IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 2005

MISAEL CORNEJO, a/k/a **MIGUEL SANCHEZ,**

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 4D03-2378

Opinion filed January 26, 2005

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Daniel T. Andrews, Judge; L.T. Case No. 01-16379CF10E.

Carey Haughwout, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant.

Charles J. Crist, Jr., Attorney General, Tallahassee, and Claudine M. LaFrance, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Convicted of second degree murder, Misael Cornejo contends that the evidence in this circumstantial case was insufficient to establish his criminal liability as a principal in the shooting death of the victim. We agree, and reverse his conviction for second degree murder. Consistent with Sigler v. State, 881 So. 2d 14 (Fla. 4th DCA 2004), we remand to the circuit court for retrial on the charge of third degree felony murder, which was given to the jury as a lesser included offense and for which there was sufficient evidence to submit the case to the jury.

The state charged Cornejo with first degree murder, on the theory that he was a principal. After the state rested, the defense moved for a judgment of acquittal of the first degree murder charge. The jury convicted Cornejo of the lesser offense of second degree murder. We hold that the motion for judgment of acquittal should have been granted as to first and second degree murder.

A judgment of acquittal is proper in a circumstantial evidence case such as this if the state fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt. See Barwick v. State, 660 So. 2d 685, 694 (Fla. 1995) (citing Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993), receded from on other grounds by Topps v. State, 865 So. 2d 1253, 1258 (Fla. 2004)). In ruling on the motion, the trial judge must determine whether "there is competent evidence from which the jury could infer guilt to the exclusion of all other inferences. If there is an absence of such evidence, a judgment of acquittal is appropriate." Id. at 694 (citation omitted).

The state acknowledges that Cornejo did not fire the shots that killed the victim; all evidence at trial pointed to co-defendant Jeronimo Pantoja as the shooter.[1] "To sustain a conviction as a principal for a crime committed by another, the state must prove that the defendant 'intend[ed] that the crime be committed and [did] some act to assist the other person in actually committing the crime.'" Ehrlich v. State, 742 So. 2d 447, 450 (Fla. 4th DCA 1999) (quoting Staten v. State, 519 So. 2d 622, 624 (Fla. 1988)).

Nothing in the evidence overcame the reasonable hypothesis that Cornejo had no knowledge of any plan to *shoot* the victim, that he offered no assistance or encouragement that led to the *shooting*, and that his actions after the shooting were consistent with someone who was an accessory after the fact.

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[1]The jury convicted co-defendant Pantoja of first degree murder.

There was evidence of a feud between the victim and his three friends on the one hand, and Cornejo, the co-defendant, and their friends on the other. The victim and his friends vandalized the co-defendant's car and burglarized the apartment of Cornejo's gang associate. Cornejo discouraged the group from riding and looking for the victim and urged that the police be called.

One witness saw Cornejo for a few seconds chasing the victim. Although Cornejo was one of the people who surrounded the victim, the state offered no evidence that Cornejo encouraged anyone else to attack the victim. The state presented no testimony that Cornejo had a gun in his possession, gave a gun to anyone else, or knew that the shooter had a gun.

None of the physical evidence rebuts Cornejo's claim that he was not responsible for the shooting. Blood was found on an inside door of a Mercury Marquis. When stopped soon after the shooting, Cornejo was in the front passenger seat of the Marquis. No evidence was offered as to the door on which the blood was found; with seven people in the car at the time of the stop, this blood was not probative of Cornejo's participation in the shooting.

The state also focused on the medical examiner's testimony that the victim had wounds consistent with a screwdriver, and that the police found a screwdriver in the front passenger seat of the car in which Cornejo was apprehended. However, the police found screwdrivers in both of the vehicles carrying gang members, and the state presented no evidence linking any particular screwdriver to the wounds on the victim's body.

In sum, in this circumstantial case, the state did not offer substantial competent evidence that excluded Cornejo's reasonable hypothesis of innocence, namely that he had no knowledge of a plan to shoot the victim, and that he did not encourage, assist, or incite the shooting of the victim.

Although there was insufficient evidence to support a charge of second degree murder, we find that there was sufficient evidence to support the charge of third degree felony murder, which was submitted to the jury as a lesser included offense. The enumerated felony for the third degree murder charge was aggravated battery.

However, Sigler prevents us from remanding for the entry of a conviction of third degree felony murder, because the jury's verdict did not necessarily include a finding that Cornejo had committed an aggravated battery.

