

SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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THE PEOPLE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
JORGE GONZALEZ et al.,
Defendants and Appellants.

No. S234377

Second Appellate District, Division Four, No. B255375
Los Angeles County Superior Court No. YA076269
Honorable Scott T. Millington, Judge

GONZALEZ'S OPENING BRIEF ON THE MERITS

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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

JORGE GONZALEZ, ERICA
MICHELLE ESTRADA, AND
ALFONSO GARCIA,

Defendants and Appellants.

No. S234377

INTRODUCTION

Jorge Gonzalez, Erica Estrada, and Alfonso Garcia were each charged with first degree murder with the special circumstances allegation that the homicide occurred during the course of a robbery. Although the charging document alleged murder in violation of Penal Code section 187, and in statutory language which refers only to malice murder, the trial court at the prosecution's request instructed only on felony murder, and gave no instructions on malice murder, on any lesser-included offenses, or any defenses.

The jury returned a verdict of first degree murder which did not specify whether it was based on malice murder or felony murder, and

made no reference to robbery. The jury also made a true finding on the sole special circumstances allegation, i.e., that the homicide occurred during the course of a robbery.

Gonzalez argued on appeal, *inter alia*, that the failure to instruct on malice murder, second degree murder, other lesser-included offenses to malice murder, and specified defenses was error which was reversible *per se*. Gonzalez also argued, in the alternative, that if the error was not reversible *per se*, then that it nonetheless required reversal because he was prejudiced by the failure to instruct.

The Court of Appeal assumed that the failure to instruct was error, but ruled that it was harmless because of the jury's true finding on the felony murder special circumstances allegation.

This Court granted review to consider whether the finding on the felony murder special circumstances allegation rendered harmless the trial court's error in failing to instruct on malice murder and relevant lesser-included offenses and defenses to malice murder.

Gonzalez respectfully submits that the error is structural and therefore reversible *per se*, and that in the alternative the failure to instruct was prejudicial and requires reversal of the judgment.

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STATEMENT OF THE CASE

The Los Angeles County District Attorney jointly charged Jorge Gonzalez (hereinafter sometimes referred to as “appellant”), Erica Michelle Estrada and Alfonso Garcia by amended information, in count one, with the malice murder (§ 187, subd. (a)), of Victor Rosales on October 6, 2009, while engaged in the commission of a robbery (§§ 211, 190.2, subd. (a)(17)). It was also alleged that a principal was armed with a handgun (§ 12022, subd. (a)) during the murder. (3CT 457.) The amended information charged appellant, in count two, with shooting a handgun at an occupied motor vehicle. (§ 246.) (3CT 457.) The amended information further alleged that appellant personally discharged a handgun in committing both crimes (§§ 12022.53, subds. (b) (c) (d)). (3CT 458.)

The case was tried to a jury before Judge Scott T. Millington over 25 trial days. (3CT 452-453, 462-463, 472-512, 515-518, 522-523, 644-648.) On October 4, 2013, the jury convicted appellant of first degree murder and found the special circumstances allegation to be true, but found that each of the firearm use allegations (§§ 12022.53, subds. (b) (c) (d), § 12022, subd. (a)) to be not true. The

jury also acquitted appellant on count two, the charge of shooting at an occupied motor vehicle (§ 246). (3CT 644-647.)

The trial court sentenced appellant to state prison for life without possibility of parole. (3CT 673, 675.) Appellant appealed from the judgment. (3CT 677.)

The California Court of Appeal, Second Appellate District, Division Four, affirmed the judgment in a written opinion filed on March 30, 2016. The appellate court ruled that any error in failing to instruct was harmless (Slip Opn. [Appendix A to Petition for Review], at pages 27-28):

It is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on malice murder, its lesser included offenses and the defenses of accident and self-defense. The jury found beyond a reasonable doubt that appellants were guilty of first degree murder for a death that occurred during the perpetration or attempted perpetration of a robbery. Accordingly, the failure to instruct on first degree murder was not prejudicial, as that instruction would merely have provided the jury with another theory on which to convict appellants of first degree murder. Nor was the failure to instruct on accident and self-defense prejudicial, as neither accident nor self-defense is a defense to felony murder. (Citations omitted.)

Additionally, the jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstances allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In determining whether

appellants were guilty of murder of murder under the felony-murder theory, the jury was required to determine first whether appellants committed or attempted to commit robbery, and only thereafter whether a death occurred during the commission of the robbery or attempted robbery. Thus, it is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on the lesser included offenses of murder. (Citations omitted.)

