

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

THE PEOPLE,)	No. S113421
)	
Plaintiff and Respondent,)	Los Angeles County
)	Sup.Ct. No NA039436-
)	02
vs.)	
)	CAPITAL CASE
WARREN JUSTIN HARDY,)	
)	
Defendant and Appellant.)	
_____)	

Automatic Appeal from the Judgment of the Superior Court
State of California, County of Los Angeles, No. NA039436-02
Hon. John David Lord, Judge Presiding

APPELLANT’S SECOND SUPPLEMENTAL REPLY BRIEF

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APPELLANT’S SECOND SUPPLEMENTAL REPLY BRIEF

Appellant Warren Justin Hardy submits the following in reply to the Second Supplemental Respondent’s Brief. As for any matter not specifically addressed herein, Hardy will rely on the arguments and points and authorities in Appellant’s Opening, Reply, and Second Supplemental Opening Briefs. The effort to keep briefing short and concise should not be interpreted as a lack of confidence in the merits of the matters not expressly addressed, but reflects Hardy’s

view that the issue has been adequately presented. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

ARGUMENT

XXIV

THE TRUE FINDINGS OF THE SPECIAL CIRCUMSTANCES UNDER PENAL CODE SECTION, SUBDIVISION (A)(17), AND THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT APPELLANT HAD TO COMMIT ANY SPECIAL CIRCUMSTANCE FELONY FOR AN INDEPENDENT FELONIOUS PURPOSE UNDER PENAL CODE SECTION 190.2, SUBDIVISION (A)(17), IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 16, OF THE CALIFORNIA CONSTITUTION.

The second supplemental opening brief argued the jury was not properly instructed it had to find an independent felonious purpose to find true the special circumstances under section 190.2, subdivision (a)(17) and (18), that the murder was committed during the commission of a robbery, a kidnapping, a kidnapping for rape, a rape, and a rape by foreign object, and that the murder was intentional and involved the infliction of torture. (SAOB2 1-11; see also *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026.) Respondent argued the issue was forfeited, the trial court had no duty to instruct

on the requirement of an independent felonious purpose, and any error was harmless. (SRB2 5-15.) Hardy disagrees on all points.

A. There was no forfeiture, and the issue is cognizable on appeal.

Contrary to respondent's assertion that Hardy's claim is forfeited (Contra SRB2 6-7), there was no forfeiture of this issue. Indeed, under certain circumstances, this Court can exercise its discretion to consider issues not previously raised on appeal. In the decision in *People v. Brooks* (2017) 3 Cal.5th 1, for example, issued well after prior briefing in the instant case was complete, this Court reviewed on the merits the issue of whether the special circumstance of kidnapping required proof of an independent felonious purpose. This Court reviewed the issue despite the fact appellate counsel in *Brooks* failed to raise the issue on appeal. In fact, appellate counsel did not raise the issue until after the opinion was issued. Brooks' counsel filed a petition for rehearing based on Justice Liu's dissent, which found the evidence insufficient to support the kidnapping-murder true finding.

In modifying the original *Brooks* opinion based on the petition for rehearing, which raised for the first time a claim of error in failing to instruct the jury that it must find an independent felonious purpose

before it could find true the kidnapping-murder special circumstance, this Court noted that “Ordinarily, this court will not consider an issue raised for the first time in a petition for rehearing.” (See Order Modifying and Denying Rehearing, *People v. Brooks*, filed May 31, 2017, p.2, amending opinion at 2 Cal. 5th 674). Nevertheless, this Court considered the newly raised issue in *Brooks*, reasoning that “[i]n the circumstances presented . . . in which a capital defendant . . . presented a meritorious claim that can be resolved solely on the basis of the appellate record, we find it appropriate to consider the new claim of instructional error raised in defendant’s petition for rehearing.” (*Ibid.*)

If this Court found it appropriate to consider the new issue in *Brooks*, raised for the first time in a petition for rehearing, a fortiori, then, it is similarly appropriate in the instant capital case to consider the issue raised in Hardy’s Second Supplemental Reply Brief, which it granted leave to appellant to file. (See also, *People v. Mattson* (1990) 50 Cal.3d 826, 854; *People v. Norwood* (1972) 26 Cal. App. 3d 148, 153 [“A matter normally not reviewable upon direct appeal, but . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal”].)

