

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 opinion filed herein on May 12, 2004, be modified as follows:

1. On page 2, first sentence of the first full paragraph the word “been” is deleted so the sentence reads:

Irma Perez was last seen alive on the night of August 22-23, 1997, when an officer saw her outside a Hollister bar along with defendant and two other men.

2. On page 8, line 5, insert the word “of” between the words “perpetration” and “a” so the sentence reads:

As CALJIC No. 8.27 would have told the jury, if defendant was not the killer he could only be guilty of felony murder if (1) he was aiding and abetting the killer in the latter’s perpetration of a predicate offense, or (2) the killer was aiding and abetting defendant in *his* perpetration of a predicate offense.

3. On page 13, second sentence of the first full paragraph, the words “defendant contends” are changed to “the People contend” so the sentence reads:

Citing *People v. Castro* (1994) 27 Cal.App.4th 578, 585 (*Castro*), and *Thompson, supra*, 50 Cal.3d at pp. 170-171, the People contend that a killing is deemed to occur during the commission of a rape if the rape and killing are part of a “continuous transaction.”

4. On page 14, line 12, the word “Defendant asserts” are changed to “The People assert” so the sentence reads:

The People assert that the jury was sure to find a continuous transaction in light of evidence that two people dragged Ms. Perez from the place where some of her clothing was found to the place where her body was found.

5. On page 16, before the first full paragraph starting with “Similarly” insert the following paragraph:

Defendant contends that a *Mayberry* instruction was required under *People v. May* (1989) 213 Cal.App.3d 118, but that case differs materially from this one. The victim herself testified, giving an “enigmatic” account of her behavior toward the defendant. (*Id.* at p. 126.) The court noted that she gave few “manifestation[s] of nonconsent.” (*Ibid.*) The jury could thus have believed her testimony, at least in material part, and still concluded that the defendant reasonably thought she had consented to have sex. Here there was no basis for the jury to conclude that the victim seemed to consent without actually intending to do so.

6. On page 18, line 4, the words “Defendant seems” are changed to “The People seem” so the sentence reads:

The People seem to accept for purposes of appeal that the rape as found by the jury occurred on near the embankment immediately adjacent to Southside road.

7. On page 18, line 6, the words “Defendant does” are changed to “The People do” so the sentence reads:

The People do not contest that the kidnapping conviction rests on a movement as short as 10 to 12 feet, but contends that such a movement was sufficient here to support conviction.

8. On page 20, line 19, the citation “9 Cal.4th” is changed to “38 Cal.2d” so the full citation reads:

(*Chessman, supra*, 38 Cal.2d at pp. 186, 192.)

9. On page 23, first sentence of the third paragraph the word “with” is deleted so the sentence reads:

A certain inherent tension may be seen to exist between the concept of a thing that *tends to accompany* another thing, and one that is inessential or insignificant in relation to that other thing.

10. On page 24, footnote 12, line 10 the word “below” is deleted so line 10 reads:

highway’ ”; citing and quoting *Kelly v. Hill* (1951) 104 Cal.App.2d 61, 65];

11. On page 28, line 4, the word “or” is changed to “of” so the sentence reads:

Similarly the court in *Shadden* suggested that the movement was incidental because it is not inherent in the crime of rape, but in a later section of the opinion emphasized the important if not instrumental role of the movement in “ma[king] it less likely for others to discover the crime,” “decreas[ing] the odds of detection [citation],” and “enhanc[ing] [the defendant’s] opportunity to rape and injure [citations]” the victim.

12. On page 30, second sentence of the second full paragraph the words “People contend” are changed to “defendant contends” so the sentence reads:

The defendant contends the case is indistinguishable from *Stanworth, supra*, 11 Cal.3d 588, where the evidence was held insufficient to support a conviction of kidnapping for robbery. Defendant contends that we should instead find the movement sufficient, as the courts did in *Salazar, supra*, 33 Cal.App.4th 341, and *People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*).

13. On page 30, third sentence of the second full paragraph the words “Defendant contends” are changed to “The People contend” so the sentence reads:

The People contend that we should instead find the movement sufficient, as the courts did in *Salazar, supra*, 33 Cal.App.4th 341, and *People v. Jones* (1999) 75 Cal.App.4th 616 (*Jones*).

14. On page 34, first paragraph, line 3, insert the word “of” between the words “some” and “these” so the sentence reads:

“[Defense Counsel]: He has also been convicted of a felony in possession of cocaine. I—I would—I don’t know without conceding, but probably there would be a ruling that some of these could come in, the moral t[ur]pitude offenses. I mean I’d just like to—

The appellant’s petition for rehearing is denied.

There is no change in the judgment.

Dated:

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.