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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD CARTER,

Defendant and Appellant.

C067055

(Super. Ct. No.
09F05363)

Defendant Donald Carter, charged with felony murder and the special circumstances of killing 80-year-old Sophia McAllister while burglarizing, robbing, and raping her, testified that he broke into her house to get the money he desperately needed to buy more rock cocaine. He admitted he intended to commit the three felonies, albeit in his drug induced, crazy state of mind, but he denied intending to kill her. He reverses his defense on appeal, now suggesting that the jury might have found that the three felonies were only incidental to his plan to murder Mrs. McAllister.

The distinction is, in fact, pivotal. Defendant asserts the trial court failed to instruct the jurors sua sponte that the prosecution had to prove that the murder was carried out to advance the commission of the burglary, robbery, and rape or, in other words, that they could not find the special instruction to be true if the commission of the three felonies was merely incidental to the commission of the murder. He offers a clever and legally sound assault on the instruction delivered by the court, an argument the Attorney General does not appear to understand or rebut. It is, however, a Pyrrhic victory; he wins on the law and loses on the facts. Because there is not significant evidence that he intended to murder Mrs. McAllister and the other felonies were merely incidental to his plan to murder, the trial court was not obligated to give the so-called *Green* instruction sua sponte. (*People v. Green* (1980) 27 Cal.3d 1, 59-62 (*Green*), superseded by statute on other grounds as stated in *People v. Alcala* (1984) 36 Cal.3d 604, 621-622 & fn. 8.) We affirm.

FACTS

Few facts are necessary to resolution of the narrow instructional issues raised on appeal. The essential facts are undisputed.

In May 1989 defendant was a heavy rock cocaine ("crack") addict, under the influence of "ether base" cocaine, and in need of money to replenish his supply. Mrs. McAllister lived a couple of blocks away, and he had stolen from her before.

Knowing she was an easy target, he went to her house to steal, but he testified he did not intend to harm her.

Defendant went into Mrs. McAllister's house through a window and found her in bed. She asked him to please leave. He testified he was like a "crazy man" and out of control, and told her he needed money for drugs. The crack made him crave sex, and he tried to talk her into having sex but she refused. He became angry and raped her. He was afraid she was going to yell or call for the police, so he grabbed what he thought was a shoe, and later learned was a mallet, and struck her. He meant to quiet her, not to kill her. When he was finished raping her, he went through her bedroom drawers, took something from the kitchen, and went back out the window.

Mrs. McAllister was found dead in her house. The case went cold for 20 years. In May 2009 the Sacramento County District Attorney's crime lab received information from the DNA database that it had a hit. Defendant was identified and provided a DNA sample. Defendant ultimately confessed to the burglary, robbery, rape, and murder of Mrs. McAllister. A jury convicted him of first degree murder with the personal use of a deadly weapon and found that all three special circumstances were true.

DISCUSSION

Defendant's argument goes like this. The trial court instructed the jury on felony murder and special circumstance felony murder using the exact same language. By failing to include the only language that saves its constitutionality and renders the felony-murder special circumstance distinct from

garden-variety felony murder, the jury was compelled to find the special circumstance true once it found felony murder. In other words, the truncated instruction constituted a directed verdict on the special circumstance and thereby denied defendant his constitutional right to a jury determination of a fact that would increase his punishment within the meaning of *Ring v. Arizona* (2002) 536 U.S. 584 [153 L.Ed.2d 556]. He insists he is not challenging the constitutionality of the special circumstance, but the court's failure to give an instruction consistent with the legislation and the cases that upheld it. He relies heavily on *Green, supra*, 27 Cal.3d 1 and *Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465.

Curiously missing from defendant's argument and analysis is any mention of recent California Supreme Court jurisprudence on the topic, the full body of the targeted instruction, or the rich history of the standard instruction. Once the more pertinent law is digested, the argument is not nearly as clever as it first appears.

The Attorney General's reply misses the mark by addressing an argument defendant does not make. As mentioned, he is not launching a constitutional challenge to the legislation. The Attorney General argues repeatedly that the elements of felony murder can overlap with the elements of special circumstance felony murder and that indeed the two share common elements. But as defendant correctly observes, the problem is not that the instructions were similar, but that they were identical. We turn to guidance from our Supreme Court.