Respondent complains the second supplemental brief raising this issue “unnecessarily increased . . . workload and delayed resolution . . .” of this appeal. (SRB2 7 quoting *Alameda County Management Employees Assn. V. Superior Court* (2011) 295 Cal.App.4th 325, 337, fn. 9.) The case cited by respondent involved a civil action against the Superior Court of Alameda County arising from a reduction in force. Members of a union, to which some laid off employees belonged, sued alleging the court had violated the Trial Court Employment Protection and Governance Act (Gov. Code, § 71600 et seq.). After the appellate court issued its opinion, the superior court retained new counsel, who raised a new issue in a petition for rehearing. In that context, the untimely petition did increase workload and delay resolution. Here, however, the appeal is in a different procedural posture. No opinion has issued. The work for the parties and this Court is essentially the same as if the issue had been raised in Hardy’s initial brief.

B. The trial court was required to instruct on the applicable principles of controlling law governing at the time the offenses were committed.

Respondent concedes that at the time of these offenses “the special circumstances allegations required an independent felonious purpose” (SRB2 8.) That is because offenses charged against

Hardy occurred late on December 28, and 29, 1998. (11RT 2250.)

The trial court utilized a version of the CALJIC instructions that erroneously incorporated a 2000 change in the law. (See SAOB2 6, citing *People v. Brents* (2012) 53 Cal.4th 599, 608, fn. 4; Prop. 18, Primary Elec. March 7, 2000.)

Versions of CALJIC No. 8.81.17 that predated the 2000 change in the law included instruction on the independent felonious purpose requirement.¹ The Fifth Edition (1988) of CALJIC No. 8.81.17, included the following bracketed second paragraph:

The murder was committed in order to carry out or advance the commission of the crime of _____ or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] _____ was merely incidental to the commission of the murder.

The Comment to CALJIC No. 8.81.17 noted:

Where the kidnapping was for purpose of murder, murder was not committed while defendant was engaged in kidnapping. *Ario v. Superior Court, Alameda County* (1981)

¹ Current CALCRIM No. 730 contains similar language instructing the special circumstance is not proved when any section 190.2, subdivision (a)(17) felony “was merely part of or incidental to the commission of that murder.” Instruction is required when evidence supports a reasonable inference the felony was committed to facilitate the murder.

[124 Cal.App.3d] 285, 287-290, 177
Cal.Rptr. 265, 266-267.^[2]

People v. Green (1980) 27 Cal.3d 1, 60, held the defendant had not committed “a murder in the commission of a robbery but the exact opposite, a robbery in the commission of a murder.” The jury had asked for clarification about the time frame of the special circumstance felony. (*Ibid.*) This Court noted it had taken the defendant longer to commit the robbery than to commit the murder. (*Ibid.*) This Court concluded it was “not unconstitutionally arbitrary to impose the death penalty on defendants who killed in cold blood in order to advance an independent felonious purpose, e.g., who carried out an execution-style slaying of the victim of or witness to a holdup, a kidnaping, or a rape.” (*Id.* at p. 61.)

The trial court in Hardy’s case did not give the foregoing portion of CALJIC No. 8.81.17 or anything similar to it. Hardy’s jury was never instructed on the independent felonious purpose

² *Ario* considered an appeal from the denial of defendant’s motion to dismiss special circumstance allegations. (*Ario v. Superior Court, Alameda County, supra*, 124 Cal.App.3d at p. 286.) *Ario* held kidnaping special circumstance allegations required “that the kidnaping was for some purpose other than merely to facilitate the primary crime of murder. If it were merely incidental to the murder or ancillary to it, with no separate purpose, the rationale of [*People v.*] *Green* [(1980) 27 Cal.3d 1] prevents a determination that the murder was committed while the defendant was engaged in kidnaping.”

requirement. “[T]he trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citation.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.”

