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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.

CESAR GOMEZ,

Defendant and Appellant.

G046665

(Super. Ct. No. 09WF1949)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Cesar Gomez was convicted of first degree special circumstance murder in the death of Ashley Lilly. The jury found the murder was committed during commission of a robbery (Pen. Code, § 190.2, subd. (a)(17)) and also found true that defendant had a prior strike conviction under the Three Strikes Law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12). He was sentenced to life in prison without the possibility of parole.

Gomez appealed, and we appointed counsel to represent him. Counsel filed a brief which set forth the facts of the case, 8 different assignments of error he had considered, 48 cases, 11 statutes, and a state constitutional provision he had examined in analyzing those possible appellate issues. Counsel did not argue against his client, but advised the court that despite this exhaustive scrutiny he could find no issues to argue on appellant's behalf. Appellant was given 30 days to file written argument in his own behalf. That period passed, and we received no communication from appellant.

We examined the record ourselves to see if we could find any arguable issue and found no putative error in the determination of appellant's guilt. We find ourselves in agreement with appellate counsel that there are no appellate issues with a reasonable prospect of success with respect to appellant's guilt or the judgment imposed upon him.

FACTS

Appellate counsel filed a commendably complete statement of the facts pertaining to the charged offenses in this case. Having found no errors in that recitation, we adopt it here as the basis for our opinion:

“About 8:30 p.m. on August 21, 2009, a bellman at the Crown Plaza Hotel in Garden Grove received a call to check on the guest in room 322, which was occupied by Ashley Lilly. After knocking on the door several times and receiving no answer, the bellman opened the door with a master key and found Lilly lying unconscious on the floor in the room. He asked if she was alright, but she did not respond. The bellman

immediately reported his findings to the manager. When the manager and the bellman returned to the room, Lilly was still lying unconscious on the floor.

“About 9:52 p.m., officers from the Garden Grove Police Department responded to the hotel. They found Lilly dead on the floor at the foot of the beds in her room. Her hands and ankles were tied with white shoelaces, and a blue bandana was inside her mouth and wrapped around her face. The police found a bag of condoms and KY jelly in the room. The room was disheveled and appeared to [have] been ransacked. Lilly’s cell phone, laptop computer, and car keys were missing.

“Lilly’s right pinky fingernail appeared to be broken. A broken fingernail tip was located and collected from the hotel room by the forensic team.

“Dr. Anthony Juguilon of the Orange County Medical Examiner’s Office performed an autopsy of Lilly’s body. His autopsy revealed scattered abrasions on Lilly’s head and face, consistent with someone who was in a struggle. Lilly’s right eye was swollen, and there were contusions and lacerations in her mouth. These injuries were inflicted while Lilly was still alive and were consistent with blunt force trauma like being punched multiple times or having her head pounded into a carpet surface. There was no evidence that Lilly was sexually assaulted.

“Based on hemorrhaging within Lilly’s throat and neck muscles, a fracture of hyoid bone under her tongue, and the presence of petechia hemorrhaging in her eyes and eyelids, Dr. Juguilon classified the cause of death as asphyxia due to manual strangulation by compression of her throat by a hand. According to Dr. Juguilon, a person being strangled could become unconscious within seven to 30 seconds, but that time frame is highly variable from person to person. Dr. Juguilon opined that absent a significant health issue or heart problem, it would take between three to five minutes of continuous strangulation for a person to suffer irreversible brain damage and die, but that

time frame is variable from person to person and ‘hard to pinpoint.’¹ Dr. Juguilon further opined that Lilly was a healthy young woman, but acknowledged that a heart arrhythmia cannot be ascertained post mortem.

“Based on the absence of bruising and hemorrhaging under the furrows caused by the shoelaces used to tie Lilly’s hands and ankles, Dr. Juguilon concluded that Lilly was dead when she was tied up. Lilly’s injuries were consistent with her assailant punching her, choking her to death, and then tying her up.

“The police obtained Lilly’s cell phone number from guest registration and requested call records from her cell phone carrier. The police learned that Lilly worked as a prostitute, advertised her services on several social networking websites, and used the hotel to meet her customers.

