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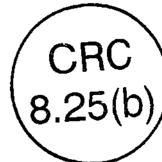
SUPREME COURT OF THE STATE OF CALIFORNIA



SUPREME COURT
FILED
MAY 11 2016
Frank A. McGuire Clerk
Deputy

THE PEOPLE OF CALIFORNIA,
Plaintiff and Respondent,
v.
JORGE GONZALEZ et al.,
Defendants and Appellants.

Court of Appeal, Second Appellate District, No. 255375
Los Angeles County Superior Court No. YA076269
Honorable Scott T. Millington, Judge

2nd

GONZALEZ'S PETITION FOR REVIEW

Robert Franklin Howell
California Bar No. 071273
Post Office Box 71318
Las Vegas NV 89170
Telephone 702-834-3845
AttorneyHowell@Yahoo.Com

Attorney for Petitioner Gonzalez

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TO TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Jorge Gonzalez ("appellant"), respectfully asks that this Court grant review of the published opinion of the Court of Appeal, Second Appellate District, Division Four, filed in No. B255375 on March 30, 2016, and modified on April 28, 2016. The Court of Appeal affirmed the judgment in Los Angeles County Superior Court No. YA076269, in which appellant was convicted of first degree murder and sentenced to prison for life without the possibility of parole. A copy of the opinion of the Court of Appeal is affixed as Appendix A, and a copy of the modification of the Opinion is affixed as Appendix B. Appellant Gonzalez did not seek rehearing.

ISSUES PRESENTED FOR REVIEW

Appellant asks that review be granted as to the first two issues (below) pursuant to rule 8.500(b)(1), *California Rules of Court*, to settle important issues of law. Appellant's additional issues are presented in order to exhaust them for purposes of potential federal court review.

1. Does a trial court have a sua sponte duty to instruct on malice murder, and on lesser-included offenses and defenses to malice murder, when the defendant is charged with only malice murder (Pen. Code, § 187, subd. (a)) and the prosecution proceeds only on a felony murder theory.

2. What is the standard of review for harmless error when a trial court fails to instruct on lesser-included offenses and defenses to malice murder in a case in which only malice murder is charged but the prosecution proceeds solely on a felony murder theory?

3. Is CALCRIM 334, which instructs a jury on principles of sufficiency of accomplice testimony, erroneous because it does not require the corroborating evidence to incriminate the accused, and does not contain a mandatory provision advising that the testimony of an accomplice may not be used as corroboration?

4. Was Appellant Gonzalez deprived of his Fourteenth Amendment right to due process of law by the admission of a purported "adoptive admission" to the effect he failed to object to planning of a robbery in a motel room in which he was merely present with several others?

SUMMARY OF THE CASE

The prosecution case depended almost exclusively on two unusual sources. The first source were the out-of-court statements attributed to Alejandro Ruiz, an undocumented alien whose unsworn accounts provided the only prosecution evidence of how the shooting allegedly occurred, and who did not appear at trial because the police apparently could not locate him. (7RT 5139.) The jury found that his testimony was not true – at least in

material part – when it found that no defendants used a gun in the alleged robbery, as shown by their "not true" findings on all firearm allegations.

The second principal source of prosecution evidence was the testimony of Anthony Kalac, who appeared but refused to testify until given a grant of use immunity.[1] Kalac was a heroin addict who admitted that he had personally robbed drug dealers in the past, but who claimed that he was merely present during the planning of the robbery in this case.[2] Kalac conceded that he was stoned on 15 hits of heroin at the time he made his alleged observations. Kalac was the only witness who claimed that the shooting grew out of an agreement or a conspiracy to rob Victor Rosales, and thus supplied the only evidence to support the prosecution's felony murder theory and special circumstances allegation.

The Opinion (Appendix "A") adequately summarizes the procedural history and the facts for introductory purposes. Additional facts necessary to the discussion of specific issues are set forth in the body of the text, *post*.

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[1] Kalac was initially called to testify outside the presence of the jury, and with his personal attorney present, and declined to answer any questions until he was granted use immunity for his testimony. (5RT 3934-3935, 4008-4009.)

