circumstance finding. The lying-in-wait special circumstance resulted in his life without the possibility of parole sentence. (§ 190.2, subd. (a)(15).) Defendant reasons: he waited outside the bar only to determine—by hearing Ms. Reynoso’s voice—whether she was present there; there was no ambush and no surprise attack from an advantageous position; and he did not act stealthily, treacherously or deceitfully. This sort of waiting, defendant concludes, is not lying in wait.

Our review of the lying-in-wait special circumstance finding is for substantial evidence. (*People v. Stevens* (2007) 41 Cal.4th 182, 201; *People v. Mayfield* (1997) 14 Cal.4th 668, 670.) In reviewing a challenge to the sufficiency of the evidence, we apply the following standard, “[We] must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment.” (*People v. Mincey* (1992) 2 Cal.4th 408, 432; accord, *People v. Hovarter* (2008) 44 Cal.4th 983, 996-997; *People v. Stevens, supra*, 41 Cal.4th at p. 201.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the special circumstance beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) Our Supreme Court has held, “Reversal [for insufficient evidence] is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient evidence to support

[the conviction].’ [Citation.]” (*People v. Bolin, supra*, 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Proof of a lying-in-wait special circumstance requires evidence of an intentional murder committed under circumstances which include: the concealment of his or her purpose; a substantial watching and waiting period for an opportunity to commit the killing; and immediately thereafter, an unexpected attack on an unsuspecting victim utilizing a position of advantage. (*People v. Carpenter* (1997) 15 Cal.4th 312, 388, superseded by statute on another ground as noted in *People v. Friend* (2009) 47 Cal.4th 1, 87; accord, *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073; *People v. Moon* (2005) 37 Cal.4th 1, 22.) In *Mendoza*, our Supreme Court explained: “““The element of concealment is satisfied by a showing ““that a defendant’s true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim.”” [Citation.]” (*People v. Moon, supra*, 37 Cal.4th at p. 22.) As for the watching and waiting element, the purpose of this requirement ‘is to distinguish those cases in which a defendant acts insidiously from those in which he acts out of rash impulse. [Citation.] This period need not continue for any particular length ““of time provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.”” [Citation.]’ (*People v. Stevens, supra*, 41 Cal.4th at p. 202, fn. omitted.) ‘The factors of concealing murderous intent, and striking from a position of advantage and surprise, “are the hallmark of a murder by lying in wait.” [Citation.]’ ([*People v.*] *Stevens*, [*supra*, 41 Cal.4th] at p. 202.)” (*People v. Mendoza, supra*, 52 Cal.4th at p. 1073, fn. omitted.)

In *Mendoza*, the defendant was on parole from the youth authority. Two weeks prior to the murder, he purchased a handgun and ammunition. On the night of the murder, the defendant was armed. The defendant was walking with his girlfriend, Johanna Flores, and a fellow gang member. A police car stopped behind the group. Pomona Police Department Officer Tim Fraembs exited the car and spoke to them. The defendant responded rudely. Officer Fraembs then directed the defendant to sit on the curb with Ms. Flores. Officer Fraembs patted down the defendant’s fellow gang member.

The defendant slowly moved behind Ms. Flores and draped his left arm over her shoulder. The defendant stood very close behind her with his chest against her back. The defendant placed his right hand behind her back. He slowly pushed her forward into the street and towards Officer Fraembs. Eventually, they got within six or seven feet of Officer Fraembs. The defendant suddenly pushed Ms. Flores aside and shot Officer Fraembs.

Our Supreme Court held there was sufficient evidence to prove a substantial period of watching and waiting for an opportune time to attack: “[A] rational jury could find that defendant, who was carrying a gun in knowing violation of his parole conditions, decided at or near the outset of the encounter that he would kill the officer rather than face a certain return to custody. As the trial testimony reflected, when Fraembs drove up, defendant ignored the suggestions of both Flores and [the fellow gang member] to simply flee the scene. At the point Fraembs exited his car to question them, defendant rudely challenged the officer, but did not panic or immediately reach for his gun and shoot. Instead, as Fraembs began a patsearch of [the fellow gang member] after directing defendant and Flores to sit on the curb, defendant positioned himself behind Flores so that his right arm was hidden from the officer’s view. He then controlled her movements in order to approach the officer without attracting attention. Once they were close enough that defendant could not miss hitting Fraembs, he pushed Flores aside, drew his weapon, and stepped even closer to the officer before firing. On this record, a rational jury could conclude that defendant did not react impulsively to Fraembs’s appearance at the scene, but that he watched Fraembs for a substantial period as he not only waited for, but affirmatively engineered, the opportune moment to launch a surprise attack.” (*People v. Mendoza, supra*, 52 Cal.4th at p. 1074, fn. omitted.)

Our Supreme Court further held there was substantial evidence of concealment of purpose and surprise attack on an unsuspecting victim from a position of advantage: “Although Officer Fraembs was certainly aware of defendant’s physical presence, the evidence reflected that defendant managed to conceal his murderous purpose so well that he took the officer completely by surprise when he fired the single deadly shot at close

range. From this evidence, a rational jury could infer that defendant did not kill out of rash impulse, but rather in a purposeful manner that required stealth and maneuvering to gain a position of advantage over the unsuspecting officer. [Citations.]” (*People v. Mendoza, supra*, 52 Cal.4th at p. 1074; see also *People v. Lewis* (2008) 43 Cal.4th 415, 509-515.)

Substantial evidence supported the lying-in-wait special circumstance finding in the present case. Defendant parked his car in the alley. His car was less likely to be seen than if parked in the lot or on the street. He tucked his dagger into his waistband where it would be unseen. Rather than enter or wait by the rear door, which was closer to where he parked, defendant walked all the way around to the front of the bar. He positioned himself in front of the bar where it was easier to hear what was going on inside. Because both defendant and Ms. Reynoso were regular customers of the bar, he was able to pick out voices. He walked back and forth between the front window and the front door of the bar for 30 minutes. He smoked, paced and listened. It was not until Ms. Reynoso moved closer to the front door that defendant was able to ascertain her presence and placement in the bar. It was apparent Ms. Reynoso was unaware of defendant’s presence as she would have left, as she had done earlier in the evening. Defendant waited until Ms. Reynoso and her companions were engaged in conversation. Defendant then walked into the bar, straight to Ms. Reynoso and, without saying a word, stabbed her to death. The jury could reasonably conclude: defendant watched and waited for a substantial period of time; he concealed his intentions until he knew where Ms. Reynoso was and that she was engaged in conversation; and only then did he launch his attack, taking Ms. Reynoso and those around her by complete surprise.

#### B. Court Security Fee

The trial court failed to orally impose a \$40 court security fee. (§ 1465.8, subdivision (a)(1), as amended by Stats. 2010, ch. 720, § 33, eff. Oct. 19, 2010; see *People v. Davis* (2010) 185 Cal.App.4th 998, 1001.) The oral pronouncement of

judgment must be modified to reflect the imposition of the fee. The abstract of judgment need not be amended as the \$40 fee is reflected there.

#### IV. DISPOSITION

The oral pronouncement of judgment is modified to impose a \$40 court security fee pursuant to Penal Code section 1465.8, subdivision (a)(1). The judgment is affirmed in all other respects.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.