

In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

JOSEPH ANDREW PEREZ, JR.,

Defendant and Appellant.

CAPITAL CASE

Case No. S104144

Contra Costa County Superior Court Case No. 990453-3
The Honorable Peter L. Spinetta, Judge

REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF

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ARGUMENT

THE TESTIMONY OF DR. PETERSON WAS ADMISSIBLE, UNDISPUTED, AND CONSISTENT WITH THE TRIAL EVIDENCE AND THE OPINIONS OF DR. HOGAN; EVEN IF PETERSON'S TESTIMONY HAD BEEN DEFECTIVE IN ANY WAY, THE TESTIMONY WAS NOT RELEVANT TO A DETERMINATION OF PEREZ'S GUILT

A. Introduction

We have made no attempt to reconcile the conflicting state and federal decisions relating to the application of *Crawford* and its progeny to autopsy reports. Instead, we have argued that the trial testimony of Dr. Brian Peterson, a pathologist whose testimony was based on the autopsy photos of murder victim Janet Daher and the autopsy report prepared by Dr. Susan Hogan, was admissible in this case under several recent decisions of this court. We have also argued that any possible error in the admission of Peterson's testimony was harmless because the cause and timing of Janet's death were neither disputed at trial nor relevant to a determination of Perez's guilt. In short, all parties involved in this case agreed that Janet had died after being strangled with a telephone cord and stabbed many times in the back and neck. The defense attorney argued that Perez had not been involved in the killing in any way, and that Janet had been killed by Maury O'Brien, Lee Snyder, and an unidentified third party. (9RT 2054-2057; 15RT 3617-3619.) The prosecutor, in contrast, scarcely mentioned Janet's injuries or the cause of her death in opening statement or closing argument. Instead, the prosecutor argued that Perez was guilty of first degree murder with special circumstances, even if he had not been the actual killer of Janet, because Perez had been a knowing and active participant in a burglary and robbery that resulted in the murder of Janet. (15RT 3543-3556, 3562, 3589.) Critically, the defense attorney repeatedly told the jury that there was no doubt about the nature of Janet's injuries or the cause and

timing of her death. (9RT 2053 [the defense attorney acknowledged in his opening statement that there was “no question” about many of the underlying facts of this case, including “the injuries that [Janet] suffered”]; 15RT 3616-3617 [the defense attorney acknowledged in closing argument that the strangulation and stabbing of Janet had “happened for sure”].) The defense attorney also asserted that physical evidence relating to the cause and timing of Janet’s death was irrelevant to any disputed issue because Perez had not been involved in the killing in any way. (9RT 2057 [“this case is not based on physical evidence . . . because none of it applies to Mr. Perez”].) Thus, even if there had been any error in the admission of Peterson’s testimony (and there was not), the error could not reasonably have affected the outcome of trial.

Perez nonetheless argues on appeal that the trial testimony of Peterson was inadmissible and harmful to him for several reasons. First, Perez argues that Peterson had no valid basis to express an expert opinion about Janet’s death because he had not personally conducted or observed the autopsy. (Appellant’s Supplemental Brief (ASB) 25-29.) Perez further asserts that Peterson’s reliance on factual information from Hogan’s autopsy report was not merely constitutionally impermissible, but inherently unfair because it led Peterson to incorrect medical conclusions about Janet’s death. (ASB 31-38, 40-42.) Specifically, Perez argues that Hogan correctly concluded that Janet had died from strangulation *before* she suffered any stab wounds, while Peterson mistakenly concluded that Janet had survived the strangulation and was subsequently killed by the stabbings. (ASB 40-42.) Finally, Perez argues that the cause and timing of Janet’s death was a material and disputed issue at trial because the prosecution’s primary witness, O’Brien, gave significantly different descriptions of the killing when he testified at the 2001 trial of Perez and at the 2000 trial of codefendant Snyder. (ASB 41-44.) For all of these

reasons, Perez argues that the testimony of Peterson (and the omission of any testimony from Hogan) rendered his trial fundamentally unfair.

