IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,)	Cal. Sup. Ct. No. S138474
)	
Plaintiff and Respondent,)	San Diego County
)	Superior Court No. SCE230405
vs.)	
Eric Anderson)	
)	
Defendant and Appellant.)	
)	

Automatic Appeal From The Judgment Of The Superior Court Of The State Of California, In And For The County Of San Diego,
The Honorable Lantz Lewis, Presiding

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In his appeal, appellant argues numerous errors at the guilt and penalty phase of his trial, asking that the convictions and judgment of death be reversed. In response, the Attorney General agrees that the sealed record be reviewed as to appellant's *Pitchess* motion. Respondent also agrees that the trial court erred in imposing sentence for the serious felony prior and prison prior based on the same prior conviction. Respondent contends there was no other error and the judgment should be affirmed.

This reply brief addresses only points raised in respondent's brief that require further discussion. As such, any omission of argument pertaining to issues discussed more fully in appellant's opening brief and disputed in respondent's brief should not be interpreted as appellant's concession of the issue.

ARGUMENT

I. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING DEFENSE COUNSEL'S REQUEST FOR A SEVERANCE OF THE TRIAL

A. Introduction

Appellant Anderson did not receive a fair trial. He was forced to go to trial with co-defendant Lee, who sometimes visited at Brucker's home because he was friends with Brucker's son. (15 RT 2382, 2384-85.) Lee knew Brucker was the owner of Cajon Speedway. Hoping to profit from his knowledge of a safe containing cash in the Brucker house (15 RT 2386-87, 2402), Lee tried to shop around his knowledge, asking for part of the proceeds of the crime. First he raised this idea with Huhn and his girlfriend Peretti, and then later raised the same idea

with Handshoe and Paulson. (16 RT 2523-25; 22 RT 3766-68, 3772, 3774; 17 RT 2866, 2868.) Eventually Huhn and Handshoe robbed the specific house proposed by Lee. (22 RT 3751-53, 3757-58.) Brucker was killed in the process and then implicated appellant, who has consistently insisted that he had nothing to do with the incident. (17 RT 2823-25.) Despite all of this evidence, the trial court acquitted Lee of conspiracy just before sending the case to the jury. (26 RT 4598.)

Respondent argues was no error in denying the request for severance because co-defendant Lee's defense was not antagonistic to appellant's defense, and there was sufficient independent evidence proving appellant murdered Brucker. Lee's defense was that he was not an aider and abettor or coconspirator to the crimes. (Respondent's Brief ("RB") at pp. 28, 33.) In its argument, respondent appears unable to distinguish the case appellant relies on, *People v. Massie* (1967) 66 Cal.2d 899 (Appellant's Opening Brief ("AOB") at pp. 40-41) and ignores the federal due process claim completely.

B. Co-Defendant Lee's Defense Was Antagonistic To Appellant's Defense

Appellant's defense was that he was not present during the crime and played no part in the conspiracy to murder or in the murder of Brucker. The trial court's dismissal of the conspiracy charge against Lee before the case was sent to the jury effectively removed part of the prosecution's case-in-chief and likely confused the jury regarding a substantial part of appellant's defense theory.

Throughout the trial, Lee's defense counsel was antagonistic to appellant. In opening statements, Lee's attorney talked about several aggravating facts. For example, counsel stated:

> [t]hey were under-educated, jobless, and supporting their meth habits or meth addiction with things other than normal jobs. Enter into this world,

around the beginning of April, Eric Anderson. Eric Anderson, who was older and a man who had a gun and who had a plan. He was significantly older, you will learn, than these lost boys. But he was no Peter Pan. He was more like a Pied Piper, and he met their needs -- Eric had their needs in mind, but he had different needs, and you will learn throughout this trial that he had also darker connections ...

...You will also learn, on that fateful morning, before Steven Brucker lost his life, of threats that were made. Let me get this exactly right, because it's coming in verbatim. "We're going to do this, right, boys?" "We're going to do this, right, boys?" Those are the words of Eric Anderson to Apollo Huhn and the younger Handshoe. You will also learn of threats made to Valerie Peretti and her unborn child. Remember, Valerie Peretti was there at that meeting, at all times during those April 14th meetings, and Handshoe and Huhn through the course of this. Cross-examination is also evidence, and you will hear at any of the meetings, at any of the times, there was no talk of Randy Lee being anywhere near. You will learn that he was not part of Handshoe's trailer tribe, this group of people that met there; that Eric Anderson, the evidence shows, didn't even know Randy Lee, had never talked to him. You will learn that he was not mentioned, only robbers, "only the people that go get a cut of this," nothing about percentage. And, finally, you will learn that he was not threatened, the only one not threatened that day. Handshoe was threatened, Huhn was threatened, Valerie Peretti was threatened, but Eric Anderson had no words for Randy Lee, for obvious reasons. (15 RT 2338, 2340-41.)

