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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

OPAL LEANNE FAULK,

Defendant and Appellant.

E055002

(Super.Ct.No. FVI1002100)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin,
Judge. Affirmed.

Reed Webb, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, and Kevin Vienna, Deputy
Attorney General, for Plaintiff and Respondent.

Defendant, Opal Leanne Faulk, was sentenced to three years in prison¹ after pleading no contest to being an accessory to murder after the fact. In 1988 defendant had helped her then-husband escape responsibility for the shotgun murders of his two elderly employers. In this appeal, defendant contends the trial court improperly imposed a restitution fine to reimburse the victims' daughter for funeral expenses. Specifically, defendant argues that the facts behind her conviction for being an accessory to murder after the fact exclude her from being the cause of the victims' funeral expenses.

FACTS AND PROCEDURE²

In 1988, Hulon "Pappy" Hughes and his wife, Elaine, operated a roofing business from their property in Apple Valley, on which were situated a number of mobile homes and outbuildings. The Hughes' lived in one of the mobile homes, as did several of their employees, including defendant and her husband Harold Toney.³ On October 11, 1988, Pappy fired Toney and told him to clean up his place and move out. Toney called Pappy a son of a bitch and used other profanity. Pappy slapped or backhanded Toney in the face. Pappy was 72 years old at the time and used a wheelchair and sometimes a cane. Toney was enraged and told Pappy, "If you want trouble, you've got it coming." Pappy said he might have to get a gun and Toney told him "I guess I have to get my gun too."

¹ On September 6, 2011, defendant was sentenced to three years, with credit for 718 days (later changed to 722 days)

² The facts of the crime and investigations are taken from the preliminary hearing transcript and the probation report

³ At some point it was determined that defendant and Toney were not legally married because Toney had not divorced his previous wife.

Toney either grabbed Pappy or it appeared that he might do so. Other employees rushed to Pappy's aid.

The next morning, a roofing contractor telephoned twice and spoke with both Pappy and Elaine about picking up a roofing sample. Directly after the second phone call, the contractor made the three or four minute drive to the property, entered the Hughes' trailer through the open front door, and found the couple dead, each with a gunshot wound to the head. While calling 911, the contractor saw defendant outside through the rear window walking toward her trailer. After going outside, the contractor called out to defendant, but she did not answer him.

The responding Sheriff's deputy arrived moments later. The customer was waiting outside the trailer and told the deputy there were two gunshot victims inside and two people behind the trailer. The deputy looked inside the Hughes' trailer and saw Hughes slumped over in his wheelchair and Elaine leaning against the trailer's back wall, both obviously dead. The deputy notified the dispatcher by radio to confirm the reported double homicide, then drove his patrol car around to the back of the Hughes' trailer to where several other trailers were located.

The deputy found defendant "walking around in a confused state" between her trailer and the Hughes' trailer and appearing to be "confused and upset." When questioned, defendant told the deputy that Toney was inside their trailer. The deputy placed defendant in his patrol car and called for backup. The backup deputies spent 15 to 20 minutes coaxing Toney out of his trailer using a loudspeaker. They told him to come out with his hands up. Toney eventually emerged with his hands up, appearing "agitated

and sweaty” and kept repeating that he “didn’t do it.” The deputies had not asked Toney about the murders and it was unclear how he knew about them. The deputies arrested Toney.

The subsequent investigation revealed that the Hughes’ did not trust banks and consequently kept large amounts of cash on hand to pay for expenses, including business expenses and employee pay. Both Hughes’ wallet and Elaine’s purse were missing at the time of their murders and were never found. Both defendant and Toney gave varying and inconsistent accounts of their whereabouts on the morning of the murders. They were held in custody for two days, but the District Attorney’s office did not file charges. Defendant and Toney moved to Kentucky, where they eventually parted. Defendant married and moved to Georgia.

In May of 2010, Sheriff’s deputies working cold cases spoke with a man in Kentucky who had known Toney for 20 years, and had known defendant while she lived with Toney in Kentucky. The man stated that Toney had bragged to him many times that he had gotten away with killing an elderly couple in California with a shotgun. Toney said he shot them while he was high on methamphetamine, that he took \$13,000 in cash from their bodies, and hid the gun in a barrel of oil as he ran back to his trailer. Toney became very excited each time he told the story. Deputies spoke with a second witness from Kentucky who stated that Toney had once confirmed to her when she asked him about it that he had killed the elderly couple.

Another witness told investigators that he had run into Toney a few weeks after the murder. Toney was a drug user and normally did not have any money, but that day he

was wearing new boots, had a new motorcycle helmet and “had money to spend.” The witness said that Toney had looked at him and “smirked.”

