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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

REBECA NIVAREZ,

Defendant and Appellant.

G045230

(Super. Ct. No. 06CF0633)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Conditionally reversed and remanded with instructions.

Robert E. Boyce, 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, Charles C. Ragland and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Rebeca Nivarez of first degree murder (Pen. Code, § 187, subd. (a))¹ and second degree robbery (§§ 211, 212.5, subd. (c)). The court denied defendant's motion for a new trial. It sentenced her to 25 years to life in prison for murder, along with a concurrent term of three years for robbery. On appeal, defendant argues insufficient evidence supports the murder and robbery convictions and that the court erred by denying her new trial motion and by failing to stay execution of sentence on the robbery conviction pursuant to section 654.

We reject defendant's contention that the evidence is insufficient to support the convictions. But we agree the robbery sentence must be stayed under section 654. Furthermore, on this record, we cannot be certain the court applied the correct legal standard when considering defendant's motion for a new trial. We therefore remand the case for a hearing on defendant's new trial motion.

FACTS

The victim, Mario Rodriguez Hernandez, sold jewelry to clients at their homes by appointment. He carried the jewelry in a briefcase.

On March 18, 2005,² Hernandez left his home in the morning and did not return for lunch, which was unusual.

Around 3:30 that afternoon, defendant pawned \$2,500 worth of jewelry.

That evening, Hernandez had still not returned home. His granddaughter obtained from the phone company a list of Hernandez's last cell phone calls. She phoned the last phone number Hernandez had called on March 18. Defendant answered the call.

¹ All statutory references are to the Penal Code.

² All dates refer to the year 2005 unless otherwise specified.

Defendant told the granddaughter that Hernandez had come by around 7:00 a.m. on March 18 to pick up \$20 she owed him for a pair of earrings.³

On March 19, the granddaughter informed the police of her communication with defendant. An officer contacted defendant. Defendant told the officer that Hernandez had phoned her between 7:00 a.m. and 7:30 a.m. to say he was on his way for an 8:00 a.m. appointment with her, but never showed up.

Also on March 19, defendant went to her daughter's apartment and gave the daughter a bag of jewelry to hold for a few days. Defendant said she did not want to leave the jewelry at her own house. Defendant said the jewelry was worth about \$4,000 and she had bought it in Los Angeles because she planned to start selling jewelry again. Defendant told her daughter not to tell anyone about the jewelry.

Defendant's daughter asked defendant if defendant's boyfriend had killed Hernandez. Defendant told the daughter not to phone her and ask anything about the missing person because defendant believed the police were tapping her phone and listening to her conversations.

Defendant's son, Ricardo Diaz, lived in her garage.⁴ Defendant's friend and housemate, Lilia Avila, last saw Ricardo on March 23 or 24. Defendant told Avila that Ricardo had gone to Colorado to meet a girlfriend.

Before defendant retrieved the jewelry from her daughter, the daughter removed a pair of earrings from the bag. When defendant later took back the jewelry, she asked the daughter for Mapquest directions to Colorado. Defendant said she was

³ The granddaughter testified to this information at the trial. Prior to the trial, however, she told the police that defendant told her that Hernandez never showed up for the morning appointment.

⁴ Because defendant's daughter also has the last name Diaz, we refer to the son in this opinion by his first name, Ricardo.

thinking of moving to Colorado, along with Ricardo, because she was struggling financially living in Orange County.

On March 24, Hernandez's vehicle was located at a Mission Viejo park after a woman who lived nearby reported to the police that a van had been parked at the park since March 18. Inside the van were an attaché case, two boxes of jewelry, two plastic gloves, and two plastic bottles of a liquid that smelled like gasoline.

On March 25, defendant told Avila she was going to a job interview and would return. But defendant did not return and did not answer her phone when her daughter and Avila called her. The next day, defendant's daughter and Avila found a note in defendant's room stating that defendant had gone to Colorado to follow Ricardo.

A wholesale jeweler who had sold Hernandez jewelry for five or six years gave police information about the type of jewelry Hernandez had purchased. He identified the pair of earrings that defendant's daughter had taken from the bag of jewelry as a pair Hernandez had bought.

In December, defendant phoned her daughter and said she was living in Anaheim. The daughter asked defendant if she knew the police were looking for her. Defendant said she had taken Ricardo out of the country to a drug rehabilitation facility in Tijuana.

The daughter met defendant at a park and asked defendant to come with her to the police station. Defendant said that a psychic had told her "that she had a curse, that someone wanted to be with her no matter what and the person was not going to stop until he got what he wanted, which was being with her." Defendant said she had told Ricardo what the psychic had said. Defendant said Ricardo had stabbed and murdered this man in self-defense (because the man had pulled a knife on him) and then "dumped his body in an alley blocks away from" defendant's home. Defendant said she was there and saw it happen. Defendant said the man had had only \$5 in his pocket. She said she had to take

Ricardo out of the country. The daughter asked defendant to contact the police and to go away.