(*People v. Stewart* (1976) 16 Cal.3d 133, 140; *Kelly v. South Carolina* (2002) 534 U.S. 246, 257 [“It is the duty of the trial judge to charge the jury on all essential questions of law, whether requested or not”].) “[I]t is [the] court’s duty to see to it that the jury are adequately informed on the law governing all elements of the case submitted to them to an extent necessary to enable them to perform their function in conformity with the applicable law. [Citation.]”

(*People v. Sanchez* (1950) 35 Cal.2d 522, 528; *McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 836.)

Neither *People v. D’Arcy* (2010) 48 Cal.4th 257, 297, nor *People v. Monterroso* (2004) 34 Cal.4th 743, 767, excuse the trial court’s failure to instruct on the independent felonious requirement. (Contra, SRB2 9.)

In *Monterroso*, in the early morning hours, the defendant shot and killed a clerk at a market, and a second clerk at a nearby liquor store. (*People v. Monterroso, supra*, 34 Cal.4th at p. 750.) A jury

convicted him of two first degree murders and found true the burglary-murder and robbery-murder special circumstances as to each. (*Ibid.*) Unlike the instant case, the jury in *Monterroso* was instructed on the independent felonious purpose, however, the defendant challenged the wording of the instruction. Defendant argued it was error to instruct on the independent felonious purpose as an alternative, that is, using the disjunctive “or” rather than the conjunctive “and.” (*Id.* at p. 767.) This Court rejected the argument because uncontradicted evidence showed defendant shot the first victim when he failed to comply with the defendant’s orders to submit to the robbery, then relied on the murder to show the other robbery victims he was serious. (*Ibid.*) The defendant killed the second victim to eliminate the only witness to the burglary-robbery. Thus, in *Monterroso*, the evidence showed defendant committed the murders to advance the robbery or facilitate his escape or avoid detection. (*Ibid.*) Accordingly, this Court concluded there was “no substantial evidence to reasonably suggest defendant entered the store or committed a robbery merely in order to murder either victim.” (*Ibid.*)

Similarly, in *People v. D’Arcy, supra*, 48 Cal.4th 257, the jury convicted defendant of first degree murder and found true special circumstance allegations that the murder was intentional and

involved the infliction of torture and was committed while defendant was engaged in the commission of mayhem. (*Id.* at p. 265.) On appeal, the defendant challenged the lack of instruction requiring a finding that the murder was committed to facilitate the commission of mayhem. This Court rejected the argument because the evidence clearly showed the defendant's concurrent intent to maim and murder the victim. (*Id.* at p. 297.) He made such threats on the day before, and the morning of, the murder. As he committed the crimes, he yelled his intent both to kill the victim and to cause her extreme pain and disfigurement. (*Ibid.*)

In contrast, to *Monterroso* and *D'Arcy*, there were no witnesses to the crimes in the instant case. There were no statements from Hardy indicating a concurrent intent, or any intent. The order of the crimes themselves was unclear, as was the motive or motives. There was no evidence the special circumstance felonies were anything other than "merely incidental to the commission of the murder." (Former CALJIC No. 8.81.17.) Nor does Hardy's case present the situation in *People v. Kimble* (1988) 44 Cal.3d 480, 501, where no evidence supported the instruction. Indeed, in *Kimble*, the defendant "apparently concede[d], there was substantial evidence from which the jury could have found the rape and robberies were

not ‘incidental’ to the murders.” (*Id.* at p. 502.) Again, “*the evidence clearly showed a concurrent intent*” intent in *Kimble*. (*Id.* at pp. 502-503 [italics in original].)