In *Green, supra*, 27 Cal.3d 1, the Supreme Court observed that the purpose of the special circumstance was to single out those “defendants who killed in cold blood in order to advance an independent felonious purpose” (*Id.* at p. 61.) “Although the defendant in *Green* technically committed a robbery, it was clear from the evidence that it was not ‘a murder in the commission of a robbery but the exact opposite, a robbery in the commission of a murder.’” (*People v. Valdez* (2004) 32 Cal.4th 73, 113, quoting *Green, supra*, 27 Cal.3d at p. 60.) But *Green* was only the beginning of the story, and defendant fails to follow its trail.

The predecessor to CALCRIM No. 730 was CALJIC No. 8.81.17, and the second paragraph of the latter standardized instruction derives from *Green*. (*People v. Monterroso* (2004) 34 Cal.4th 743, 766-767 (*Monterroso*)). That paragraph “informed the jury that to find the special circumstance allegation true, the prosecution must prove that ‘[t]he murder was committed in order to carry out or advance the commission of the [target crime] or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [target crime] was merely incidental to the commission of the murder.’ (CALJIC No. 8.81.17.)” (*People v. Taylor* (2010) 48 Cal.4th 574, 628 (*Taylor*)).

The Supreme Court provided additional guidance. “The second paragraph of CALJIC No. 8.81.17 is appropriate where the evidence suggests the defendant may have intended to murder his

victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation. In other words, if the felony is merely incidental to achieving the murder—the murder being the defendant’s primary purpose—then the special circumstance is not present, but if the defendant has an ‘independent felonious purpose’ (such as burglary or robbery) and commits the murder to advance that independent purpose, the special circumstance is present.” (*People v. Navarette* (2003) 30 Cal.4th 458, 505 (*Navarette*).)

Defendant is far from the first to challenge a trial court for delivering a truncated version of the standardized instruction. The central holding of these cases is “that inasmuch as *Green* did not announce a new element of the special circumstance allegation but had merely clarified the scope of an existing element, a trial court had no sua sponte duty to provide a clarifying instruction in the absence of evidence to support a finding that the felony was in fact merely incidental to the murder. [Citation.]” (*Monterroso, supra*, 34 Cal.4th at p. 767.) “Thus, a trial court has no duty to instruct on the second paragraph of CALJIC No. 8.81.17 unless the evidence supports an inference that the defendant might have intended to murder the victim without having had an independent intent to commit the specified felony.” (*People v. D’Arcy* (2010) 48 Cal.4th 257, 297.)

Three cases provide fitting exemplars. In each case, the Supreme Court found no instructional error in failing to give the *Green* instruction because there was no significant or

substantial evidence to support an inference the defendant intended to murder but not to commit the other felony. In each case, the Supreme Court marshaled the evidence of intent.

In *Monterroso, supra*, 34 Cal.4th at page 767, the court summarized the evidence: "Here, there was no substantial evidence to reasonably suggest defendant entered the store or committed a robbery merely in order to murder either victim. As to the first murder, uncontradicted evidence revealed that defendant shot Singh when Singh failed to comply with defendant's orders not to move and that defendant relied on the murder to show the other robbery victims that he was not kidding around. Although (as defendant points out) Singh may also have been selected because of his race, concurrent intents to kill and to commit a felony nonetheless support a felony-murder special circumstance. [Citations.] As to the second murder, defendant eliminated the only witness to the burglary-robbery. [Citation.] Thus, the evidence showed only that defendant committed these murders to advance the burglary-robbery or to facilitate his escape or to avoid detection. Inasmuch as the second paragraph properly could have been omitted from the instructions, defendant suffered no prejudice by the trial court's error in phrasing the two paragraphs in the disjunctive."

Similarly, in *Navarette, supra*, 30 Cal.4th at page 505, the court explained: "Here, the record includes no significant evidence of any motive for the murders other than burglary and/or robbery. Defendant asserts, based on 'the multitude of

stab wounds,' that the killings might have been an explosive 'unleashing of some type of unconscious hatred for women,' having nothing to do with robbery or burglary. But the record does not include any evidence (other than the brutality of the crimes) that defendant had an unconscious hatred for women, and defendant did nothing to develop this theory of the case at trial, making only a passing speculative reference to this theory at closing argument. Defendant's primary defense at trial was that he was too intoxicated to act with intent. Under the circumstances of the case as presented to the jury, the second paragraph of CALJIC No. 8.81.17 was not required."