This Court granted the petitions for review filed by each of the appellants/defendants, limited to the following issue:

Was the trial court's failure to instruct on murder with malice aforethought, lesser included offenses of murder with malice aforethought, and defenses to murder with malice aforethought rendered harmless by the jury's finding of a felony murder special circumstance?

Gonzalez accordingly submits this brief, limited as directed by the Court, to that single, specific issue.¹

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¹ In the Court of Appeal, the Attorney General argued that a trial court has no duty to instruct on malice murder in the circumstances of this case, i.e., where the charging documents cites and contains allegations only under Penal Code section 187 and makes no reference to felony murder. The Attorney General also argued that there was no duty to instruct because of lack of substantial evidence to support any additional jury instructions. Gonzalez does not understand that this issue (whether the trial court had a duty to instruct) to be within the scope of this Court's grant of review, and accordingly has not addressed it in this brief.

STATEMENT OF THE FACTS

Prosecution Case.

A. Introduction.

The prosecution case depended heavily if not 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.) Although his out-of-court accusations are included in the following summary of prosecution evidence, the jury found that his testimony was not true – at least in material part – when it found that none of the defendants used a gun in the alleged robbery, as reflected in their “not true” findings on all of the firearm use 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.² Kalac was a heroin addict who

² Kalac was initially called to testify outside the presence of the jury, and with his personal attorney present, declined to answer any questions, citing the Fifth Amendment. (5RT 3934-3935.) Kalac was then granted use immunity for his trial testimony. (5RT 4008-4009.)

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.³ 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 following narrative is a unified summary of all the relevant proffered prosecution evidence, including the out-of-court and partially rejected account of the absconding Ruiz, and the claims of Kalac, even though completely self-serving and made through the lens of admittedly heavy heroin intoxication.

B. Summary Of Prosecution Evidence.

On October 6, 2009, Kalac went to the residence of his friend "Alf" Garcia, with the intent to get high on drugs. (5RT 4010; 7RT

³ 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.)

4367.) Kalac had a heroin habit,⁴ whereas Garcia's drug of choice was methamphetamine ("meth"). (5RT 4011.). Kalac entered Garcia's house, where he met Jennifer Araujo, who was Garcia's girlfriend. (5RT 4012; 7RT 4367.) Kalac smoked some heroin while waiting for Garcia to get dressed. (5RT 4012, 4013.) Kalac had already smoked about 10 "hits" of heroin that morning, before going to Garcia's residence, and smoked another 5 or 6 "hits" once he got there. (5RT 4014; 6RT 4366, 4368, 4432.)

Garcia told Kalac that there had been a birthday party at a motel down the street the previous night, and asked him if he wanted to go hang out and get high there. (5RT 4016; 7RT 4367.) Kalac agreed to go but hid his heroin, which was slightly less than half a gram, in Garcia's house, because he did not like to travel with it. (5RT 4016; 7RT 4367-4369, 4419.) Kalac expected to use meth to get high at the motel, but called his drug dealer on the way there to try to get a bag of heroin. (6RT 4430, 4431; 7RT 4865.)

⁴ Kalac admitted that he had used heroin for a "few years" prior to October of 2009, but claimed to have successfully kicked his habit since then, and to be sober during his trial testimony. (5RT 4011, 4015; 7RT 4867, 4876.) In October of 2009, Kalac was inhaling about one-half gram of black tar heroin on a daily basis. (6RT 4361, 4418.) Kalac was also an occasional meth user, although it was not his "drug of choice." (6RT 4386, 4421)

Kalac, Garcia and Araujo walked down the street to the Crystal Inn, and Garcia knocked on the door of one of the rooms. (5RT 4017; 6RT 4250.) Appellant (known to Garcia as "Sharkie") answered the door. (5RT 4017; 6RT 4251.) Kalac, Garcia, and Araujo entered the room, where Estrada, whom Garcia described as being appellant's "girlfriend," was also present. (6RT 4252, 4253.) Kalac immediately walked over to the couch, and sat down. (4254.)

Kalac heard the other people in the room talking among themselves, but he remained silent because he did not know anyone except Garcia. (6RT 4255.) Garcia suggested to appellant that they "pack a bowl," which Kalac understood to mean put meth in a pipe and smoke it. (6RT 4256, 4370.) Appellant told Garcia that there were no drugs in the room. (6RT 4256.)