[2] If there was a robbery or attempted robbery of Rosales in this case, it was carried out through the use of Kalac's personal *modus operandi*, which as he described it was to "snatch and run" with drugs seized from the drug dealer, and did not involve the use of any weapon or intimidation. (7RT 4872-4875.)

DISCUSSION

I.

THE TRIAL COURT DEPRIVED APPELLANT OF HIS 6TH AMENDMENT RIGHTS TO JURY TRIAL AND TO PRESENT A DEFENSE AND HIS 14TH AMENDMENT DUE PROCESS RIGHT TO PERSONAL FREEDOM ABSENT PROOF OF EACH ELEMENT OF THE CRIMINAL CHARGES BEYOND ANY REASONABLE DOUBT BY FAILING TO INSTRUCT ON THE ELEMENTS OF MALICE MURDER, SECOND DEGREE MURDER, VOLUNTARY MANSLAUGHTER ARISING FROM HEAT OF PASSION DUE TO PROVOCATION, VOLUNTARY MANSLAUGHTER DUE TO IMPERFECT SELF-DEFENSE, AND THE COMPLETE DEFENSES OF REASONABLE SELF-DEFENSE AND ACCIDENT.

In the Court of Appeal, Mr. Gonzalez argued that the trial court's failure to instruct on malice murder, second degree murder, voluntary manslaughter due to heat of passion arising from adequate provocation, voluntary manslaughter due to imperfect self-defense, and the complete defenses of reasonable self-defense and accident, deprived appellant of his Sixth Amendment rights to jury trial and to present a defense, as well as his Fourteenth Amendment right to personal liberty without proof of each element the charged criminal offense beyond any reasonable doubt. Appellant argued there, as he does in this Court, that each of these omissions was prejudicial, and requires that the Judgment be reversed.

The Attorney General argued in the Court of Appeal that the Government need not plead felony murder, or take any formal action to

disclaim a malice murder theory, but may instead through stealth maneuvers (arguments on unrelated issues, inferences drawn from incomplete prosecution opening statements, permissive inferences which may be found in allegations on other pleaded charges, or stated preferences for jury instructions) limit a trial court's judicial power to instruct to only a felony murder theory, thereby eliminating lesser included offenses and defenses, even if such lessers and defenses are shown by the evidence. (RB 34.)

Appellant argued that, on the contrary, The decision of this Court in *People v. Smith* (2013) 57 Cal.4th 232 -- although it was not a felony murder case -- is directly contrary to the Attorney General's claim that the accusatory pleading rule is not applicable to define the scope of the trial court's duty to instruct. (See also *People v. Anderson* (2006) 141 Cal.App.4th 430.) As stated in *Smith, supra,* 57 Cal.4th at 244:

> The rule we affirm today—requiring *sua sponte* instruction on a lesser offense that is necessarily included in one way of violating a charged statute when the prosecution elects to charge the defendant with multiple ways of violating the statute—does not require or depend on an examination of the evidence adduced at trial. The trial court need only examine the accusatory pleading.

Review should be granted to settle the issue whether a defendant is entitled to instruction on malice murder and on its lesser-included offenses and defenses in a case in which murder under section 187 is pleaded but the

prosecution elects to proceed solely under a felony murder theory.

The Court of Appeal in this case declined to address the issues of lesser-included offenses and defenses, and instead opined that any error in failing to instruct was harmless. (Appendix A at page 27.) In doing so, the Court of Appeal has created a split in published authority with the decision in *People v. Campbell* (2015) 227 Cal.App.4th 746, 757, which holds that such error is necessarily always prejudicial.

Appellant submits that the error was prejudicial in this case, even if some form of harmless error balancing is applied. From the jury's perspective, Rosales had been killed and there was only one option for it to take in order to punish someone for the killing. The jury necessarily had to find the special circumstances allegation to be true in order to effect any punishment. By limiting the jury to this unfair all-or-nothing choice, the failure to instruct made it likely that "'the jury ... resolve[d] its doubts in favor of conviction.'" (*Beck v. Alabama* (1980) 447 U.S. 625, 634, quoting *Keeble v. United States* (1973) 412 U.S. 205, 208; see *People v. Ramkeesoon* (1985) 39 Cal.3d 346, 350; *People v. Wickersham* (1982) 32 Cal.3d 307, 324.)

