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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF)
CALIFORNIA,)

Plaintiff-Respondent,)

v.)

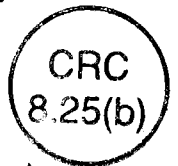
PERLA ISABEL GONZALEZ,)

Defendant-Appellant.)

Court of Appeal No. D055698
Superior Court No. FVA024527

SUPREME COURT
FILED

SEP 2 2011



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Deputy

APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY
HONORABLE MICHAEL KNISH, JUDGE

APPELLANT'S REPLY BRIEF ON THE MERITS

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Supreme Court Case No. S189856

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APPELLANT’S REPLY BRIEF ON THE MERITS

I.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN PERLA’S¹ CONVICTION FOR THE MURDER OF MORALES

A. Perla Cannot Aid and Abet Morales in His Own Murder.

Respondent argues Perla can be found guilty of murder because she proximately caused Morales’ death by giving him the loaded gun, and contends the rule in *People v. Antick* (1975) 15 Cal.3d 79 does not apply because Morales’

¹ In the Opening Brief, counsel referred to Perla Gonzalez by her first name to avoid confusion with other Gonzalez family members. For the sake of continuity, Perla will be referred to by her first name here as well.

acts were not the “sole” proximate cause of his death. (Respondent’s Brief (“RB”), pp. 14-16.)

Under the rationale of *Antick*, Perla cannot aid and abet Morales in his own murder. “As [the deceased accomplice] could not be found guilty of murder in connection with his own death, it is impossible to base defendant’s liability for this offense upon his vicarious responsibility for the crime of his accomplice.” (*People v. Antick, supra*, 15 Cal.3d 79, 88-90; see also, *People v. McCoy* (2001) 25 Cal.4th 1111, 1119-1120; *In re Joe R.* (1980) 27 Cal.3d 496, 506, fn. 5.)

Morales initiated the lethal knife attack and shot Canas several times in the struggle for the gun. Morales’ acts are imputable to him, but his acts cannot be legally recognized as the cause of his own death, and therefore there is no homicide. Perla cannot be guilty of Morales’ murder based on vicarious liability for Morales’ crime because Morales could not be guilty of the murder himself. (*Antick, supra*, 15 Cal.3d at pp. 88-90.)

The rule stated in *People v. Gilbert* (1965) 63Cal.2d 690 and explained in *Antick* does not depend on Morales’ conduct being the “sole” proximate cause of death. If the deceased accomplice is the “sole” proximate cause of death, there would be no vicarious liability, because the defendant committed no act proximately causing the death.

The *Antick* rationale applies if the defendant commits an act that aids the accomplice, such as handing the accomplice a gun. In committing this act, the jury can find the defendant aided and abetted the attempted murder of the intended victim, but she cannot be guilty of aiding and abetting her accomplice in his own homicide. Under the rule stated in *Antick*, Perla cannot be vicariously responsible for Morales' death.

B. Perla Did Not Commit an Act Sufficiently Provocative of Lethal Resistance

Respondent contends that “no particular act of violence should limit the reach of the provocative act doctrine.” (RB, p. 17.) To prove liability under the provocative act doctrine, however, the defendant’s conduct must be “sufficiently provocative of lethal resistance,” such that the death occurred as a “reasonable response” to the act. (*In re Joe R.*, *supra*, 27 Cal.3d 496, 504-505.) Taking the gun to the confrontation did not provoke Canas’ lethal response, nor did it instigate the confrontation. Morales instigated the lethal confrontation by attacking Canas with a knife.

A reasonable trier of fact could not find that Perla’s act of handing the gun to Morales and running from the scene proximately caused Canas’ lethal response. Her handing the loaded gun to Morales could have allowed Morales to prevail in

Morales' lethal attack, but her act did not provoke Canas' lethal response, required for Perla to be liable under the provocative act doctrine. (*In re Joe R.*, *supra*, 27 Cal.3d at p. 507.)