“The investigation led the police to defendant Cesar Gomez. Gomez was arrested during a traffic stop on September 10, 2009. At the time of his arrest, Gomez was accompanied by his girlfriend – Bertha Ayala – in her white Chevrolet Tahoe SUV. Gomez had a partially healed cut on his right thumb, a partially healed scratch on his chest, and a four-inch, healed scratch on the side of his abdomen.

“At the police station, Gomez provided the police with his brother’s name and date of birth. The detectives, however, confirmed his true identity through his fingerprints.

“Gomez was interviewed at the police station by Detectives Farley and Reynolds. Gomez told the detectives he lived with Ayala on and off for about six to seven months, and that on August 20, 2009, the couple had an argument. After the argument, Gomez drove from Artesia to Garden Grove, where he encountered Lilly at a liquor store and went with her to her hotel room. He denied initially knowing she was a prostitute until she told him her services would cost him \$140 per hour. Gomez refused

¹ On cross-examination, Dr. Juguilon acknowledged that some forensic pathologists are of the opinion that a person can die from manual strangulation within 45 seconds to a minute.

to engage in sex with Lilly, and she began yelling at him calling him a ‘stupid fucking spic’ and threatening him, ‘I am gonna have you killed.’ Gomez became angry and started yelling back at her. Pretending there was someone else in the room, Lilly yelled for help. As Gomez attempted to exit the room, Lilly grabbed him and said, ‘Where the fuck are you going?’ Gomez then punched her twice in the face, causing her to fall down onto the floor. He then tied her arms and legs with his shoelaces and placed a blue handkerchief in her mouth so she could not yell. Gomez ransacked Lilly’s room, taking her laptop computer, cell phone, camera and car keys. Gomez then left the room and went to his car. He wrote down the phone numbers from Lilly’s cell phone in order to intimidate her contacts should Lilly report the crime. On his way home Gomez destroyed and threw away all the items he took from the room.

“After additional questioning by the detectives, Gomez said that he had an argument with Ayala when he discovered that she was working as a prostitute. He became angry and decided to contact a random prostitute through the *Backpage* website with the intent of robbing her. He selected Lilly because her ad stated it was her last day at the Crown Plaza Hotel. He called Lilly and made arrangements to meet her at the hotel.

“Gomez said he went to the hotel room to take Lilly’s money but that she started getting ‘all stupid and crazy.’ He socked her and hit her in the back of the head, and she scratched and bit him when he tied her up. Because she was yelling, Gomez gagged her with his blue bandana. But Lilly continued yelling, so Gomez choked her and repeatedly slammed her head on the floor as he straddled her. He did not intend for it to happen, but ‘shit just went bad.’ When he finally released his hold on Lilly, he believed she was ‘playing dead.’ He thought she was alive because of the snoring sounds she was making. Gomez denied having sex with Lilly. He said Lilly’s laptop computer and camera were still at his residence in Artesia, but that they were ‘smashed up.’

“Gomez said that two days later he contacted more women who advertised on the *Backpage* website to obtain money from them, but that he never ‘hooked up’ with them.

“In the afternoon on September 10, 2009, a search warrant was served at Gomez’s residence in Artesia. A blue bag was located inside an SUV parked in the garage. A smashed up laptop computer and cell phone were located inside the bag. The police also found a set of keys, which included a key to Lilly’s car. A Wal-Mart plastic bag was located in the closet of the master bedroom. The bag contained blue shoelaces, two blue bandanas, a brown cloth glove with its fingers cut off, and a piece of a flip cell phone.

“Ayala’s 17-year-old son, Julian Gallardo, was present during the search of the residence. A search of Gallardo’s bedroom disclosed a pair of size 13 tennis shoes. One of the shoes had white shoelaces in it, and the other one did not.

“Gallardo testified that Gomez was his mother’s boyfriend and lived on and off with Gallardo and Ayala in the residence in Artesia. On August 20, 2009, when Gomez returned home from work, he asked Gallardo to give him a ride to a nearby Wal-Mart store because Gomez wanted to buy a cell phone. They drove to Wal-Mart, where Gomez bought a pre-paid cell phone and paid for it in cash.² When they returned home, Gomez charged the phone and activated it.