The police asked defendant's daughter to phone Ricardo and record the conversation. The daughter did so on February 10, 2006.

In February 2006, the daughter was shopping at a grocery store when she saw defendant giving out food samples. The daughter started crying and said, "How could you be here knowing that the police is looking for you, knowing what you've done?" Defendant asked her to stop crying. The daughter said she had spoken with Ricardo and knew what had happened. She said that Ricardo had said defendant "was involved with the murder of this man." Defendant said she liked her job and was sorry she would have to look for another one. The daughter phoned the police.

In March 2006, a homicide detective interviewed defendant. Defendant said, "A mother will do for her child many things." She said Ricardo had a drug problem that had caused her to lose many things, such as a vehicle, and that she had shed many tears for him. After the police had come to defendant's home in March 2005, Ricardo had panicked and fled because he had an arrest warrant. A week later, he had phoned her and said he was in Tijuana. She had driven his car to Tijuana and met him in a hotel room where he was coming down from drugs. Ricardo had confessed to murdering Hernandez. Ricardo told defendant that on the morning of her appointment with Hernandez, Ricardo had jumped into Hernandez's vehicle upon Hernandez's arrival. Ricardo told Hernandez, "If you're looking for my mother, . . . she's not home." Hernandez did not like Ricardo's tone of voice and the two men argued. Hernandez pulled out a knife. Ricardo disarmed Hernandez and stabbed him. The next day Ricardo disposed of the body.

Defendant offered conflicting stories about what Ricardo did with the van and the body. She admitted she was there when the vehicle was abandoned, but later said she never saw the vehicle. She initially said Ricardo phoned her and needed a ride from

Garden Grove, then later changed her story to say she gave him a ride from Mission Viejo. When the detective said the bloodhound had picked up defendant's scent at the park where the vehicle was located, defendant replied the man was not there and the body was not there.

Defendant said she owned the jewelry she asked her daughter to hold. Defendant said that any gloves found in the van belonged to her, because she used them for work. She said she was familiar with the Mission Viejo area because she cleaned houses there.

Defendant said she had known Hernandez for about two or three years. She said he was a kind man with heart problems and she felt sorry for him and often cooked for him.

Defendant said she had gone to see a psychic or tarot card reader because she was having headaches, backaches, and bad luck (such as recently losing her job). The card reader said a short elderly man with dark skin "was suffocating her and prohibiting her from succeeding in life." The card reader advised defendant to take some remedies and pray using candles. The detective accused defendant of asking Ricardo to murder Hernandez "because of the spell that Hernandez had supposedly put on her" Defendant did not deny the accusation and did not seem bothered by it.

Defendant said she helped pay for Ricardo to fly to Cuernavaca, Mexico, where his father lived.

At some point, defendant's daughter phoned her father (who lives in Mexico) and found out her brother, Ricardo, was at the father's home.

Ricardo was arrested in 2008 and a buccal swab was taken from him for DNA comparison. Ricardo's DNA profile (a profile estimated to occur in less than one in one trillion persons) was a major contributor match with DNA found in the glove in Hernandez's van.

DISCUSSION

Substantial Evidence Supports the Robbery and Murder Convictions

Defendant argues there was no substantial evidence that: (1) she premeditated Hernandez's murder, or (2) for purposes of felony-murder and the robbery conviction, that she formed the intent to rob Hernandez before he was killed. She contends there was no evidence: (1) she participated in the attack on Hernandez; (2) of how or when Hernandez was killed and the extent and timing of her involvement (or lack thereof); or (3) of when, where or how the jewelry was taken from Hernandez or how the jewelry ended up in her possession.

Robbery is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Robbery requires the defendant to have conceived an "intent to steal either before committing the act of force against the victim, or during the commission of that act; if the intent arose only after the use of force against the victim, the taking will at most constitute a theft." (*People v. Morris* (1988) 46 Cal.3d 1, 19, disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543-544, fn. 5.) "[I]n order to be held liable as an aider and abettor, the requisite intent to aid and abet must be formed *before or during such carrying away of the loot to a place of temporary safety.*" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1161.)

First degree murder includes any "willful, deliberate, and premeditated killing, or [one] which is committed in the perpetration of, or attempt to perpetrate, . . . robbery . . ." (§ 189.) As discussed above with respect to robbery, felony murder on a robbery-murder theory poses the question "whether there was substantial evidence to show that the "requisite intent to steal arose either before or during the commission of the act of force."'" (*People v. Sakarias* (2000) 22 Cal.4th 596, 619.)