Thus, the true finding on the special circumstances allegation was compelled by the failure to instruct on malice murder and lesser offenses, and was not necessarily the result of a factual determination but more likely

was the product of the jury's desire to punish his killer(s).

In *People v. Breverman* (1998) 19 Cal.4th 142, 178, footnote 25, this Court pointed out the fallacy of reasoning from the fact that a jury found a defendant guilty of a greater offense to the conclusion that it would not have chosen to convict him of a lesser offense on which it was erroneously not instructed. "That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice." (*Ibid.*)

The same reasoning applies where a jury is presented with conclusive evidence of a homicide, but is not allowed the option of selecting a conviction which neatly fits the facts, but instead is given only of the choice of acquittal or making a true finding on a special circumstances allegation. (*People v. Campbell* (2011) 51 Cal.4th 148, 167.)

Mr. Gonzalez argued in his opening brief in the Court of Appeal that the trial court's failure to instruct on malice murder and its lesser included offenses and defenses deprived appellant of his Sixth Amendment rights to jury trial and to present personal defenses, and of the due process of law guaranteed to him under the Fourteenth Amendment to the United States

Constitution. (AOB at pages 54-57.) Mr. Gonzalez also argued that the instructional failures require reversal of the judgment without a weighing of prejudice. (AOB 58.) Mr. Gonzalez makes the same contentions in this Court.

"The right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution" as well as Article I, section 15 of the California Constitution. (*People v. Schroeder* (1991) 227 Cal.App.3d 784, 787; see also *People v. Morse* (1992) 2 Cal.App.4th 620, 670; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19.) A "state court's failure to correctly instruct the jury on a defense may deprive the defendant of his due process right to present a defense." (*Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1099; see also *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739 ["It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case"]; *Mathews v. United States* (1988) 485 U.S. 58, 63.) The failure to instruct on the defendant's theory of the case where there is evidence supporting instructions also violates the Sixth Amendment. (*United States v. Unruh* (9th Cir. 1988) 855 F.2d 1363, 1372; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.)

The trial court's failure to instruct on the elements of the charged

offense of malice murder, on lesser-included offenses, and on the applicable defenses accordingly abridged appellant's fundamental federal constitutional rights and therefore requires reversal without a weighing of prejudice. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1315-1316; see *Osborne v. Ohio* (1990) 495 U.S. 103, 123-25; *Harmon v. Marshall* (9th Cir. 1995) 57 F.3d 763 [failure to instruct on one element of an offense is reversible per se]; *United States v. Hove* (9th Cir. 1995) 52 F.3d 233, 235-36; *United States v. Stein* (9th Cir. 1994) 37 F.3d 1407, 1410.)

Even assuming, *arguendo*, that proof of prejudice is required, the stark conflicts in the evidence, the hearsay nature of Ruiz's unsworn account, and the self-serving nature of Kalac's assertions, make it impossible for the government to discharge its heavy burden of proving that the failure to instruct was harmless beyond any reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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II.

THE TRIAL COURT'S JURY INSTRUCTION GOVERNING JURY ASSESSMENT OF ACCOMPLICE TESTIMONY WAS ERRONEOUS BECAUSE IT FAILED TO ACCURATELY DEFINE THE TYPE OF EVIDENCE WHICH IS SUFFICIENT TO CORROBORATE AN ACCOMPLICE'S TESTIMONY, AND IT FAILED TO ADVISE THE JURORS THAT THE STATEMENTS OF ONE ACCOMPLICE MAY NOT BE USED TO CORROBORATE THE TESTIMONY OF ANOTHER.

The modification of CALCRIM 334 which was given by the trial court to define the sufficiency of the corroboration required for a jury to return a conviction based upon accomplice testimony was inaccurate and incomplete. First, the modification failed to instruct the jury that the statements of one accomplice may not be used to corroborate the testimony of another. Second, this modified instruction failed to advise the jury that, in order to be sufficient, corroborating (as used in the instruction, "supporting") must pertain to an element of the charged crime and tend to incriminate the accused. These errors permitted the jury to credit Kalac's testimony even though it was not supported by corroborating evidence, and were prejudicial.