“During dinner, Gomez and Ayala began arguing about Gomez having other women on his *Myspace* webpage. At some point, Gomez wanted to borrow Ayala’s SUV. When Ayala refused to let him drive her vehicle, Gomez asked Gallardo to give him another ride in Ayala’s vehicle, and Ayala agreed to that arrangement. Gallardo then

² Security video cameras at the Wal-Mart store in Cerritos recorded a white SUV arriving at the parking lot at 7:19 p.m. on August 20, 2009, and Gomez and Gallardo exiting the vehicle, walking into the store, and going to the electronics aisle in the store where prepaid cell phones are sold. According to the video recording, Gomez and Gallardo left the store and walked back to the SUV at 7:25 p.m.

drove Gomez to the Crown Plaza Hotel in Garden Grove, with Gomez giving directions where to drive.

“When they arrived at the hotel and parked in the parking lot, Gomez went to the hotel, telling Gallardo to wait for him in the vehicle. Gallardo remained in the vehicle and listened to music. He had no idea why Gomez went to the hotel.

“As he was waiting for Gomez, Gallardo received a call from Ayala, who said that Gomez had called her and instructed Gallardo to go to room 322 in the hotel. Gallardo went to the hotel and knocked on the door of room 322. Gomez opened the door, handed Gallardo a blue and black bag, and told him to go back to the vehicle. Although Gomez opened the door only a foot, Gallardo noticed that the room was ‘all messed up’ and there was a girl on the floor, who looked dead. Gallardo took the bag and went to the elevator. Gomez caught up with him and they both walked back to their vehicle in the parking lot. As they were driving back to Artesia, when Gallardo asked Gomez what he had done, Gomez told him in [a] threatening voice not to say anything. Later, Ayala also instructed Gallardo not to talk to the police.

“Gallardo denied having anything to do with Lilly’s death or tying her up. He denied knowing that Gomez was going to the hotel to commit robbery. He also had no idea that a shoelace was missing from his shoes found in the residence.

“When Gallardo was interviewed by the detectives, he initially lied to them on two occasions. He was arrested and charged as an accessory after the fact. He reached an agreement with the prosecution that he would receive a lesser sentence in exchange for his testimony against Gomez. He pled guilty and spent 10 months in jail. Although Gallardo was facing a three-year sentence, if the prosecutor viewed his testimony as truthful, he would be placed on probation and would not have to serve any additional time in custody.

“On August 20, 2009, between 8:34 p.m. and 8:37 p.m., security video cameras at the Crown Plaza Hotel recorded a man dressed in dark coveralls in the

hallway outside the banquet room and restaurant in the hotel. The man appeared to be holding an object to his ear. The security video cameras also recorded the man walking in the same hallway at 9:05 p.m. The recording depicts an individual walking behind the man and carrying a bag in his hand. The hallway where the video was recorded leads to an exit from the hotel.

“A forensic scientist found blood on the broken fingernail collected from Lilly’s hotel room, a pillowcase from the bed in the hotel room, and the shoelaces with which Lilly’s hands and ankles were tied. The scientist obtained DNA from the blood and compared it to the DNA obtained from the known samples collected from Lilly, Gomez, and Gallardo. It was determined the DNA collected from the pillowcase came from a single source. Lilly was excluded as a contributor, but the scientist could not exclude Gomez as a contributor. The frequency with which this particular DNA profile occurs in the general population is one in one trillion.

“The DNA profile obtained from the blood found on the broken fingernail contained a mixture of DNA profiles from at least two contributors. That DNA mixture was consistent with Lilly’s and Gomez’s DNA profiles. Gallardo was excluded as a contributor. The DNA profile obtained from the blood found on the shoelaces used to tie Lilly’s hands and ankles also contained a mixture of DNA profiles consistent with Lilly’s and Gomez’s DNA profiles. Gallardo again was excluded as a contributor.

“Based on the evidence, the prosecutor argued that Gomez was guilty of first degree murder because he either killed Lilly during his commission of robbery or strangled her with deliberation and premeditation.

