

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,)
)
Plaintiff and Respondent,)
)
)
vs.)
)
WARREN JUSTIN HARDY,)
)
Defendant and Appellant.)
_____)

No. S113421

Los Angeles County
Sup.Ct. No NA039436-
02

COPY

SUPREME COURT
FILED
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Deputy

Automatic Appeal from the Judgment of the Superior Court
State of California, County of Los Angeles, No. NA039436-02
Hon. John David Lord, Judge Presiding

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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DEATH PENALTY

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State of California, County of Los Angeles, No. NA039436-02
Hon. John David Lord, Judge Presiding

APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

Appellant Warren Justin Hardy submits this supplemental brief pursuant to Rules 8.520 (d) (1) and 8.630 (d) of the California Rules of Court.

AUTHORITY TO FILE SUPPLEMENT BRIEFING

Rule 8.520 (d) (1) of the California Rules of Court provides that, "a party may file a supplemental brief limited to new authorities . . . that were not available in time to be included in the party's brief on

the merits.” The word count limitation is 2,800 words. Rule 8.630(d) permits the filing of such briefs in capital appeals.

Appellant’s Opening Brief was filed on June 12, 2013.

Respondent’s Brief was filed on October 30, 2013. Hardy filed a Supplemental Opening Brief on July 7, 2014. Respondent filed a Supplemental Respondent’s Brief on July 31, 2014. Appellant’s Reply Brief was filed November 21, 2014.

On March 20, 2017, this Court issued its decision in *People v. Brooks* (2017) ___ Cal.5th ___ [SO99274]. In *Brooks*, the appellant argued the true finding of the kidnapping special circumstance allegation required reversal because the evidence was insufficient to prove Brooks had kidnapped the victim for an independent felonious purpose. Hardy raised a similar issue in Argument VI, which argued the special circumstances under Penal Code section 190.2, subdivision (a)(17), and the judgment of death, should be reversed because the evidence failed to prove Hardy committed any of the special circumstance felonies¹ for an independent felonious purpose.

(AOB 219-245.)

¹ The jury found the special circumstances under section 190.2, subdivision (a)(17) and (18), true that the murder was committed during the commission of a robbery, a kidnapping, a kidnapping for rape, a rape, and a rape by foreign object, and that the murder was intentional and involved the infliction of torture. (12RT 2528; 3CT 597-598.)

In *Brooks*, Justice Liu wrote separately and dissented from the holding finding the evidence was sufficient. The dissent noted “the jury here was never instructed that in order to find the special circumstance to be true, it must first determine that Brooks had an independent felonious purpose to commit the kidnapping. Brooks did not raise this instructional issue on appeal” (*People v. Brooks, supra*, conc. and dis. opn. of Liu J. slip opn. p. 4.)

Hardy’s initial briefing did not challenge the instructional omission, which Justice Liu’s recent dissent discusses. Hardy’s jury also “was never instructed that in order to find the special circumstance to be true, it must first determine that [Hardy] had an independent felonious purpose to commit the [felonies].” (*People v. Brooks, supra*, conc. and dis. opn. of Liu J., slip opn. p. 4.) The dissent in *Brooks* applies to the instructional error at Hardy’s trial, and therefore requires reversal of the true findings to the felony special circumstance allegations, and the judgment of death.

ARGUMENT

XXIV

THE TRUE FINDINGS OF THE SPECIAL CIRCUMSTANCES UNDER PENAL CODE SECTION, SUBDIVISION (A)(17), AND THE JUDGMENT OF DEATH MUST BE REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT THE JURY THAT APPELLANT HAD TO COMMIT ANY SPECIAL CIRCUMSTANCE FELONY FOR AN INDEPENDENT FELONIOUS PURPOSE UNDER PENAL CODE SECTION 190.2, SUBDIVISION (A)(17), IN VIOLATION OF APPELLANT'S RIGHT TO FEDERAL AND STATE DUE PROCESS OF LAW AND RIGHT TO A JURY DETERMINATION OF THE FACTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTION 16, OF THE CALIFORNIA CONSTITUTION.

A. SUMMARY OF ARGUMENT.

The jury found true the special circumstances under section 190.2, subdivision (a)(17) and (18), that the murder was committed during the commission of a robbery, a kidnapping, a kidnapping for rape, a rape, and a rape by foreign object, and that the murder was intentional and involved the infliction of torture. (12RT 2528; 3CT 597-598.) However, "when the underlying felony is merely incidental to the murder, the murder cannot be said to constitute a murder in the commission of the felony and will not support a finding of felony-murder special circumstance." (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1026.) In Hardy's case, there was no substantial evidence that

any of the felonies charged were committed with an independent felonious purpose. (*People v. Green* (1980) 27 Cal.3d 1, 61-62.) Further, assuming arguendo there was substantial evidence, the jury was never instructed it had to find an independent felonious purpose for any of the special circumstance felony allegations. (*People v. Brents* (2012) 53 Cal.4th 599, 610.) This was error. *Brents* required instruction that each special circumstance felony allegation had to be committed for an independent felonious purpose.