None of Perez's contentions have merit. In short, Peterson's opinions about Janet's death were: (1) reasonable and undisputed; (2) admissible under this court's recent decisions; (3) consistent in all material respects with the opinions of Hogan; and (4) fully supported by evidence that was independent of Hogan's autopsy report. And even if Peterson's conclusions had been materially different than Hogan's, Perez could not have suffered prejudice because he admitted at trial that the cause and timing of Janet's death were irrelevant to the question of his guilt.

B. Peterson's Testimony Was Consistent With All Trial Evidence and the Prior Testimony of Hogan

As we have shown in our respondent's brief and supplemental respondent's brief, the primary trial testimony describing the killing of Janet was provided by Perez's former codefendant, O'Brien. O'Brien described for Perez's jury how he had unlawfully entered Janet's house with Perez and Snyder, and that Perez decided that Janet had to be killed so she could not identify the three men as burglars. (11RT 2468-2475.) O'Brien accompanied Perez and Snyder as they took Janet upstairs to the master bedroom, and Snyder ripped the telephone cord off the bedroom phone. (11RT 2478-2481.) O'Brien went downstairs for a short time, and when he returned to the bedroom he saw Janet lying face down on the floor, with Perez sitting on her back. (11RT 2481-2485.) Janet's hands were bound with part of the telephone cord, and Perez was pulling "really hard" on the remaining portion of the cord to strangle Janet. (11RT 2483-2485, 2488.) At the same time, Snyder was helping Perez strangle Janet by pushing her head backwards with his foot. (11RT 2484-2485.) Perez then told O'Brien to get a knife from the kitchen, and O'Brien removed a knife from his pocket and gave it to Perez. (11RT 2486-2490.) Perez used the

knife to stab Janet many times in the back, neck, and arms. (11RT 2489-2490.)¹

The other prosecution evidence presented at Perez's trial was fully consistent with O'Brien's testimony. Also, that evidence directly supported Peterson's opinions that Janet had suffered lethal attacks from both strangulation and stabbing, and that the strangulation had occurred first and was the primary cause of death. Contrary to Perez's assertion, there was no material difference between the medical conclusions of Peterson and Hogan.

When Janet's body was discovered in her bedroom, her hands were bound behind her back with a telephone cord that extended to (and around) her neck. (9RT 2191-2192; 13RT 2892-2895.) There were bloodstains on the nearby walls and carpet, and Janet's navy blue sweatshirt was wet and pierced with holes that corresponded to stab wounds in her back and arms. (13RT 2892-2897, 2900-2903, 2928.) When Janet's body was received at the examining room for the autopsy the next morning, it was in the same position and condition it had been in her bedroom—face down and fully clothed, with the telephone cord wrapped around her hands and neck. (13RT 2921, 2923, 2952.) Criminalist Steven Ojena observed the autopsy and took photos of Janet's body, and he and Peterson referred to those photos during their trial testimony. (13RT 2920-2930, 3007-3022.) Among other things, Ojena stated that the telephone cord had been wrapped

¹ At page 6 of our supplemental brief we suggested that O'Brien testified that he had *seen* Perez binding Janet's hands behind her back with the telephone cord, but O'Brien actually said he had left the bedroom before Janet's hands were bound. (11RT 2480-2485.) The discrepancy does not diminish our analysis; the crucial point is that when O'Brien returned to the master bedroom, he saw that Janet's hands were bound behind her back and that Perez was strangling her with the remaining portion of the cord. (11RT 2480-2485.)