“The defense did not present any affirmative evidence. Defense counsel conceded that Gomez was responsible for Lilly’s death, but argued that Gomez was guilty of only involuntary manslaughter or implied malice second degree murder because there was no proof beyond a reasonable doubt that he killed Lilly with deliberation or premeditation or that he intended to rob her before or at the time he killed her.”

DISCUSSION

We have carefully examined this record. We have both considered the issues suggested by appellate counsel and scoured the record for other possibilities he might have missed. We see no reason to recount all the things we considered and rejected. Some were ephemeral possibilities we were able to reject out of hand, some required more careful thought, some required research and analysis. We address only the latter in this opinion.

Appellate counsel suggested the possibility appellant's statements to the police might have been the result of a *Miranda* violation. (*Miranda v. Arizona* (1966) 384 U.S. 436.) We reviewed the transcript of the Evidence Code section 402 hearing in this case. It comprises uncontradicted testimony of a complete and appropriate *Miranda* advisement. Obviously, there was nothing that could be argued on appeal under those circumstances.

We also considered the fact appellant's trial counsel purported to be caught unawares by testimony the victim would have to have been choked for three to five minutes to sustain irreversible brain damage and die. Counsel also said he had not expected the prosecution to be trying to prove premeditation and deliberation but thought they would be relying exclusively on the felony murder doctrine to make this a first degree murder. Appellate counsel considered assignments of error pertaining to inadequacy of counsel and violation of discovery by the prosecution related to these assertions.

But the jury verdict made those arguments academic. They found the defendant guilty and found he had committed the murder in the course of a robbery. So they found facts that brought the case within the felony murder doctrine. Whether defense was adequately prepared to resist proof of premeditation and deliberation, whether its ability to resist those elements based upon its late discovery of the fact an expert would testify appellant choked his victim for three to five minutes, did not matter.

The jury's finding that appellant killed in the course of a robbery would have made his crime first degree murder regardless of the time available for premeditation and deliberation.

Appellate counsel considered arguing that Gallardo was an accomplice as a matter of law. But that does not work either. Gallardo was clearly not an accomplice to the murder – at worst he was an accessory after the fact – and his status as an accomplice to the murder would have required more in the way of intent than the mere carrying off of items appellant asked him to take could have shown. It is extremely doubtful trial counsel could have convinced anyone Gallardo was an accomplice in fact, much less as a matter of law.

Nor could any instructional error involving witness Gallardo have had an impact on the case. Appellant gave a complete and detailed confession to the police, which he never repudiated. DNA results showed his blood on the victim's broken fingernail and the shoelaces used to bind the victim. Applying the test of *People v. Watson* (1956) 46 Cal.2d 818, 836, it is clear to us that any error in this regard was harmless. There is no reasonable probability that it could have affected the outcome of this trial. Indeed, it would almost certainly be harmless beyond a reasonable doubt.

And we are similarly unconvinced a good argument could be made of prosecutorial misconduct. Appellate counsel considered a complaint based on the prosecutor's opening statement including information about police using the DNA database to link appellant to the crime. But the mistake was cured by the court, and in light of the subsequent introduction of the DNA connection, it could hardly have amounted to reversible error. "Prosecutorial misconduct is cause for reversal only when it is 'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant.' [Citation.]" (*People v. Milner* (1988) 45 Cal.3d 227, 245.) That is not the case here, and

none of the suggested assignments of error arising out of the prosecutor's closing argument would meet that standard either.

The only instructional issue that comes close to being arguable is the one considered by appellate counsel: failure to give a sua sponte instruction on involuntary manslaughter. The theory here would be that appellant was provoked by his victim calling him a "stupid fucking spic" and threatening to have him killed for failing to pay her. But the former is clearly not enough to justify an instruction on involuntary manslaughter and the latter actually suggests premeditation and deliberation more than provocation: it suggests appellant killed her to keep her from later trying to kill him. The law does not sanction – nor accept as provocation – such reasoning. There was not enough here to justify a lesser included instruction.

In short, appellate counsel was correct that there are no arguable issues in this case. We have analyzed the ones he considered and searched the record for others. We can find none. The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.