Everyone talked and watched television. (6RT 4257.) Kalac thought that the others were discussing something "along the lines of finding someone that they could get dope from, basically," but Kalac did not know "exactly what was said."⁵ (6RT 4257, 4258.)

⁵ Kalac testified that he was "high" on heroin during the entire time he was at the Crystal Inn. (6RT 4370, 4433.)

After about 15 minutes, Kalac telephoned his drug dealer and arranged to meet him at a nearby gas station so that he could buy \$30 or \$35 worth of heroin. (6RT 4259, 4260.) Kalac left the room and went to the gas station, but his heroin dealer did not show up, so after awhile Kalac returned to the motel room, where Garcia, appellant, Estrada and Araujo were all still present. (6RT 4259.)

Kalac again sat on the couch, and listened to the others' conversations. (6RT 4261.) Kalac thought that now there was some conversation to the effect that no one had any money, and that they were trying to figure out how to borrow money or to get someone to "front" them some drugs. (6RT 4261, 4372; 7RT 4875.) Kalac heard Estrada say that she knew someone "that they could come up on," although he didn't know exactly what she said. (6RT 4262, 4373, 4374.) Kalac understood that the phrase "come up on" meant "to rob basically."⁶ (6RT 4262.) Gomez, Estrada and appellant were primarily

⁶ Kalac testified that he had heard the phrase "come up on" hundreds of times in the past when people were talking about robbery. (6RT 4263; 7RT 4863.) The phrase "come up" was never uttered by Kalac, however, during an extensive police interview which was conducted after the homicide. (7RT 5188.) Kalac also testified that he used that phrase when, in the past, he had "come up" on Hispanic drug dealers and robbed them himself, although that phrase "never physically came out of [his] mouth." (7RT 4864, 4870, 4874.) Kalac had "no clue" about the number of drug dealers whom he had personally robbed, and could not identify even the calendar years in which his robberies occurred. (7RT 4871-4872.)

speaking Spanish to one another, and Kalac did not participate in their discussions.⁷ (6RT 4374-4375.) Kalac was watching television while the conversations were occurring. (6RT 4416.) Kalac was a “drug addict at the time,” so that his “one and only concern was to get high.” (6RT 4422; see 6RT 4428-4429.)

Appellant was talking on his own cell phone when Estrada used the phrase “come up on,”⁸ and although Kalac could not hear “specifically what they were saying,” he thought that the “general subject” of the conversations was “robbing this gentleman that [Estrada] spoke of.” (6RT 4264.) Estrada said something “along the lines of it being an ex-boyfriend who had been physical with her.” (6RT 4265.) Kalac thought that appellant got “a little agitated” when he heard this news. (6RT 4265.) Kalac did not know “exactly what she was saying,” but concluded that she was talking about robbing

⁷ A homicide detective later interviewed Kalac and asked him: “In reality, you don’t know what they were actually planning at the time?” Kalac responded: “I don’t know what they were doing.” (6RT 4375.) Kalac did not see a gun in the motel room at the Crystal Inn, and did not hear anyone mention one. (6RT 4413, 4414.)

⁸ Kalac testified that the words which were used that indicated to him that there was going to be a robbery was Estrada’s statement that they were going to “come up” on somebody. (6RT 4375.) In an interview conducted by a homicide detective later, Kalac reported that appellant “was on the phone almost the entire time” until he left the motel room. (7RT 5212.)

her assailant because she mentioned “the physical abuse, the black eye.” (6RT 4266.)

Estrada decided to ask Rosales for \$150 in meth and \$50 in heroin, asked Kalac to give her his money, and told him that they would give him heroin from the robbery. (6RT 4266-4267.) Kalac gave them about \$28 or \$29. (6RT 4267.)

Estrada got on the telephone and talked in both English and Spanish. (6RT 4268.) Although Kalac did not understand Spanish, he thought he heard Estrada say “30 minutes” and “across the street at the laundromat,” and state that she would be the person who met with the drug dealer. (6RT 4270, 4271-4272; 7RT 4890.)

Garcia said that he would go along and be the “lookout for the robbery”⁹ and he and appellant walked out of the motel room. (6RT 4273, 4411; 7RT 4882, 4883.) As soon as they left, Estrada started to pack up her property, and told Kalac that they were “going to move next door to a cheaper hotel.” (6RT 4275, 4276.) Estrada made another phone call to see “how far out the drug dealer was from getting there,” and told him that she would be there in 10 to 15 minutes. (6RT 4275, 4398.)

⁹ At the preliminary hearing, Kalac testified that Garcia had agreed to be the lookout for “the drug transaction.” (6RT 4412.)

