

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO DOMINGUEZ,

Defendant and Appellant.

H022727

(San Benito County

Super. Ct. No. CRF99-37033)

**ORDER MODIFYING OPINION
AND DENYING REHEARING**

NO CHANGE IN THE JUDGMENT

THE COURT:

It is ordered that the modification filed herein on January 12, 2005, be vacated and the following modification inserted as follows:

1. The paragraph commencing at the bottom of page 11 with “The People assert” and ending at the top of page 12 with “about its presence” as well as footnote 8 are modified to read as follows:

The People assert that certain forensic evidence, including blood on Ms. Perez’s jeans, “strongly suggested that she had been beaten before the intercourse began.” This argument was made for the first time on remand from the Supreme Court, citing testimony that was not mentioned in the original briefs. The cited evidence would undoubtedly support an inference that the rape itself was particularly brutal, which would support a further inference that defendant left Ms. Perez in a weakened state that contributed to her death. Such an inference would certainly establish the requisite causal connection. (See *Cavitt, supra*, 33 Cal.4th at p. 204 [binding of victim and leaving her alone with alleged killer established requisite causal relationship between defendants’ participation in robbery and killing].) However the prosecutor only alluded to this evidence briefly, as refuting defendant’s claim of consensual sex and thus indicating that he himself killed Ms.

Perez.⁸ Shortly thereafter the prosecutor *contradicted* the inference urged here, asserting that “*after* Dominguez raped her, him and Martinez beat her.” This divergence reflects the fundamental flaw in the harmless error argument here, which is that the vagueness of the evidence makes it impossible to say with confidence what happened on that night beyond the facts that Ms. Perez was sexually penetrated by defendant, brutally assaulted, and ultimately killed. The sequence of these events, and the identity of the author of the latter two, is a matter for speculation and surmise. If the jury did not believe defendant was involved in the killing, it might well not have believed that he inflicted the injuries on which the People rely. The jurors’ inquiry suggests a hypothesis under which Martinez inflicted a lethal assault after defendant’s involvement with the victim had ceased entirely. The evidence now cited was not enough to dissuade the jury from entertaining that hypothesis. More to the point, jurors were not told that they had to find a causal connection between defendant’s rape and Ms. Perez’s killing. Once they entertained the possibility that Martinez was the killer, as their note to the court established they did, any attempt to determine the relationship—if any—between the rape and the killing was inherently tinged with conjecture. Had the jury been instructed that such a relationship had to be found, it could well have entertained a reasonable doubt about its presence.

The respondent’s petition for rehearing is denied.

There is no change in the judgment.

Dated:

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

⁸ “Then Dominguez and Jose Alfredo Martinez . . . took her into that field, down that 10- to 12-foot gully and brutally raped her and killed her. There is blood all over the front and the back of the jeans. Does that sound like consensual sex like he testified to? No.”