tightly around Janet's neck and left a "ligature mark" (which Peterson described as a brown furrow or groove) in Janet's skin. (13RT 2923-2925, 3007-3009.) One or more of the autopsy photographs showed bleeding in Janet's eyes and a dusky tint to the skin of her head and neck, and Peterson recognized those characteristics as consistent with ligature strangulation. (13RT 3007-3009, 3015-3018; see also Exh. 104.) Other autopsy photos showed several stab and incision wounds to Janet's back and neck. (13RT 2922, 2928-2930, 2954-2955, 3009-3020; Exhs. 100-105.) Peterson could see in at least one of the photos that a stab wound to Janet's neck would have been lethal because it had cut her windpipe, jugular vein, and carotid artery. (13RT 3015-3018; see also Exh. 104.) The autopsy photos also showed other stab wounds to Janet's upper back that were deep enough to leave bruise (abrasion) marks to the surrounding skin. (13RT 3016-3018.) In short, Peterson's conclusions about Janet's wounds were based almost entirely on photographs and testimony from the police officers who had observed Janet's body in her home and during the autopsy. And Peterson's ultimate conclusions—that Janet had died from a "combination" of strangulation and stab wounds, and that the strangulation had occurred first—were nearly identical to the opinions expressed by Hogan at the 2000 trial of petitioner's codefendant, Lee Snyder. As summarized by the Court of Appeal, Hogan testified at that trial as follows:

Hogan testified that the telephone cord ran around the victim's neck, "embedded" in the soft neck tissue, and then across and over the left shoulder, diagonally across the back from the left shoulder to the right hip, and around the wrists three times. The victim's tongue was protruding from her mouth, giving evidence of ligature strangulation cutting off the air and blood supply to the victim's head. Based on the evidence of hemorrhaging, Hogan opined that "tremendous force" had been applied to the victim's neck. This strangulation had been sufficient to be the cause of the victim's death. In addition, there were multiple cutting and deep stab wounds in

the victim's neck, chest and back, at least four of which would have been fatal by themselves. Hogan testified that the stab wounds had been delivered with great force.

(People v. Snyder (2003) 112 Cal.App.4th 1200, 1210.)

Perez nonetheless notes that Peterson's opinion was based on statistical data provided in Hogan's autopsy report, including measurements of the depth of the stab wounds and the amount of blood in Janet's chest and lungs. (ASB 27-29.) But such measurements were not testimonial hearsay (*People v. Dungo (2012) 55 Cal.4th 608, 619*), and Peterson was in any event entitled to rely on those measurements in forming his personal opinions about Janet's death (*People v. Sanchez (2016) 63 Cal.4th 665, 685-686*). More importantly, Peterson's opinions about the timing and cause of Janet's death were not materially different from Hogan's opinions. Contrary to Perez's assertions (ASB 26, 40, 41), Peterson agreed with Hogan that the strangulation of Janet had occurred before the stabbings, and that the strangulation had been the primary cause of death. (See 13RT 3020-3021.) In explaining his opinions to Perez's jury, Peterson first stated that the strangulation had probably occurred before the stabbings because there was no evidence of defensive knife wounds to Janet's hands. (13RT 3020.) Next, Peterson stated:

[D]espite all the different stab wounds to the lungs, there was not a lot of blood inside the chest. It amounted a maybe a cup or so in the left side, maybe two cups on the right side. Typically, there would be more. *So, I think that relatively lethal to sublethal force had already been delivered [to Janet] before those stab wounds.*

I can say unequivocally, based on the blood inside the chest, that her heart was beating at the time those stab wounds were delivered. *Whether she was conscious or not, I can't say. I suspect the major force in this case was, however, the strangulation.*

(13RT 3020, italics added; see also 13RT 3021 [Peterson explaining that Janet’s death was a “combination of” strangulation and stabbing].)