At about 1 p.m., Rosales telephoned his friend Alejandro Ruiz and asked Ruiz to give him a ride. (3RT 2792.) Ruiz agreed and picked up Rosales at about 2:14 p.m. (3RT 2792.) Rosales told Ruiz that he had received a telephone call from his girlfriend, Estrada, who wanted him to meet her. (3RT 2792.) Rosales told Ruiz that he and Estrada had agreed to meet at a laundromat that was on the corner of Prairie Avenue and 112th Street. (3RT 2792.)

Rosales was a drug dealer, who sold drugs to Estrada at a discount, and sometimes gave them to her. (8RT 5467.) Rosales was also a drug user, and on this day he had both methamphetamine ("meth") and amphetamine in his blood. (5RT 3656, 3674.)

As they approached the laundromat, Rosales told Ruiz to pull over and park along the curb. (3RT 2792.) As Ruiz was parking, he saw Estrada and two male Hispanics walk out from behind some large palm trees. (3RT 2793; 7RT 5140.) Estrada pointed at Rosales, whereupon one of the two men who with her walked up to within 3 feet of the passenger side of Ruiz's car, pulled out a small chrome semi-automatic handgun, and fired one shot. (3RT 2793; 4RT 3030, 3054.) The shooter reached in and grabbed Rosales, and attempted

to pull him out of the car, but Ruiz accelerated his vehicle and drove westbound on 112th Street. (3RT 2793.)

Liliana Rosales (Liliana”), who was Rosales’s sister, walked out of her residence, located at 3947 110th Street in Inglewood, and went to the driveway to get into her car. (3RT 2475, 2479, 2738.) Ruiz drove up, stopped his Alero, and told Liliana that Rosales had been shot. (3RT 2480, 2482-2483, 2493, 2527; 4RT 3079, 3108.)

Liliana ran over to the Ruiz’s van, saw that Rosales was hurt, and asked him “who did this to you?” (3RT 2483.) Rosales replied: “Erica. Erica.” (3RT 2484.) Ruiz also stated: “Erica, Erica.” (3RT 2493-2494, 2706, 2714-2716.) After Rosales’s mother arrived, bystanders asked Ruiz who had done it, and he stated: “the girlfriend, the girlfriend.” (3RT 2508, 2509, 2514.) Estrada had previously met Rosales’s mother and two of his sisters, who understood that Estrada and Rosales had no serious romantic relationship, but were merely “friends with benefits.” (3RT 2477, 2512, 2520.)

Rosales was taken in an ambulance to the hospital, where he died from a single gunshot wound.¹⁰ (3RT 2491, 2711, 2753-2754.)

¹⁰ An autopsy confirmed that Rosales died from a single gunshot wound to his chest. (5RT 3648, 3654, 3666.) The fatal bullet entered the right side of the chest close to the midline, traveled at 45 degree angles from left to right and from top to

Estrada, Araujo and Kalac took the luggage from the room at the Crystal Inn and put them in Estrada's older, black Cadillac. (6RT 4277; 7RT 4359, 4377.) Kalac and Araujo got into the car, and Estrada drove it in a roundabout way to the American Inn. (6RT 4277, 4377-4378.) Estrada went into the motel and registered,¹¹ and then they took the bags to the room. (6RT 4278, 4378.)

Kalac left the room and walked down Prairie Avenue, where he ran into appellant and Gomez, who were waking northbound on the other side of the street. (6RT 4279-4281, 4379, 4393.) Garcia crossed the street and told Kalac that "shit went bad." (6RT 4282, 4381, 4394, 4409.) Kalac and Garcia went to the motel room, where Garcia changed clothes, and then they went to Garcia's residence. (6RT 4282, 4405.) Kalac retrieved the heroin that he had stashed at Garcia's house, and then returned to his own residence. (6RT 4283.)

bottom, pierced the heart, and lodged in the left back. (5RT 3657, 3658.) In addition to the bullet wound, Rosales had stippling on his right hand and right wrist. (5RT 3649, 3960-3961, 3973.) "Stippling" is a small abrasion or scratch left on the skin when struck by gunpowder particles. (5RT 3655, 3959.) It occurs when a firearm is discharged within 2 feet of the skin. (5RT 3655, 3658.) Because there was no stippling around the entry wound on Rosales's chest, the autopsy surgeon concluded that the gun had been fired from more than 2 feet away from the chest. (5RT 3664.) The prosecution firearms examiner, however, testified that if the victim was wearing clothing, it would prevent stippling on the skin if the bullet passed through the cloth before hitting the skin. (5RT 3982.) No attempt was made to examine Rosales's shirt for the presence of gunshot residue. (7RT 5206.)