The same rationale has been reiterated more recently in *Taylor, supra*, 48 Cal.4th at page 629: "Likewise, because there was no evidence here reasonably suggesting that defendant intended to kill the victim without also having an independent intent to assault her sexually, the trial court did not err in omitting the second paragraph of CALJIC No. 8.81.17. Indeed, in this case, there was no evidence suggesting defendant harbored any intent to kill the victim, concurrently or otherwise. Rather, the evidence showed that defendant entered the victim's home unarmed. Within minutes of the entry, he pushed both the victim and her sister into the back bedroom, where he sexually assaulted the victim until ejaculating, and then ran from the house after pausing briefly on his way out to take money from an open purse belonging to the victim's sister. The evidence showed, moreover, that the victim's death was attributable to cardiac arrest resulting from fear, stress, and pain, and that a

younger woman likely would have survived such an attack. On this record, there was no evidence from which the jury could have inferred that defendant entered the victim's home to murder her, and that the sexual assaults were merely incidental to the commission of that offense. The trial court thus did not err in omitting the second paragraph of CALJIC No. 8.81.17 when instructing the jury on the special circumstance allegations."

What defendant fails to mention is that CALCRIM No. 730 includes a bracketed option, which, like CALJIC No. 8.81.17's second paragraph, contains the *Green* instruction he complains was missing. That option provides:

"[3. If the defendant did not personally commit [or attempt to commit] _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>, then a perpetrator, (whom the defendant was aiding and abetting before or during the killing/[or] with whom the defendant conspired), personally committed [or attempted to commit] _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)>;] [¶] . . . [¶]

"[In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> independent of the killing. If you find that the defendant only intended to commit murder and the commission of _____ <insert felony or felonies from Pen. Code, § 190.2(a)(17)> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]"

The question thus presented is the same question raised in *Monterroso, Navarette, and Taylor*: was there sufficient evidence from which the jury could have inferred defendant entered Mrs. McAllister's house to murder her, and the burglary, robbery, and rape were merely incidental to the murder? The answer is the same resounding no. Indeed, the inference defendant now asks us to draw is antithetical to the defense he offered at trial.

After all, defendant confessed to burglary, robbery, and rape. His defense was predicated on his addiction to rock cocaine and the fact he was under the influence of a powerful strain of the substance at the time. He testified to his motive to steal from Mrs. McAllister so he could get more crack. And he was emphatic that he never intended to hurt her. He grabbed what he thought was a shoe, merely intending to quiet her. On this record, as in *Monterroso, Navarette, and Taylor*, there is no evidence the felonies were committed in the commission of a murder, but rather the murder was committed in the commission of the felonies. There is no evidence of any motive for murder other than the burglary and robbery. To the contrary, defendant testified to the independent felonious purpose required by *Green* to differentiate special circumstance murder from other felony murders. The trial court did not, on this record, have a sua sponte obligation to include the *Green* instruction.

II

Defendant's second argument is a slight variation on the first but cast through the prism of his voluntary intoxication

defense. In a replay of his closing argument, he argues that he was in a crack-induced state of craziness, out of control, and behaving like a monster. This evidence, he insists, is sufficient for the jury to reject the notion that he intended to commit either the felonies or the murder. Rather, because he was incapable of rational thought, he committed the offenses "based on an autonomic internal process that did not involve any sort of cognitive intent." With his mental state at issue, he claims the trial court erred by failing to instruct the jury that the special circumstance requires a union of act and intent, and that he must have committed the murder to "'carry out or advance the commission of'" the felony. We disagree.

First, we agree with the Attorney General that the instructions, when viewed as a whole, properly embody the principle that the defendant must intentionally commit the prohibited act with the requisite specific intent. As for the special circumstance instruction, the court followed CALCRIM No. 730. This standard instruction provides:

"The defendant is charged with the special circumstance of murder committed while engaged in the commission of Burglary, Robbery and/or Rape in violation of the Penal Code section 190.2(a)(17).

"To prove that this special circumstance is true, the People must prove that:

- "1) The defendant committed Burglary, Robbery and/or Rape;
- "2) The defendant intended to commit Burglary, Robbery and/or Rape;

"3) The defendant did an act that caused the death of another person;

"And

"4) The act causing the death and the Burglary, Robbery and/or Rape were part of one continuous transaction;

"To decide whether the defendant committed Burglary, Robbery and/or Rape, please refer to the separate instructions that I will give you on those crimes. You must apply those instructions when you decide whether the People have proved this special circumstance."