Perez nonetheless strains to find a material difference in the opinions of Peterson and Hogan by noting that Hogan had testified at Snyder’s 2000 murder trial that Janet was probably dead (and not merely near death) when the stab wounds to her back were inflicted. (ASB 40-42, 45, citing 5 Snyder RT 933, 943-944.) When Hogan testified before Snyder’s jury, she first described the obvious characteristics of ligature strangulation, including the deep furrow in the skin of Janet’s neck from the embedded telephone cord, the internal bleeding in Janet’s eyes and skin, and the protrusion of her tongue from her mouth. (5 Snyder RT 930, 933-934.) Hogan said that the internal bleeding in Janet’s face and eyes probably would not have occurred if she had earlier suffered multiple stabbings to her neck and back. (5 Snyder RT 944.) Hogan also said that the relatively small amount of blood in Janet’s chest provided additional evidence that the strangulation had occurred first. She explained:

For the extent of these [stabbing] injuries, I would expect more blood in the chest. So, *I can’t say definitively*, but my opinion is that the strangulation occurred first and that [Janet’s] heart *may not have been beating* when these stab wounds occurred, based on the you know, I would expect about a thousand milliliters [of blood] with these kinds of injuries.

(5 Snyder RT 944, italics added.)

In short, there was no meaningful difference in the opinions of Hogan and Peterson. Hogan thought the relatively small amount of blood in Janet’s chest probably indicated that she was dead when the stab wounds were inflicted. Peterson thought Janet was still alive—but only barely—when the stab wounds were inflicted. The relatively small amount of blood in Janet’s chest indicated to Peterson that Janet may have been unconscious from the “relatively lethal to sub lethal force” of the strangulation.

It appears that Perez’s trial attorney recognized that Hogan’s testimony at the Snyder trial was not materially different from Peterson’s testimony at Perez’s trial. The defense attorney obviously had ready access to the transcript of the Snyder trial, and the attorney could have used that transcript to aggressively cross-examine Peterson with any prior inconsistent testimony from Hogan. But Perez’s trial attorney asked Peterson just one short and oblique question about Hogan’s prior testimony: “If [Hogan] had said that she—in her opinion, [Janet’s] heart may or may not have been been [*sic*] beating when the stab wounds occurred, you would disagree with that?” (13RT 3025.) Peterson replied, “Yes, I would disagree with that.” (13RT 3025.) The defense attorney did not pursue the matter further with Peterson or mention the timing or cause of Janet’s death in closing argument. The attorney obviously realized that any difference in the opinions of Hogan and Peterson was trivial and irrelevant.

C. Any Differences in the Trial Testimony of O’Brien at Codefendant Snyder’s 2000 Trial and Perez’s 2001 Trial Did Not Diminish the Admissibility or Credibility of Peterson’s Opinions

Perez further argues that he suffered prejudice from the alleged deficiencies in Peterson’s testimony because the cause and timing of Janet’s death were materially disputed issues at trial. Perez first asserts that his defense would have been strengthened if the jurors had been conclusively told that Janet had died from strangulation before any stab wounds were inflicted because “O’Brien attributed the stabbing solely to Perez.” (ASB 42.) We fail to see Perez’s point. O’Brien testified at Perez’s trial and Snyder’s trial that Perez had been the sole stabber of Janet, but O’Brien also testified at both trials that Perez was the primary strangler of Janet. (See 11RT 2482-2490; 4 Snyder RT 716-721.) Thus, even if Janet had died before Perez began stabbing her, Perez’s guilt for Janet’s murder would not have been diminished; Perez’s guilt for first degree murder would have

been equally established by his strangling of Janet. Indeed, Perez was guilty of first degree murder with special circumstances, even if he did not lay a finger on Janet, if he had been a knowing and active participant in the burglary, robbery, and killing of Janet. (See *People v. Chiu* (2014) 59 Cal.4th 155, 166-167 [an aider and abettor of a first degree murder is equally guilty if he aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission].)

Another of Perez's assertions of prejudice is more complicated. Perez first states that "O'Brien testified inconsistently at Perez's trial and at [Snyder's] trial as to what he allegedly saw of [Janet's] murder." (ASB 42.) Perez continues:

At Snyder's trial, O'Brien testified that he saw *both* Snyder and Perez put their hands on [Janet] while she was being strangled. (4 Snyder RT 717.) But at Mr. Perez's later trial, O'Brien changed his story dramatically in order to make it appear that Mr. Perez was the sole or the main perpetrator of the murder.