Sheriff’s deputies went to Georgia twice to interview defendant, the first time on May 28, 2010 and the second time on September 13, 2010. At the time she lived with her husband of 17 years and her stepson. Defendant gave several accounts of what she and Toney had been doing the morning of the murders. These accounts varied from each other and from defendant’s statements in the days after the crime. In the days after the crime, defendant told detectives that Toney had not left their trailer all morning.

Defendant stated that she had gone over to the Hughes’ trailer in the morning to borrow their car, but did not go in because they appeared to be busy with a man on a telephone.

When re-interviewed in 2010, defendant initially stated that it was Toney who had gone over to borrow the Hughes’ car that morning and she had stayed inside the trailer. When confronted with this discrepancy and witness statements that she had been seen outside the morning of the murders, defendant said she must have forgotten who had gone over to the Hughes’ trailer to borrow their car.

After the second interview, the deputies arrested defendant and she remained in custody in Georgia until being transferred to San Bernardino County Jail on December 14, 2010.⁴

⁴ The probation report said the following about Toney, defendant’s co-defendant: “Co-defendant, Harold David Toney, was in custody awaiting trial on the current allegations when he reportedly died of cancer. The case against him was subsequently dismissed on November 5, 2010, following his death.”

On September 14, 2010, the People filed a complaint charging defendant and Toney with two counts of murder (Pen. Code, § 187, subd. (a)).⁵ Later that day the trial court issued a warrant for defendant's arrest. On November 22, 2010, the People filed an amended complaint charging defendant with murder. The trial court again issued a warrant for defendant's arrest and set bail at one million dollars. Defendant was arraigned on December 15, 2010 and pled not guilty. On April 21, 2011, the People filed an information charging defendant with two counts of murder (§ 187). On June 22, 2011, defendant pled guilty to being an accessory after the fact to murder (§§ 32, 187, subd. (a)). The plea agreement included a *Harvey*⁶ waiver, which permits uncharged activity or dismissed counts to be considered for restitution purposes. On September 6, 2011, the trial court sentenced defendant to three years in prison. The court also ordered defendant to pay restitution of \$10,000 to the victims' daughter to reimburse her for funeral expenses and \$2,800 to the San Bernardino County Victim's Restitution Fund. Defense counsel objected, arguing that defendant "took no part in any actions which led to the death of these poor people" and "[t]here's no linkage to her being responsible for the

⁵ All section references are to the Penal Code unless otherwise indicated.

⁶ *People v. Harvey* (1979) 25 Cal.3d 754 held that a sentencing court may not consider previously dismissed charges not transactionally related to the charges of which defendant is convicted.

The *Harvey* waiver on the plea agreement form read as follows: "*I waive my rights regarding dismissed counts and any charges the district attorney agrees not to file to the extent that the court may consider these factors in deciding whether or not to grant probation and in deciding whether or not to impose a midterm, aggravate, or mitigated prison term, and as to restitution.*"

crime which leads to these expenses.” The trial court rejected these arguments based on the existence of the *Harvey* waiver. This appeal followed.

DISCUSSION

Defendant argues the trial court erred when it ordered her to pay restitution⁷ to the victims’ daughter and to the Victim’s Restitution Fund for funeral expenses. Defendant reasons that, because she committed her accessory crime *after* the victims were already dead, and because restitution liability for an accessory to murder after the fact is limited to the direct and immediate economic losses that *result from* that crime, she cannot be made responsible for the victims’ funeral expenses. The People counter that the trial court properly imposed victim restitution pursuant to the *Harvey* waiver that defendant signed when she pled no contest, in which she agreed that uncharged activity or dismissed counts, including the two murder charges, may be considered for restitution purposes.

We see no way to get around the fact that defendant signed a *Harvey* waiver, in which she specifically agreed that dismissed counts may be considered for restitution purposes. Such an arrangement is specifically authorized in subdivision (b) of section 1192.3: “If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, as described in this section, the court shall obtain a waiver pursuant to

⁷ Section 1202.4, subdivision (f), provides in part: “. . . in every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court *shall require* that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (§ 1202.4, subd. (f), italics added.)

People v. Harvey (1979) 25 Cal.3d 754 from the defendant as to the dismissed count.”

Defendant has cited to no authority stating that a defendant *who has signed a Harvey waiver* can avoid paying restitution to victims who have suffered an economic loss resulting from dismissed counts. It is defendant’s burden to prove error on appeal, and she has not carried her burden here.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

RICHLI

J.

KING

J.