“““When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence — i.e., evidence that is credible and of solid value — from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.””” (*People v. Hill* (1998) 17 Cal.4th 800, 848-849, overruled on a different ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

“““[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.””” (*People v. Kelly* (1990) 51 Cal.3d 931, 956.) “Reasonable doubt is defined as follows: ‘It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.’” (§ 1096.) We “““presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.””” (*People v. Rayford* (1994) 9 Cal.4th 1, 23.) “When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment.” (*Hill*, at p. 849.) “Before the judgment of the trial court can be set aside for insufficiency of the evidence to support the verdict of the jury, it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it.” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) “The standard of review is the same when the prosecution relies mainly on circumstantial evidence.” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Applying this standard of review, substantial evidence supports the convictions. Viewing the entire record in the light most favorable to the judgment, a rational trier of fact could find that the robbery and the murder, and defendant’s

motivations for them, were intertwined. Therefore, we review defendant's evidentiary challenges to the convictions in conjunction.

Substantial evidence supports the jury's determination that defendant premeditated the robbery, i.e., that she formed the intent to rob Hernandez before he was killed. She needed money since she had lost her job and her son had a drug problem. She knew about Hernandez's jewelry business. He had visited her house on a regular basis and sometimes came "there to collect payment for the gold that he used to sell." On the morning of the day he disappeared, she had an appointment with him. The plastic glove containing Ricardo's DNA found in Hernandez's van, along with the briefcase and boxes of jewelry, as well as the evidence discussed below of first degree murder, supports a finding that some jewelry was taken from Hernandez's immediate presence through force, fear, and murder (whether intentional or not). After Hernandez's disappearance, defendant pawned some of his jewelry and asked her daughter to hold some of it and to keep quiet about it.

There was substantial evidence that she premeditated his murder. She had two motivations to kill him: (1) she needed money and wanted to rob him of his jewelry, and (2) she believed he had put a spell or curse on her. Alternatively, there was substantial evidence of felony-murder, i.e., robbery-murder.⁵ As discussed above, substantial evidence showed defendant formed an intent to rob Hernandez before he was killed and therefore aided and abetted in the robbery before the murder took place. (*People v. Pulido* (1997) 15 Cal.4th 713, 716 [to be guilty of first degree murder on a robbery-murder theory, defendant must aid and abet robbery before the killing].) Critical to both these theories, the evidence showed Ricardo intended to kill or rob Hernandez in the van. Although defendant told the police that Ricardo killed Hernandez *in self-defense* after Hernandez pulled out a knife during an argument about Ricardo's tone of voice in

⁵ Because the jurors did not *expressly* find premeditation, it is unclear whether they convicted defendant of a premeditated murder or felony murder or both.

Hernandez's van, the presence of a plastic glove containing Ricardo's DNA in Hernandez's van suggests Ricardo's force against Hernandez was premeditated. Absent a work-related need to don plastic gloves, it strains the imagination to believe the glove was put on the moment the need for self defense arose. Defendant said the glove was hers because she used that type of glove for work. And defendant told her daughter that she (defendant) was present at the time of the murder and witnessed it.

In response to accusations made against her, defendant replied with false or evasive statements that showed a consciousness of guilt and/or constituted adoptive admissions. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1102 [“pretrial false statements by a defendant may be admitted to support an inference of consciousness of guilt by the defendant”]; *People v. Preston* (1973) 9 Cal.3d 308, 313-314 [“If a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence . . . , and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt”].) When defendant's daughter asked her whether defendant's boyfriend had murdered Hernandez, defendant's only reply was to admonish the daughter not to mention the subject in phone calls with defendant. Defendant lied about going to Colorado to join Ricardo. When the daughter confronted defendant at a store and claimed Ricardo said defendant was involved in Hernandez's murder, defendant failed to deny the accusation. When the detective accused defendant of asking Ricardo to kill Hernandez because of the psychic's warning, defendant failed to deny the accusation. When the detective accused defendant of being present when the murder was committed, defendant failed to deny the accusation.

Defendant relies on *People v. Morris* (1988) 46 Cal.3d 1, where our Supreme Court held as a matter of law there was insufficient evidence to support the factual findings of a robbery and a robbery-murder special circumstance. (*Id.* at p. 19.) In *Morris*, however, there was no evidence the defendant took the stolen property (a credit card) from the victim's person or immediate presence by force or fear, since the victim was nude when he was shot, with no clothing or personal possessions in his immediate presence. (*Id.* at p. 20.) Our Supreme Court also pointed out that "[n]o motive or explanation for the murder was disclosed at trial other than" the defendant had to kill a homosexual because he had been dating them to make money (*ibid.*), a motive which provided no basis to infer defendant committed a robbery (*id.* at pp. 21-22).