(ASB 42, italics added by Perez.)

Perez next quotes various portions of the transcripts from his own trial and the Snyder trial to show minor inconsistencies in O'Brien's descriptions of the strangulation. (ASB 43.) Finally, Perez notes that Lacy Harpe testified as a defense witness at his trial that O'Brien had told her shortly after the killing that Snyder had been the sole stabber of Janet. (ASB 43-44.) Perez ultimately summarizes his claim of prejudice as follows:

O'Brien's attribution of the stabbing to Perez, along with Dr. Peterson's testimony exaggerating the stabbing as a cause of death and minimizing the strangling, resulted in the jury having a warped view of the evidence and prevented appellant from being able to effectively confront the untrustworthy evidence for both guilt and penalty phase purposes.

(ASB 44.)

Preliminarily, there was little difference between O'Brien's description of the killing of Janet at the Snyder trial and at Perez's trial. At both trials, O'Brien testified that: (1) Perez and Snyder had first worked together to strangle Janet and/or break her neck, with Perez pulling on the telephone cord around Janet's neck and Snyder pushing on Janet's head with his hand or foot; and (2) Perez obtained a knife from O'Brien and repeatedly stabbed Janet without assistance from Snyder. (See 11RT 2482-2490; 4 Snyder RT 716-721.) If O'Brien's testimony at Snyder's trial had truly been materially different from O'Brien's testimony at Perez's trial, Perez's trial attorney could have used the transcript of the Snyder trial to expose those differences during cross-examination of O'Brien. Additionally, the testimony of Peterson shed no light on the identity of the person (or persons) who had strangled and/or stabbed Janet, so any differences in O'Brien's various accounts of the killing would have had no impact on the admissibility or credibility of Peterson's testimony. And once again, there was near-conclusive evidence, from O'Brien and many other independent sources, that Perez had been an active participant in the burglary of the Daher house and the robbery and killing of Janet. As a result, Perez was guilty of first degree murder even if he had not been the sole (or even primary) killer.

Perez's final assertion of prejudice is equally weak. He argues that any error in the admission of Peterson's testimony was harmful because the prosecutor emphasized to the jury in closing argument that the multiple stab wounds in Janet's back and neck confirmed that Perez had intended to kill Janet. (See ASB at 44, quoting the prosecutor's closing argument statement at 8RT 1969 ["Every stab wound is further evidence of intent to kill, express malice"].) Perez seems to believe the prosecutor's arguments would have lost their force if the jurors had believed Janet had died before

the stab wounds were inflicted. In other words, Perez seems to argue that he could not have harbored intent to kill if he had stabbed Janet after she was dead. But again, the evidence showed that Perez had both strangled and stabbed Janet, and both crimes reflected an obvious intent to kill. Thus, even if Perez's strangulation of Janet had been sufficient to kill her without the need for any stabbings, the stabbings further demonstrated Perez's intent to kill. And again, Perez was not even required to have been the sole or primary killer of Janet to have been guilty of first degree murder with special circumstances. Thus, any error in the admission of Peterson's testimony was harmless beyond a reasonable doubt.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: September 27, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY TO APPELLANT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 3,364 words.

Dated: September 27, 2017

XAVIER BECERRA
Attorney General of California

/s/ John H. Deist

JOHN H. DEIST
Deputy Attorney General
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DECLARATION OF SERVICE

Case Name: *People v. Perez*

No.: **S104144**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

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Additionally, I served the said document by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Superior Court of California County of Contra Costa Wakefield Taylor Courthouse 725 Court Street Martinez, CA 94553-1233	
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 27, 2017, at San Francisco, California.

J. Wong
Declarant

/s/ J. Wong
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. PEREZ (JOSEPH ANDREW)**

Case Number: **S104144**

Lower Court Case Number:

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/s/John Deist

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