¹¹ Estrada paid \$51 for the room at the American Inn. (5RT 3990; 7RT 5139.)

Myra Gomez, another of Rosales's sisters, talked with responding police officers¹² and directed them to Estrada's residence, which was located at 102536 South Truro Street. (3RT 2712-2713, 2774-2780, 2797.) Later that day, around 7:14 p.m., several police officers conducted a "high risk" stop of Estrada's black Cadillac in the street outside her residence, and arrested her and appellant. (3RT 2797-2799; 4RT 3018, 3063-3064.) The police searched the car, but no gun was found.¹³ (4RT 3064; 8RT 5431.)

A police search of Ruiz's Oldsmobile Alero was conducted later at a locked, secure police towing yard, and police found a baseball bat, a cell phone lodged between the front, center console and the passenger seat, and an expended .22 caliber shell casing that was lying on the passenger-side floor board. (4RT 3088, 3112-3114; 7RT

¹² Several Inglewood police officers received a radio dispatch informing them of the shooting at 2:36 p.m., and arrived at the shooting scene at about 2:40 p.m. (3RT 2738-2739, 2742, 2744, 2758, 2759, 2768, 2788, 2790; 4RT 3053.)

¹³ A police criminalist examined a bullet recovered from Rosales's body at the autopsy and concluded that it was "most consistent with a .22 long rifle caliber." (5RT 3954, 3955; see 5RT 3985.) The criminalist could not match the bullet to the expended cartridge case found inside Ruiz's car, but thought "that it is the type of cartridge case that I would expect from a .22 long rifle caliber bullet." (5RT 3955.) The criminalist testified: "There's no way to identify that that bullet specifically came from that cartridge case ..." (5RT 3956.) The handgun used in the shooting was never found. (8RT 5431.)

4930-4934.) The only fingerprints found on the vehicle that could be matched to anyone were those of Rosales. (4RT 3123-3124.)

At 4 a.m. on December 17, 2009, police went to 3725 West 112th Street in Inglewood to search the house at that address. (5RT 3992-3993.) When the police announced their presence at the front door, Garcia ran about 5 steps out the east door of the residence. (5RT 3995, 3998-3999, 4002.) A police officer shot Garcia in his left, inner thigh with a .40 millimeter foam baton round, whereupon Garcia turned and ran back inside the house. (5RT 3996-3997.) Eventually, Garcia surrendered himself to at the front door. (5RT 3997.)

Several months later, Kalac told Stephanie San Angelo, who was his sometimes roommate and girlfriend, about the shooting. (7RT 4891, 4895.) Kalac told her that a male subject named "Ralph" or "Alf" was the "mastermind" of a robbery which took place in October of 2009, which was carried out by Alf, Kalac, and two other subjects (one male and one female). (7RT 4921.) Kalac stated that they intended to jack either the girl's boyfriend, ex-boyfriend, or the father of her child. Kalac told San Angelo that Alf shot and killed the drug dealer, who was in a car, in the area of 113th Street and Prairie

Avenue, and that after the robbery Alf gave the gun to Kalac. (7RT 4921; 4895-4896.)

San Angelo asked Kalac if he had walked past the dead body without saying anything, and Kalac replied: "Yeah, I didn't care about it. I cared about my dope." (7RT 4896.)

Kalac's response bothered San Angelo enough that, on February 1, 2010, she went to the Inglewood Police Department and reported Kalac's statements to Detective Michael Han. (7RT 4909, 4914-4915, 4921, 5167.)

Detective Han did not work in the homicide section, so he sent the following e-mail to several homicide officers to try to find the detective assigned to the case (7RT 4920-4921):

For your information, on Monday, February 1, 2010, I met with an anonymous informant at the IPD lobby. The informant said he/she heard the following story from a male white subject by the name of Anthony Kalac. The informant relayed that recently he/she heard Anthony Kalac talk about a robbery to a drug dealer. Anthony Kalac said a male subject by the name of "Ralph" or "Alf" was the mastermind in the robbery. On or about October, 2009, "Ralph," Anthony Kalac, and two other subjects (one male and one female) executed the drug dealer, who was in the car, in the area of 113th Street and Prairie Avenue. After the murder, "Ralph" gave the gun to Anthony Kalac to get rid of it.