The Fifth, Sixth and Fourteenth Amendments to the Federal Constitution together guarantee the right to have a jury find all elements of the offense beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) “Jury instructions relieving states of this burden violate a defendant’s due process rights . . . [by] . . . subvert[ing] the presumption of innocence accorded to accused persons and [by] invad[ing] the truth-finding task assigned solely to juries in criminal cases.” (*Carella v. California* (1989) 491 U.S. 263, 265.) Failure to properly instruct by omitting or misstating elements is federal and state constitutional error. (*Neder v. United States* (1999) 527 U.S. 1, 18; *People v. Cox* (2000) 23 Cal.4th 665, 676.) Such an error requires reversal of the special circumstance true finding and the judgment of death.

B. STANDARD OF REVIEW.

Errors in jury instructions are questions of law which are reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

C. THE FAILURE TO INSTRUCT JURORS THAT THEY HAD TO FIND AN INDEPENDENT FELONIOUS PURPOSE BEYOND A REASONABLE DOUBT WAS REVERSIBLE ERROR.

The offenses charged against Hardy occurred late on December 28, 1998, and early on December 29, 1998. (11RT 2250.) Trial testimony commenced on November 13, 2002. (10RT 1925.) In March 2000, voters approved an amendment to section 190.2, providing, “[t]o prove the special circumstance of kidnaping in subparagraph (B) . . . if there is a specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnaping . . . is committed primarily or solely for the purpose of facilitating the murder.” (§190.2, subd. (a)(17)(M); see also, *People v. Brents, supra*, 53 Cal.4th at p. 608, fn. 4; Prop. 18, Primary Elec. March 7, 2000.) The 2000 amendment eliminated the independent felonious purpose requirement for special circumstance felonies. However, the 2000 law cannot apply to Hardy, because it involved a substantive change that was not in force at the time of the crimes charged against him. Thus, applying the amendment to Hardy

would be a violation of the ex post facto clause. (*Weaver v. Graham* (1981) 450 U.S. 24, 29-30; *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 293-294.)

The trial court gave CALJIC No. 8.81.17.1 (2CT 555), which instructed the jury only that to “find that the any [sic] of the special circumstances . . . , it must be proved: . . . [t]he murder was committed while [the] defendant was [engaged in] [or] [was an accomplice] in the [commission] of one or more of the . . . crimes.” (2CT 555.) The instruction did not require a finding of an independent felonious purpose for any of the special circumstance felonies.

The 1999 CALJIC instructions used at trial erroneously failed to include the requirement of an independent felonious purpose. The Use Note to the July 1999 CALJIC No. 8.81.17.1 stated it was based on an amendment to “Penal Code section 190.2, subdivision (M), adopted in 1998. It would be applicable to crimes committed on or after January 1, 1999” In fact, the amendment to section 190.2, subdivision (a)(17)(M), did not become effective until March 2000. (*People v. Brents, supra*, 53 Cal.4th at p. 608, fn. 4; Prop. 18, Primary Elec. (March 7, 2000).) The prematurely revised instruction was erroneously given in Hardy’s trial.

Hardy's jury was not instructed that it had to find an independent felonious purpose for any special circumstance felony. At the time of the offenses, however, such a finding was required. The trial court had a sua sponte duty to instruct on the principles of law applicable to the case. (*People v. Flood* (1998) 18 Cal. 4th 470, 480.) "A trial judge's duty is to give instructions sufficient to explain the law." (*Kelly v. South Carolina* (2002) 534 U.S. 246, 256.) Special circumstance allegations are the functional equivalent of the elements of a crime. (*Williams v. Calderon* (9th Cir. 1995) 52 F.3d 1465, 1476.)

People v. Brents, supra, 53 Cal.4th 599, is instructive. The crime in *Brents* was committed in 1995. The defendant had argued with the victim, then choked her, put her body in a vehicle, drove her to a remote location, and poured gasoline on the vehicle and lit it. The victim died of thermal injuries. The defendant was found guilty of murder with a true finding to a kidnapping special circumstance.

On appeal, the defendant in *Brents* argued the evidence was insufficient to prove the kidnapping special circumstance allegation, and the failure to instruct, that special circumstance kidnapping required an independent felonious purpose, was error. This Court

found sufficient evidence, but held there was instructional error.

(*People v. Brents, supra*, 53 Cal.4th at p. 610.)