A. The Jury Instruction.

The trial court instructed the jury with a modification of CALCRIM 334 (Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice) as follows (8RT 5784-5787; see 3CT 602-603; spelling, punctuation and syntax as in the official Reporter's Transcript; italics added):

Before you may consider the testimony of Anthony Kalac as evidence against the defendants, you must decide whether Anthony Kalac was an accomplice to those crimes. A person is an accomplice if he is subject to prosecution for the identical crime charged against the defendant.

Someone is subject to prosecution if:

One, you [*sic*] personally committed the crime.

Or, two, he knew of the criminal purpose of the person who committed the crime.

And, three, he intended to, and did in fact, facilitate, promote, encourage or instigate the commission of the crime.

The burden is on the defendant to prove that it is more likely than not that Anthony Kalac was an accomplice.

An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he is present at the scene of a crime, even if he knows that a crime will be committed or is being committed and does nothing to stop it.

A person may be an accomplice even if he is not actually prosecuted for the crime.

If you decide that a witness was not an accomplice, then supporting evidence is not required and you should evaluate his testimony as you would that of any other witness.
If you decide that a witness was an accomplice, then you may not convict Defendants Jorge Gonzalez, Erica Estrada, and Alfonso Garcia of murder in violation of Penal Code section 187 as charged in Count One, and Defendant Jorge Gonzalez of shooting at an occupied vehicle in violation of Penal Code section 246 as charged in Count Two based on his testimony alone. You may use the testimony of an accomplice to convict the defendant only if:

One, the accomplice's testimony is supported by other evidence that you believe.

Two, that supporting evidence is independent of the accomplice's testimony.

And, three, that supporting evidence tends to connect the defendant to the commission of the crimes.

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the crimes, and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[*Omitted optional modification*: The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony of another accomplice.]

Any testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give it the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

B. Errors In The Trial Court's Corroboration Instruction.

1. Omitted modification.

As noted above, the standard option in CALCRIM 334 which addresses the issue whether one accomplice's statement may be used to corroborate another's was *not* given to the jury. (8RT 5786; 3CT 603.) It was error to omit the modification.

The corroboration required under the provisions of Penal Code section 1111 cannot be supplied by another accomplice (*People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2; *People v. Ruscoe* (1976) 54 Cal.App.3d 1005, 1011-1013; *People v. Boyce* (1980) 110 Cal.App.3d 726, 737; see *People v. Dail* (1943) 22 Cal.2d 642, 655; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132-1133) or by evidence, the foundation for which was provided through accomplice testimony. (*People v. Bowley* (1963) 59 Cal.2d 855, 863.)

Accomplices may include co-defendants (*People v. Avila (*2006) 38 Cal.4th 491, 562; *People v. Alvarez* (1996) 14 Cal.4th 155, 218-219; see *People v. Stankewitz* (1990) 51 Cal.3d 72, 90; *People v. Garrison* (1989) 47 Cal.3d 746, 772), and "testimony" under section 1111 includes out-of-court statements and requires corroboration when made by an accomplice. (*People v. Williams* (1997) 16 Cal.4th 153, 245; *People v. Belton* (1979) 23 Cal.3d 516, 526.)

Adequate "accomplice instructions must be given by the court, even though no request for them is made by the defendant. (Cit. om.)" (*People v. Sullivan* (1976) 65 Cal.App.3d 365, 372; accord, *People v. Terry* (1970) 2 Cal.3d 362, 398-399.)

The crux of the prosecution's felony murder case was the alleged conversation which took place in the motel during which Estrada, Garcia and

appellant allegedly planned a robbery of Rosales. Kalac claimed that it was during this alleged conversation that Estrada purportedly stated that she knew someone from whom they could rob drugs, and allegedly used the phrase "come up on," which to Kalac meant to rob. (See 6RT 4261-4263, 4373-4374.) The only other witness who purported to describe any conversation in the motel room was appellant, who testified that there was no such plan to rob Rosales. (See 8RT 5472, 5486, 5495-5496, 5711.)