CALCRIM No. 730 identifies both the act and the intent the jury must find to support a special circumstance. The union was further explained with even greater clarity in CALCRIM No. 252, as follows:

"The crime and other allegations charged in Count One [murder] require proof of the union, or joint operation, of act and wrongful intent.

"The allegation of personal use of a deadly or dangerous weapon (Penal Code section 12022(b)(1)) requires general criminal intent. For you to find this allegation true, the person must not only commit the prohibited act, but must do so with wrongful intent. A person acts with wrongful intent when he or she intentionally does a prohibited act, however, it is not required that he or she intend to break the law. The act required is explained in the instruction for that crime or allegation.

"The following crimes and allegations require a specific intent or mental state: Penal code section 187(a) Murder, as charged in Count One; Burglary as alleged in Special Circumstance No. 1; Robbery as alleged in Special Circumstance No. 2; and Rape as alleged in Special Circumstance No. 3. For you to find a person guilty of the crime of Murder or to find Special Circumstances No. 1, No. 2, and No. 3 true, that person must not only intentionally commit the prohibited act, but must do so with a specific intent and mental state. The act and the specific intent and/or mental state required are explained in the instruction for that crime or allegation."

Thus, the jury was properly instructed on the union of act and intent. Defendant could have requested more specificity, but he did not. Absent a request, it was not incumbent on the trial court to provide any greater clarity. Based on the instructions given, there is no reasonable likelihood the jury misconstrued or misapplied the instructions. (*People v. Maury* (2003) 30 Cal.4th 342, 437.)

As to defendant's defense that he was incapable of cognitive thought and rational decision making, the jury found otherwise following proper instruction on voluntary intoxication. The court explained to the jury: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether: 1) the defendant acted with express malice; 2) the defendant acted with deliberation and premeditation; 3) the defendant acted with the specific intent

required to commit the offenses alleged in Special Circumstances No. 1 (Burglary), No. 2 (Robbery) or No. 3 (Rape); and 4) the defendant intended and acted with the specific intent to commit the offense of Burglary, Robbery or Rape under the theory of felony murder.

"A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

"You may not consider evidence of voluntary intoxication for any other purpose."

Defendant had ample opportunity to present his defense. Both he and his sister testified to the devastating and debilitating effects of cocaine addiction, testimony that was given additional credibility by experts in the field. The testimony was recapped in a cogent final argument on behalf of the defense, followed by the instructions on voluntary intoxication. The jury, therefore, was well-informed and rejected the defense.

Cast under the same instructional error umbrella, defendant also asserts the trial court failed to instruct sua sponte that the jury must find the murder was committed for the purpose of carrying out or advancing the commission of the underlying felony. But this argument is nothing more than a restatement of the argument we rejected above. The intoxication defense does not provide the evidence missing to trigger a sua sponte obligation to give the instruction.

To say that the murder was committed for the purpose of carrying out or advancing the commission of the underlying felony is but another way of saying that the murder must be intended to advance an independent felonious purpose. The commission of any murder during the course of a felony may constitute felony murder, but it is not sufficient to establish the special circumstance. This is ground we have thoroughly covered. In this iteration of the argument, however, defendant seems to suggest that because he testified he was acting crazy—like a monster, not a rational man—the jury could have drawn the reasonable inference that he did not have an intent to commit any of the felonies.

Unfortunately, such a revision is at odds with defendant's testimony at trial. He was clear and direct about his motivation. He went to Mrs. McAllister's house to rob her. As a result, he entered the house with the intent to commit a felony and thereby committed the charged burglary. While there, he testified he had the urge to have sex with her and he forced himself upon her. As a result, his testimony refutes his appellate theory. He intended to steal to obtain money for the crack he desperately needed. The murder occurred during the execution of his burglary, rape, and robbery and not the other way around. Because an instruction that the murder must be committed for the purpose of carrying out or advancing the commission of the underlying felony is, for all intents and purposes, another reformulation of the *Green* instruction, we conclude there was no significant evidence upon which the jury

could reasonably infer that the felonies were merely incidental to the murder. There was no instructional error.

III

Defendant and the Attorney General agree that the sentencing issues are moot. The trial court has remedied the alleged errors.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

NICHOLSON, J.

MAURO, J.