In *Brents*, the jury was instructed it could find the kidnapping special circumstance true only if it found the defendant committed the murder, “to carry out or advance the commission of the crime of the crime of assault by force . . . or to facilitate the escape therefrom or to avoid detection.” (*People v. Brents, supra*, 53 Cal.4th at p. 612.) The jury instruction given had erroneously omitted the independent felonious purpose requirement. (*Id.* at pp. 613-614.) This Court concluded the error was critical “in a case . . . , in which the evidence could support an inference that defendant’s only purpose was to kill and that he lacked an independent purpose to kidnap.” (*Id.* at p. 614.) Thus, this Court reversed the true finding of the kidnapping special circumstance. (*Ibid.*)

The same rationale in *Brents* applies in Hardy’s case. There was evidence from which a properly instructed jury could have concluded the only purpose was to kill the victim. (*People v. Brents, supra*, 53 Cal.4th at p. 614.)

The prosecution theory was that Hardy and his companions intended to rob the victim, then discovered she had nothing except \$6 in food stamps. (11RT 2356.) There was no evidence of the

chronology. For example, there was no evidence whatsoever when a robbery occurred - - when the victim was on the street, during the commission of other felonies, or as an afterthought when the food stamps were found in the aftermath. Similarly, the prosecution theory was the victim was kidnapped to a secluded spot where no passerby could see or hear her. (11RT 2349-2350, 2415.) But the jury was not instructed on an independent felonious purpose. Thus, jurors could have believed the victim was moved to the embankment to be murdered. Jurors just as likely could have believed the victim was moved to the embankment for some other purpose, to be robbed or raped, and then killed.

Because of the erroneous instruction given, jurors failed to consider whether each of the special circumstance felonies (robbery, kidnapping, kidnapping for rape, rape, or rape by a foreign object) had an independent felonious purpose wholly independent from the murder before finding those special circumstances true. Thus, jurors based their true findings on the special circumstances felonies on the improper conclusion that they were related to the commission of the murder, or were committed to facilitate or conceal the murder itself. (See also AOB, 214-244.) The instructional error permitted jurors to improperly find true the special circumstances felonies without

weighing in the calculus whether those felonies were committed for an independent felonious purpose, as the law required at the time of Hardy's trial. Without such a find, the special circumstances felonies were merely incidental to the murder, and thus could not support those special circumstances.

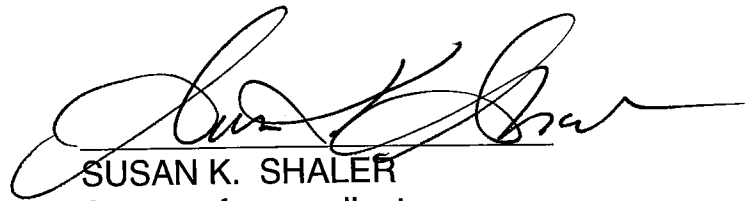
For the reasons above, the true findings on the special circumstances, and the judgment of death must be reversed.

CONCLUSION

Based on the foregoing, Hardy was denied his Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution. The true finding on the special circumstances must be reversed and the judgment of death must be vacated.

DATED: April 13, 2017

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan K. Shaler", written over a horizontal line.

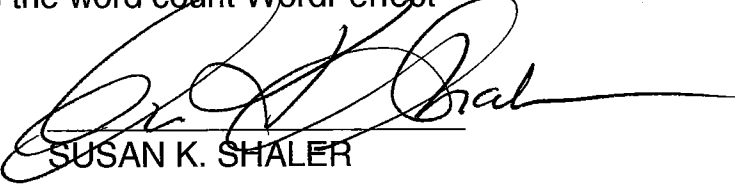
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CERTIFICATE OF APPELLATE COUNSEL
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COURT

I, SUSAN K. SHALER, appointed counsel for appellant hereby certify, pursuant to Rule 8.520(d), California Rules of Court, that I prepared the foregoing brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect X6. The word count for the brief is 2,618, including footnotes, but not including the cover or tables. Because the brief complies with the rule, which limits the word count to 2,800. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

Dated: April 13, 2017


SUSAN K. SHALER

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action. My business address is: Susan K. Shaler Professional Law Corporation, 991 Lomas Santa Fe Dr., Ste C, #112, Solana Beach, CA 92075.

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APPELLANT'S SECOND SUPPLEMENTAL OPENING BRIEF

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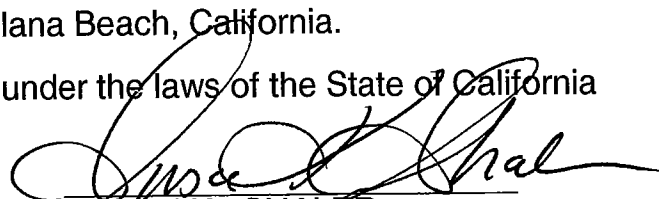
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Executed on April 13, 2017, at Solana Beach, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


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