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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.

RICARDO DAGOBERTO DIAZ-
NIVAREZ,

Defendant and Appellant.

G046945

(Super. Ct. No. 06CF0633)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Jennifer B. Truong, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Ricardo Dagoberto Diaz-Nivarez of first degree murder. (Pen. Code, § 187, subd. (a).)¹ The court sentenced defendant to 25 years to life. On appeal, defendant argues insufficient evidence supports the conviction. We affirm the judgment.

FACTS

In March 2005, the victim, Mario Hernandez, was 68-years-old and stood five feet three inches tall. He had just suffered a stroke and had a stent replaced in his heart, and used a cane to walk. He sold jewelry, including 14-karat-gold pieces, to clients at their homes by appointment.

Defendant's mother, Rebeca Nivarez, was Hernandez's customer.² Hernandez came to her house once a week or once every two weeks to sell jewelry and pick up payments. Defendant lived in Rebeca's garage.

On March 18, 2005,³ Hernandez left his home in the morning and did not return. That afternoon, Rebeca pawned \$2,500 worth of jewelry.

That evening, Hernandez's granddaughter, who had been trying to phone him with no response, called the police. She obtained from the phone company a list of Hernandez's last cell phone calls. She phoned the last phone number Hernandez had

¹ All statutory references are to the Penal Code.

The People also charged defendant with second degree robbery (§§ 211, 212.5) and alleged two special circumstance enhancements to the murder charge. On the People's motion, the court dismissed the robbery charge and the special circumstance allegations.

² To avoid confusion, we refer to Rebeca Nivarez by her first name. We mean no disrespect.

³ All dates refer to the year 2005 unless otherwise specified.

called on March 18. A woman named Rebeca answered the call and said she had had an appointment with Hernandez to give him a payment, but he never showed up. Rebeca also told an officer who came to her home that Hernandez had failed to show up for the appointment.

Rebeca went to the apartment of Claudia Diaz. Diaz is Rebeca's daughter and defendant's sister. Rebeca gave Diaz a bag of jewelry to hold until Rebeca needed it back. A couple of days later, Rebeca retrieved the jewelry from Diaz. Rebeca asked Diaz for Google directions to Colorado. Diaz asked Rebeca if she was running away from something.

On March 24, Hernandez's van was located at a Mission Viejo park after a local resident reported the vehicle had been parked there since March 18. Inside the van were two plastic gloves, two bottles (one of which smelled like an accelerant), two boxes of jewelry, and a yellow rope. One glove contained defendant's DNA.

Rebeca left her home and did not return. Defendant was no longer living there either. Rebeca's roommate and Diaz found a note in Rebeca's room saying she had gone to Denver, Colorado to look for defendant.

On February 10, 2006, at the request of police, Diaz made a covert, recorded call to defendant (who was in Mexico). The recording was played for the jury at trial. In it, defendant said he was certain the old man was dead. He said Rebeca was told by a psychic that the old man was using strong bad witchcraft on her and defendant. Rebeca put defendant in a trance with information about the "spell/curse" and said they had to kill the man. "[T]hat was the pretext." Rebeca was there when the old man was killed. Defendant and Rebeca acted "with advantage and premeditation," not in self-defense. Defendant put the body in an apartment dumpster in Rancho Cucamonga. Defendant scolded Rebeca for taking the jewelry to Diaz for safekeeping because that was how "things were then shed to light afterward."

Defense

Defendant testified on his own behalf. He was 19-years-old at the time of the incident.

Prior to the incident, Rebeca told him that Hernandez was putting a witchcraft curse on them and this was why they were going through a bad period. Rebeca said Hernandez had to die for the curse to be broken. Several times Rebeca said Hernandez had to die. Defendant paid no attention to Rebeca's talk about witchcraft, thinking it was crazy.

On the morning of the incident, defendant came home from his night job cleaning offices. He went to his room (the garage). He saw Rebeca struggling with Hernandez. Hernandez had Rebeca "by the hair"; they were fighting and yelling.

Defendant grabbed a golf club "that was there" and hit Hernandez two or three times. Hernandez continued to hold Rebeca by the hair. Hernandez and defendant started to fight.