In *Joe R.*, the minor and his accomplice robbed the victim at gunpoint, threatened to kill him, and moved him to a secluded area. The victim grabbed the gun, and the minor punched the victim on the head during the struggle. The victim, however, was able to obtain the gun and shot the accomplice. (*Id.* at p. 501.)

This Court in *Joe R.* concluded that the minor's conduct in punching the victim could have allowed his accomplice to prevail during a struggle over the firearm, but the minor's conduct did not provoke the victim's lethal response and was insufficient to make him liable for murder under the provocative act doctrine. (*Id.* at p. 507.) Similarly, here, Perla's act of handing the gun to Morales could have allowed Morales to prevail in the attack, but it did not provoke the victim's lethal response.

Canas testified he first became scared when Morales pulled out the knife. (2 RT 317.) Morales started the lethal confrontation with the knife, stabbing Canas. Morales ran to the back of the car, to the trunk where Jorge saw the rifle. (4 RT 609-619) Perla had the gun for "seconds," before Morales took it from her.

(2 RT 272.) Morales would have obtained the gun with or without Perla. Perla's act of handing Morales the gun was not sufficient to provoke a lethal response and cannot form the basis for a murder conviction.

II.

THE INSTRUCTIONAL ERROR WAS NOT HARMLESS BECAUSE PERLA'S MENTAL STATE WAS A CENTRAL CONTESTED ISSUE IN THE CASE

Respondent concedes that the critical issue in the case was Perla's mental state, but argues that Perla only contested her intent to kill, not the premeditation and deliberation allegation. (RB, pp. 23-24.) This assertion is not supported by the record. Defense counsel argued the evidence did not support premeditation and deliberation "in any way," and urged the jury not to find she premeditated or deliberated, which required "cold, calculated decisions." (9 RT 1765-1767.)

Respondent characterizes this argument as "a passing reference," and asserts Perla conceded the issue by focusing on her lack of intent to kill. (RB, p. 23.) Defense counsel argued Perla lacked the intent to kill as a means to achieve acquittals of all the charges. This strategy did not concede premeditation and deliberation, and counsel very clearly argued the issue in the alternative. (9 RT 1767.) The defense also repeatedly argued the prosecution did not prove that Perla engaged in any planning activity, consistent with a lack of premeditation and

deliberation. (9 RT 1741-1742, 1745, 1749-1750-1751, 1759-1760.) Defense counsel also argued Perla acted rashly “in the heat of passion” without planning or deliberation, and challenged Canas’ testimony regarding the manner in which he claimed she cocked the gun. (9 RT 1758-1759, 1765.) Whether Perla premeditated and deliberated was a contested issue at trial.

Respondent also argues that if the jury found Perla intended to kill by handing the gun to Morales, they would necessarily find she reflected on her decision to kill and did not act rashly. The record does not support this assertion. There was no direct evidence that Perla planned to kill Canas; Jorge testified he discussed fighting with Canas in Perla’s presence, but there was no discussion about killing Canas. (4 RT 601-602, 608.) While Morales attacked Canas, Perla did nothing but pace by the car. (2 RT 261.) If she had some preconceived plan to kill, she would have pulled out the gun and shot Canas immediately, or after Canas threw Morales to the ground, as defense counsel argued. (9 RT 1758.) Based on her actions, the jury could reasonably infer she acted rashly and panicked after seeing Canas get the best of Morales. Perla’s actions after the homicide also do not support a finding of premeditation and deliberation; she asked Canas for his help to get Morales into the car, suggesting she was not thinking rationally.

There was ample evidence that Morales' premeditated and deliberated murder. Canas testified Morales stepped forward and confronted him, tried to punch him, and then pulled out a knife. (2 RT 257-261; see *People v. Manriquez* (2005) 37 Cal.4th 547, 577 [evidence supported premeditation and deliberation finding when the defendant and the victim were engaged in a verbal altercation; several minutes elapsed, and defendant approached the victim, pulled a firearm from his waistband, and shot the victim several times].)