Here, there was no evidence of any independent felonious intent. The victim yelled a racial epithet. All the violence followed forthwith and continuously. The reasonable inference is that murderous intent derived immediately from the epithet that likely enraged Hardy and his young, black companions. The other offenses that followed were incidental. If there was an intent to murder the victim at all times after the initial encounter when she yelled a racial epithet, there was no independent intent to commit the felonies. Rather, they were an afterthought or incidental to the murder. Respondent has failed to present any evidence establishing a different scenario other than that the felonies were incidental to the murder. Indeed, respondent quotes only his own briefing to establish purported “evidence” of concurrent intent. (SRB2 10.) But, given the actual evidence presented at trial, that is little more than speculative inference, which is insufficient to support the special circumstances findings. (*People v. Waidla* (2000) 22 Cal.4th 690, 735 [“But speculation is not evidence, less still substantial evidence. [Citation.]”].)

The evidence contrasts with that in *D'Arcy*, where the defendant's own words showed his independent felonious purpose for the special circumstance felony, or *Monterroso*, where the sequence of events was shown by the evidence and supported a reasonable inference of independent felonious purpose.

C. The error was prejudicial.

The victim encountered her attackers on a public street, cursed them, and was then forced off the street to a secluded area. The prosecutor argued the victim was taken to the hidden area behind the closed businesses so she would be out of view from the street, and no one could hear her scream. (11RT 2349-2350, 2415.) This theory was consistent with the reasonable inference that the victim was removed from the street to be murdered out of plain view. After the initial encounter on the street, Pearson likely formed the intent to kill, then directed Hardy and Armstrong to take the woman on the other side of the fence away from the street. (10RT 2138-2139.)

Justice Liu's separate concurring and dissenting opinion in *Brooks* is relevant when assessing prejudice. (Contra, SRB2 11.) The *Brooks* majority concluded the jury could have inferred Brooks formed the intent to murder after "incapacitating [the victim] and

moving her” (*People v. Brooks, supra*, 3 Cal.4th at p. 63.)

Justice Liu’s separate opinion observed correctly that, without instruction, a reviewing court cannot even conclude the jury ever considered whether there was an independent felonious purpose for the special circumstance felonies.

The absence of instruction informs both the instructional error and the related insufficiency of evidence claim. (See AOB, Argument VI.) Hardy’s jurors never considered whether he had an independent felonious purpose, because they were never told to do so. The case is different from *Monterroso* and *Brents* where the juries received instruction, albeit improperly worded ones. Thus, the prejudice to Hardy was greater than that suffered by the defendant in *Brents*. Hardy’s jury had no guidance whatsoever regarding the requirement to find an independent felonious purpose before it could find the special circumstances true. That was prejudicial because the evidence reasonably supported an inference there was no such purpose. A properly instructed jury could have concluded the other section 190.2, subdivision (a) felonies were committed “in the commission of the murder.” (*People v. Green, supra*, 27 Cal.3d at p. 60.) This would have resulted in not true findings.

CONCLUSION

Based on the foregoing, and on the arguments and authorities in the opening and second supplemental opening briefs, Hardy was denied his Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution. The true findings on the special circumstances must be reversed and the judgment of death must be vacated.

DATED: September 5, 2017

Respectfully submitted,

SUSAN K. SHALER
Attorney for appellant

c:\Hardy\hardy.AOB.supp.2nd

CERTIFICATE OF APPELLATE COUNSEL
PURSUANT TO RULE 8.520 (D) (1)), CALIFORNIA RULES OF
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I, SUSAN K. SHALER, appointed counsel for appellant hereby certify, pursuant to Rule 8.520(d), California Rules of Court, that I prepared the foregoing brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect X7. The word count for the brief is 2,678, including footnotes, but not including the cover or tables. Because the brief complies with the rule, which limits the word count to 2,800. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

Dated: September 5, 2017

SUSAN K. SHALER

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APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

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