Appellant's renewed objections were overruled:

Mr. Bradley: I want to protect the record. With what we just heard, as we have raised to your Honor previously, it's our contention that Mr. Roake's strategy violates Mr. Anderson's rights under the 6th, 8th, and 14th Amendments to a fair trial and a reliable penalty determination. It's clear from what the court's heard, Mr. Roake is being more than a second prosecutor. He's arguing things beyond what Mr. McAllister is even comfortable ethically in arguing. He's arguing things that are not going to be admitted by the People in their case, and, I would suggest, things that are inadmissible, no matter who offers them. His reference to "darker connections," I think we know what he's talking about, and there is absolutely no evidence of any sort, as we've heard previously and as we've argued to the court. I think based on this, it's obvious that this case does need to be severed in order to protect Mr. Anderson's rights.

The Court: Thank you. You've made your record. We're in recess. (15 RT 2349-50)

After the recess, counsel for Huhn raised further more specific objections:

Focusing on Valerie Peretti for just a moment. Mr. McAllister, in his opening statements to the Huhn jury, as well as to the opening statement in the Anderson jury, made a point of arguing the age difference between Valerie Peretti and my client. And he called her a 14-year-old at one point, 14 or 15, 21-year-old. And essentially, your Honor, that is bad character evidence, and I would ask that -- I mean, it is evidence that shows some negative character evidence that's actually potentially a criminal offense, and its emphasis has no business in this trial. He has not been charged with

that, and it's improper disposition evidence, and I would ask the court to limit any testimony about that to simply asking Ms. Peretti how old she is, when her birthday is, and leave it at that. That's my request in respect to that, and I would ask that it not be argued any more to the jury. (15 RT 2463-64)

The trial court agreed with counsel. (15 RT 2464)

However, Lee's counsel argued:

Mr. Roake: There is no more intense love, some believe, than puppy love, and our whole approach is the intense bias and loyalty that she had to Apollo Huhn to the point that she would offer up someone else when she was caught in a lie. It is central, it is helpful to Mr. Lee's defense, and does no harm to Ms. Peretti, who comes as they see her.

The Court: And, Mr. Roake, don't misconstrue what I'm trying to do here when I balance Ms. Rosenfeld's, what I consider to be a reasonable request, against your need to represent Mr. Lee. I'm not talking about the relationship in terms of how close it was. I'm not talking about the dynamics of the relationship in terms of whether there was some persuasion, coercion, whatever may have happened. You may inquire. I'm simply saying highlighting the age discrepancy for that purpose alone, we've got enough of it. We can establish the age. If you want to establish that it's puppy love, if you want to establish that she is under the aura of someone, that's your right in terms of asking relevant questions on cross-examination.

Mr. Roake: Thank you, your honor. I understand that puppy love by its very nature deals with age, okay? So there's a gap here of four to five years between them, and that's my position.

The Court: And I don't think we can hide that fact in terms of the age difference, but I think what Ms. Rosenfeld is aiming at is it appeared from her viewpoint that the suggestion that there was some perversion here -- and if the questions go to trying to establish a character of sexual perversion or something of that nature, I will intervene without being prompted.

Mr. Roake: Your honor, I'm so sorry. I don't mean that. I'm talking about a Svengali-like approach that often happens between someone in his relatively December years and someone her age.

Ms. Rosenfeld: And, your honor, for the record, I object to even that type of characterization. And, just for the record, once again, it brings out the reason why we should have separate trials, and I would once again make a motion for a severance from all defendants, not just my jury, but a separate trial.

The Court: That objection request is noted and denied. (15 RT 2466-68.)

During closing arguments, Lee's counsel again mentioned Anderson's age. He referred to him as "someone who had had experience, someone who roomed with a cellee in prison and roomed with that same person in Poway, someone who was

aware of ways to get wealth quickly." (29 RT 4145-46.) Counsel also focused on the reason Brucker's house was hit: "Because they had hit the house next door the day before. . . The why of how Eric Anderson knew about this place, well, he just looked at the house next door. Handshoe told us why he was there. This is a theory that's untied to any evidence." (29 RT 5143.) This point was crucial to Lee because it was either Lee who identified the house as a target or appellant. Not both. The trial court's withdrawal of the conspiracy charge against Lee ultimately undermined the reasonable doubt sought by appellant that was based on Lee being the one who identified the house, the one who made the offers to share information, and the one who offered to look after Handshoe's family and put money on his books following his arrest. (22 RT 3787-88; 23 RT 3934.)