The manner of killing also overwhelmingly supports Morales' premeditation and deliberation. Morales pulled out a knife and lunged toward Canas, slashing his cheek. Canas backed up, but Morales lunged at him again with the knife. (2 RT 262-263.) Morales then obtained the gun and shot Canas several times. (2 RT 273-274; see *People v. Silva* (2001) 25 Cal.4th 345, 369 [multiple gunshot wounds inflicted on unarmed victim is "entirely consistent with premeditation and deliberation"].)

The evidence of Morales' premeditation was overwhelming; the evidence of Perla's intent was very weak. Given the disparity in the strength of the evidence, it is likely the jury applied the erroneous instruction to convict Perla of first degree murder based on Morales' intent.

The jury's request that the court provide an "explanation" of second degree murder strongly suggests the jury seriously considered finding Perla guilty of the lesser offense of second degree murder. (2 CT 405.) In a footnote, respondent summarily dismisses the jury's inquiry, erroneously characterizing it as merely a request to "locate" the instruction. (RB, p. 27, n. 14.) Respondent ignores the jurors' explicit request for further guidance on second degree murder. As Justice Aaron noted in her dissenting opinion, "one cannot ignore the fact that the *actual* jury specifically requested an instruction on second degree murder and that in response, the court directed the jury to an instruction that misstated the critical intent element." [Emphasis in original.] (Slip Opn., J. Aaron, conc. & dis., p. 5.)

From this request, it can be inferred the jurors were not convinced that Perla premeditated the murder and considered the option of convicting her of the lesser offense. At this critical juncture, the trial court provided an incorrect instruction that allowed the jury to find Perla premeditated murder based on her accomplice's mental state.

The evidence of Perla's premeditation and deliberation was very weak. Perla's intent was the critical issue for the jury to decide and the evidence supported an inference that she acted rashly, as defense counsel argued. The jury was erroneously instructed on this specific issue in response to its reasonable

request for guidance. Given these circumstances, the error cannot be deemed harmless beyond a reasonable doubt.


III.

CONCLUSION

For the foregoing reason, Perla Gonzalez respectfully requests this Court reverse the murder conviction, or, in the alternative, the true finding that she premeditated and deliberated the murder, and reduce the conviction to murder in the second degree.

Respectfully submitted,

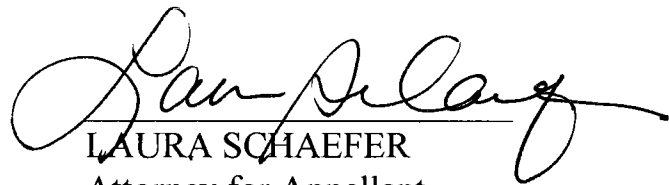
Dated: September 1, 2011


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Certificate of Word Count

I, Laura Schaefer, counsel for appellant certify pursuant to the California Rules of Court, that the word count for this document is 1,691 words, excluding the tables, this certificate, and any attachment permitted under rule 14(d). This document was prepared in Word Perfect with 14 point Times New Roman font, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 1st day of September, 2011, at San Diego, California.


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Attorney for Appellant
PERLA ISABEL GONZALEZ

People v. Gonzalez
Supreme Court Case No. S189856

Proof of Service

I, the undersigned, say: I am over eighteen years of age, a resident of the County of San Diego, State of California, not a party in the within action, my business address is 934 23rd Street, San Diego, County of San Diego, State of California 92102; on this date I mailed the APPELLANT'S REPLY BRIEF ON THE MERITS, addressed as follows:

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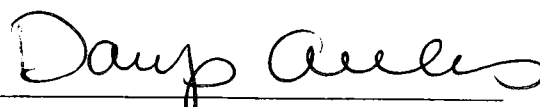
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Executed September 1, 2011, at San Diego, California.


Darys Avalos