Hernandez pulled out a knife and said he was going to kill defendant and Rebeca. Hernandez tried to stab defendant. Hernandez and defendant started struggling. Defendant bent Hernandez's hand and stabbed him twice with his own knife. They kept on fighting. Hernandez "just never wanted to stop." Defendant "saw a light cable that was there" and — still feeling threatened because Hernandez "never wanted to stop" and kept on fighting — wrapped it around Hernandez's neck and strangled him until he stopped moving.

Rebeca told defendant to tie up Hernandez, put him in a trash can, and clean the room (garage). Then Rebeca went into the house to cover up the situation so no one in the home would know what had happened. Rebeca's roommate and the roommate's daughter were home at the time.

Defendant denied having any intention, or having planned with Rebeca, to steal Hernandez's jewelry. After Hernandez's death, defendant never saw what happened to the jewelry and never received any money from Rebeca.

Defendant put Hernandez's body in Hernandez's van and parked it by some apartments. Rebeca said the police would find the vehicle there, so the next morning she drove the van, with defendant following in another car, to another city where they threw the body into a dumpster by some apartments. Rebeca then drove to a park where she parked the van. Upon their return home, Rebeca sent defendant to a healer to be cleansed. On defendant's way home, Rebeca phoned and told him to "get out of here" because the police had come by looking for him. She gave him \$100 for gas. Defendant drove to Tijuana and then flew to his father's house where he told his father what had happened.

Regarding defendant's phone call with Diaz, he said he did not act in self-defense because he "had already realized that all of this was one of [Rebeca's] plans." He used the words "premeditation and advantage" because he heard them from his father, who is an attorney. When defendant told Diaz that Rebeca's witchcraft curse was a pretext, he meant that Rebeca was planning something and tricked him into killing Hernandez.

DISCUSSION

Substantial Evidence Supports the Conviction

The prosecutor presented two theories of first degree murder (premeditated murder and felony murder) and informed the jurors they did *not* need to unanimously

agree on either theory to find defendant guilty.⁴ Defendant argues there was no substantial evidence that (1) he premeditated Hernandez’s murder, or (2) for purposes of felony murder, that he formed the intent to rob Hernandez before the killing occurred, that he committed a robbery, or that he killed Hernandez during a robbery.

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.) ““An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.”” (*People v. Jennings* (2010) 50 Cal.4th 616, 645.) 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.)⁵

““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. Jennings* (1991) 53 Cal.3d 334, 364.) ““[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

⁴ Because the jurors did not *expressly* find premeditation, it is unclear whether they convicted defendant of a premeditated murder or felony murder or a combination of both.

⁵ “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 that the defendant 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.)

beyond a reasonable doubt.”” (*People v. Kelly* (1990) 51 Cal.3d 931, 956.) 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.)
“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 conviction. Viewing the entire record in the light most favorable to the judgment, a rational trier of fact could find that, as to felony murder, substantial evidence shows defendant formed a prior intent to rob Hernandez. Defendant knew about Hernandez’s jewelry business and that Rebeca was Hernandez’s customer. Rebeca had an appointment with Hernandez on the morning he was killed. She pawned some of his jewelry that afternoon. In defendant’s recorded phone call with Diaz, he told his sister it was obvious Hernandez had gold items for sale on that day. Defendant told Diaz he scolded Rebeca for giving Diaz some of the jewelry for safekeeping because that was how their involvement in the crime was detected. Defendant’s trial testimony provides substantial evidence he had no other motive to kill Hernandez. He testified he had no problem with Hernandez before the day of the incident. He further testified he did not take seriously Rebeca’s talk about a curse and thought his mother was crazy for believing it.

As to premeditated and deliberate murder, defendant told Diaz that he and Rebeca planned the murder together and did it with “advantage and premeditation” (a phrase he repeated three times in the recorded phone conversation). He further said it was *not* an accident and *not* in self-defense. The murder took place in the garage (defendant’s room), away from other occupants of the house. (*People v. Hovarter* (2008)

44 Cal.4th 983, 1019 [choice to commit crime in isolated or secluded setting suggests premeditation].) Defendant had a single golf club in the room, although he admitted he did not play golf. He also had a cable he used to strangle Hernandez.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.