Here, in contrast, there was evidence defendant premeditated the robbery and murder: As summarized above, defendant set up an appointment with Hernandez concerning jewelry. She knew he carried gold jewelry with him. Defendant was so financially stressed at the time that she went to see a psychic about it. Defendant's statement that Ricardo killed Hernandez in the van *in self-defense* does not square with the discovery of a glove with Ricardo's DNA inside the vehicle. The glove constitutes evidence defendant and Ricardo planned to physically threaten or kill Hernandez in order to get his jewelry. The presence in the abandoned van of a briefcase and two boxes of jewelry supports an inference that the jewelry which defendant pawned and gave to her daughter was in Hernandez's immediate presence at the time he was killed. This evidence was sufficient to support a rational juror's abiding conviction of the truth of the charges.

The Robbery Sentence Must Be Stayed Under Section 654

Defendant contends the court found defendant's primary objective for killing Hernandez was to rob him, but despite this finding, the court failed to stay her robbery sentence because the court erroneously believed section 654 is inapplicable to

violent crimes. At the sentencing hearing, the prosecutor (1) asked the court to sentence defendant to 25 years to life in prison for murder and (2) stated the robbery sentence should be stayed under section 654. The court replied it believed the prosecutor was technically incorrect because section 654 does not apply “when both crimes are violent crimes.” The court did concede, however, that the prosecutor “could be right.” The court noted it had “discretion” to apply 654 since the murder charge was “based significantly on” the robbery count. The prosecutor responded that, “whether it be legally accurate or not, that would be the People’s request.” Nonetheless, the court sentenced defendant to the midterm of three years in prison for robbery, to run concurrent with her sentence for murder, and never stayed execution of sentence pursuant to section 654.

As a matter of law, the court misinterpreted section 654. The statute, by its plain terms, bars multiple punishments of a single, physical act or omission. Our Supreme Court, however, significantly enlarged the statute’s scope by adopting, in *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), a test focusing on whether the defendant engaged in an indivisible course of conduct pursuant to a single intent and objective. (*Id.* at p. 19, disapproved on a different point in *People v. Correa* (2012) 54 Cal.4th 331, 334.) Since then, courts have established judicial limitations on the *Neal* rule (*Correa*, at p. 336), which have narrowed the application of *Neal*’s single intent and objective test (*Correa*, at p. 341; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253). But there is no judicial limitation on the *Neal* rule based solely on the violent nature of both crimes, other than crimes of violence harming multiple victims.⁶

⁶ One type of *multiple victim* exception to section 654 is limited to crimes of violence: “A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person.” (*Neal, supra*, 55 Cal.2d at p. 20.)

Nonetheless, the Attorney General asserts we can infer the court impliedly found defendant harbored independent criminal objectives for the murder and the robbery. This assertion is contradicted by the court's express finding that the murder was "based significantly" on the robbery.

Because it is apparent that the court, absent its misapprehension of the law, would have stayed execution of sentence on the robbery count, we need not remand the matter for a new sentencing hearing. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.)

The Court Must Reconsider Defendant's Motion for a New Trial

Defendant argues the court applied the wrong standard in denying her motion for a new trial under section 1181, subdivision (6). Under section 1181, subdivision (6), a court may grant a defendant's new trial motion when the verdict "is contrary to law or evidence" The proper standard is whether the court itself is convinced the charges have been proved beyond a reasonable doubt. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) As our Supreme Court has explained: "The court extends no evidentiary deference in ruling on a section 1181[, subdivision] (6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to [the] . . . evidence.'" (*Ibid.*) "The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.'" (*People v. Davis* (1995) 10 Cal.4th 463, 524.) ""The determination of a motion for a new trial rests so completely within the court's discretion

that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.””” (Ibid.)

At the hearing on defendant’s new trial motion, the court stated, “Even though it’s an attack on the evidence, I think the argument is that a reasonable jury, as I understand the motion, would not have found the circumstantial evidence to support the verdict.” The court continued, “In the court’s view, the evidence was substantial and compelling with respect to the defendant’s participation in the events leading up to and following the death of or disappearance of Mr. Hernandez.” The court ruled, “And so I do not find that the jury’s verdict was without support by substantial evidence and the motion for new trial is denied.”

The court’s comments reveal it rejected any claim that the jury’s verdict was not supported by substantial evidence. But this was the wrong inquiry. As discussed above, when a defendant moves for a new trial under section 1181, subdivision (6), the court must independently assess the evidence to determine whether the charges were proved beyond a reasonable doubt. Based on this record, we cannot ascertain whether the court (1) independently evaluated the evidence, and (2) applied the reasonable doubt standard. We therefore remand the case for a new hearing on defendant’s new trial motion.

DISPOSITION

The judgment is conditionally reversed, and the matter is remanded to the trial court to address defendant’s new trial motion pursuant to the correct legal standard. If the trial court denies defendant’s new trial motion, the effect of that order shall be to reinstate the judgment modified to stay execution of sentence on the robbery count. In addition, if the trial court denies the new trial motion, the court is directed to prepare an

amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.