C. The Trial Court Erred In Denying The Motion To Sever

Citing *People v. Turner* (1984) 37 Cal. 3d 302, overruled on other grounds in *People v. Anderson* (1987) 43 Cal. 3d 1104, respondent asserts that the reviewing court decides whether the trial court abused its discretion in its ruling on a motion to sever based on circumstances known to the trial court at the time of the ruling. (*Id.* at p. 312; RB at p. 31.) Yet, the Court in *People v. Turner, supra,* 37 Cal.3d 302 also stated that circumstances after a ruling on the issue are relevant for the reviewing court in determining if error occurred: "After trial, of course, the reviewing court may nevertheless reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*Id.* at p. 313.)

Here, severance should have been granted once the opening statements were made. The trial court's failure to do so implicated appellant's constitutional rights to due process, a fair trial and reliable guilt determination. (*Beck v. Alabama*

(1980) 447 U.S. 625, 637-638 [100 S. Ct. 2382, 65 L. Ed. 2d 392]; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15.)

D. The Error Was Prejudicial

On the issue of prejudice, respondent says there was none under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] or the standard followed in *People v. Massie, supra,* 66 Cal.2d 899 whether there is a reasonable probability the defendant would have obtained a more favorable result absent the error. (*Id.* at pp. 922-23.) (RB at pp. 35-41.) Citing to the testimony of the teenage witnesses, Northcutt, and evidence appellant drove a Bronco, respondent asserts Lee's defense did not include introducing evidence implicating appellant. (RB at pp. 36-37.) Appellant disagrees. Lee's defense relied on the jury believing appellant, not Lee, was the key player in the crimes. His counsel argued to the jury that Lee had no part in the crimes and appellant was the one who led the others there. He need not have presented affirmative evidence to make the point. (29 RT 5158.) Also, there was no substantial evidence independent of Lee implicating appellant in the crimes.

This point aside, the trial court's denial of the motion to sever altered appellant's defense from the very beginning, forcing appellant's defense counsel to accommodate a defendant whose defense was at odds with appellant's. As counsel pointed out to the trial court, appellant's interests were "very much divergent" and this was clear with respect to counsel for Mr. Lee. "He's told everyone that he's the second prosecutor, and he's - you know, I don't know whether he's intentionally throwing a monkey wrench into Mr. Anderson's defense, but in the process of representing his client, he's doing just that." (9 RT 1600.)

Respondent also says that having multiple prosecutors does not support a finding of prejudice; a trial is not unfair "merely because a codefendant's counsel chooses not to attack the credibility of certain aspects of the prosecution's case that are incriminating of the defendant." (RB at p. 40.) Yet, in this case it was not just multiple prosecutors. The jury ended up likely discounting evidence that was important to appellant's defense. In this respect, after the trial court denied the motion to sever, the jury heard all the evidence about the conspiracy. Then, at the close of evidence, the trial court removed the conspiracy charge against Lee from the jury's consideration. Throughout the trial, the jury had been evaluating the evidence in light of the charges and the law as they were instructed. When the trial court ultimately withdrew the charge, jurors were not to speculate why. The result was a confusing overlap between the charge withdrawn and appellant's defense theory and jurors likely believing the evidence was not relevant to appellant's defense. The consequence was an unfair trial for appellant, violating his federal and state constitutional rights to due process, a fair trial, and fair and reliable guilt determination. (*Beck v. Alabama, supra,* 447 U.S. 625, 637-638; U.S. Const. Amend. V, XIV; Cal. Const. Art. I, §§ 7, 15.)

Respondent also cites to *United States v. Balter* (3rd Cir. 1996) 91 F.3d 427, arguing that the second prosecutor theory cannot be the sole grounds for reversal. Respondent says that appellant has not identified any evidence elicited on cross-examination by Lee or Huhn's attorneys that would have been inadmissible against him at a separate trial. (RB at p. 40.) Appellant disagrees. In *United States v. Balter*, *supra*, 91 F.3d 427, the appellate court rejected the defendant's argument of prejudice based on a second prosecutor theory. The defendant argued he was prejudiced because the court excluded evidence rebutting certain prosecution evidence. The appellate court found the defendant had agreed to the