Kalac's testimony about the "conversation" which formed the entire basis of the prosecution's felony murder case was therefore wholly uncorroborated -- unless the jurors concluded that Estrada's statements coalesced to "corroborate" Kalac's own alleged percipient knowledge of a plan to rob. But Estrada's alleged statements or those of appellant or Garcia were admitted only through accomplice Kalac, and therefore could not corroborate the latter's claims. The jury, unfortunately, was not instructed either that the defendants must be considered to be "accomplices" for purposes of the corroboration instruction, or that the foundation for their alleged statements could not be furnished by accomplice Kalac.

2. Omission Of Requirement That The Corroboration Incriminate The Accused.

CALCRIM 334 is deficient because it does not require that the corroborating evidence pertain to an element of the charged crime and thus

incriminate the accused. The instruction provides only the ambiguous requirement that the corroborative evidence somehow "connect" the accused with the commission of the crime. This amorphous requirement could mean many things, such as that the evidence merely show that the accused was present or had knowledge that a crime was going to be committed. But it lacks the specification that the evidence actually have some tendency to *incriminate*.

From the very genesis of the accomplice-corroboration rule in California, courts have held that corroboration which merely proves the credibility of an accomplice without also tending to establish the criminal liability of the defendant is not sufficient. (*People v. Clough* (1887) 73 Cal. 348; *People v. Baker* (1896) 114 Cal. 617.) These authorities establish that corroborative evidence, to be sufficient to authorize a jury to rely upon the testimony of an accomplice, must do more than merely corroborate the circumstances of an offense or raise a mere random and speculative suspicion of guilt. To be sufficient, it must, in a least a slight degree, *implicate the defendant in the commission* of the offense. (*People v. Ames* (1870) 39 Cal. 403; *People v. Koenig* (1893) 99 Cal. 574.)

The original statutory provisions required evidence "which in itself, and without the aid of the testimony of the accomplice" tended to connect the

defendant with the crime. (Pen. Code, § 1111, as enacted in 1872.) Under this early version of the statute, it was held to be error to instruct the jury that corroborative evidence was sufficient if it tended in any way to connect the defendant with the commission of the crime. (*People v. Compton* (1899) 123 Cal. 403.)

The 1911 amendment to section 1111 (Stats. 1911, chapter 292, section 1, p. 484), which omitted the above-quoted words, has been held not to have changed the law in this regard. (*People v. Robbins* (1915) 171 Cal. 466, 473.) Therefore if "there is no *inculpatory* evidence, there is no corroboration, though the accomplice may be corroborated in regard to any number of facts sworn to by him." (*People v. Morton* (1903) 139 Cal. 719, 724, quoting other authority; emphasis in original.)

There have been no legislative amendments to section 1111, insofar as the requirement of corroborative evidence is concerned, since the 1911 amendment. Thus, although the statute provides on its face merely that the corroborating evidence must "tend to connect the defendant with the commission of the offense," the common law as interpreted by the California Supreme Court requires that the evidence must not only "connect" the defendant with the offense, but must also tend to incriminate, i.e., to "inculpate" the defendant.

Although several decisions, in considering the sufficiency of evidence as corroboration, have also used only the same portion of the literal language of the statute (Pen. Code, § 1111) as is found in the standard instructions, most cases which have specifically addressed the issue of the required character of corroborating evidence have recognized that the corroboration must also *incriminate, or "inculpate,"* the defendant before it can be found to be sufficient. (See, e.g., *People v. Shaw* (1941) 17 Cal.2d 778, 803-804; *People v. Santo* (1954) 43 Cal.2d 319, 327; *People v. Robinson* (1964) 61 Cal.2d 373, 400; *People v. Perry* (1972) 7 Cal.3d 756, 769; *In re Ricky B.* (1978) 82 Cal.App.3d 106, 111; *People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543; but see *People v. Jenkins* (1973) 34 Cal.App.3d 893, 898-899.) The law governing the type of corroboration which is required is well established (*People v. Williams* (1997) 16 Cal.4th 653, 680-681; italics added, and internal quotation marks and citations omitted; accord, *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128):

> The evidence required for corroboration of an accomplice need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; *it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime* but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense