

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO DOMINGUEZ,

Defendant and Appellant.

H022727

(San Benito County

Super. Ct. No. CRF99-37033)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

NO CHANGE IN THE JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on December 14, 2004, be modified as follows:

1. The paragraph commencing at the bottom of page 11 with “The People assert” and ending at the top of page 12 with “about its presence” as well as footnote 8 are modified to read as follows:

The People assert that the evidence showed that Ms. Perez had been raped with extreme force and that other evidence raised the likelihood that she had been beaten before she was raped. The People cite no record support for the latter assertion, which is now being made in this court for the first time, and we have found none.⁸ The finding that Ms. Perez was raped, and the evidence that the rape may have been particularly brutal, would have supported a finding that the rape left Ms. Perez in a weakened state which contributed to her death. Such a finding would certainly establish the requisite causal connection. (See *Cavitt, supra*, 33 Cal.4th at p. 204 [binding of victim and leaving her alone with alleged killer

⁸ We have searched not only the trial record but materials outside that record, such as the probation report, and have failed to find any basis for the People’s assertion.

established requisite causal relationship between defendants' participation in robbery and killing].) However if the jury did not believe defendant participated in the killing itself it might well not have believed that he inflicted the injuries on which the People rely in contending that he brutally raped her. Again, the jurors' inquiry suggested that they might have found that defendant's involvement stopped at mere presence. More to the point, they were not told that they had to find a causal connection between defendant's rape and Ms. Perez's killing. Once they entertained the possibility that Martinez was the killer, as their note to the court established they did, any attempt to determine the relationship—if any—between the rape and the killing was inherently tinged with conjecture. Had the jury been instructed that such a relationship had to be found, it could well have entertained a reasonable doubt about its presence.

The respondent's petition for rehearing is denied.

There is no change in the judgment.

Dated:

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.