In Sigler, a defendant was convicted of second degree murder. We held that the evidence did not support the conviction, because there was insufficient evidence of a depraved mind. Sigler, 881 So. 2d at 16 (citing Sigler v. State, 805 So. 2d 32 (Fla. 4th DCA 2001)). We also held that we could not remand for the entry of a conviction of third degree felony murder under section 924.34, Florida Statutes (2003), because the jury's verdict "did not include a jury determination beyond reasonable doubt as to each element" of the enumerated felony (harboring an escapee). Sigler, 881 So. 2d at 18.

Similarly, in this case, the jury's verdict of second degree murder did not require the jury to determine beyond a reasonable doubt whether Cornejo had committed aggravated battery, the predicate offense for third degree felony murder. Consistent with Sigler, we remand for a new trial on the charge of third degree felony murder.

STEVENSON and HAZOURI, JJ., concur.
GROSS, J., concurring in part and dissenting in part with opinion.

GROSS, J., concurring in part and dissenting in part.

There was sufficient evidence to give the case to the jury on the charge of second degree murder.

In the light most favorable to the state, the evidence supporting the theory that Cornejo was a principal in a second degree murder was the following:

1. Cornejo associated with the shooter as a member of a gang known as "SUR 13," which had had ongoing "problems" with a rival group, which included the victim and his friends.

2. On the evening of the shooting, the victim got in a verbal fight with the shooter and his friends and threw a two-by-four at the shooter's car. Later that evening, the victim and another person burglarized an apartment where a member of the SUR-13 faction resided.

3. Cornejo was a passenger in one of two cars that went looking for the victim. While the car was driving slowly down the road, Cornejo eyeballed an undercover police officer, who testified: "The only way to really put it is that he had a purpose. He was looking for somebody or maybe scanning the area . . . ."

4. Cornejo and his friends cornered the victim near a Farm Store. The gang members surrounded the victim, with two wielding knives and one holding a gun. Although no witness placed a weapon in his hand, Cornejo was amidst the group trying to stab and hit the victim. A witness heard someone call out to Cornejo. The victim swung a two-by-four, attempting to knock the weapons away. Another witness said that during the melee, Cornejo was "standing close" to the victim, "just standing right there doing nothing." During the fight, the shooter pulled out a gun and fired two shots at the victim. Everyone, including Cornejo, jumped into two cars and left the scene.

5. When the police caught Cornejo, he was in the front passenger seat of a car containing six other gang members. Blood that matched the victim was found on an inside door. From the car, the police recovered a screwdriver on the front passenger seat and other weapons from other locations. The police recovered three screwdrivers from another car containing gang members.

6. The medical examiner opined that the victim had two square marks on his back that were caused by a screwdriver.

7. The morning after the arrest, Cornejo and the shooter were in a holding cell with nine other gang members. The shooter gave a pep talk to his friends, acknowledging that he had pulled the trigger and saying that "as long as you guys stick to your story and don't talk to anybody, we shouldn't have any problems." Cornejo told the group that there was nothing to worry about, "that it all goes back to the fact that there really were no witnesses, and as long as [we] stick together with the story [then] everything should pan out."

8. A friend of the victim, Julio Mejia , was also in the holding cell with Cornejo. Mejia testified that Cornejo "told me that if they [had] caught me that day, they were going to kill me." On cross-examination, Mejia reiterated that Cornejo told him in the holding cell, "If they had grabbed me that day, they would have killed me." The trial judge understood Mejia's testimony about Cornejo's statement to mean "If [my friends and I] could have gotten to you, we would have killed you too." The trial judge felt that it was this statement that justified giving the case to the jury.

One view of the evidence was that Cornejo accompanied his fellow gang members to look for the victim, was present at the scene where the victim was beaten and shot, fled the scene with his fellow gang members after the shooting, was in one of the two cars in which the gang members fled the scene, participated in an attempted cover up with his friends in jail, and told Mejia, the victim's friend, that if the gang had caught him the night before, they would have killed him too. This is at least as much evidence as the "getaway driver [in an armed robbery] who has prior knowledge of the criminal plan and is 'waiting to help the robbers escape,'" a set of facts which the supreme court has held sufficient to support a conviction as a principal in a robbery. Staten v. State, 519 So. 2d 622, 624 (Fla. 1988) (citation omitted)

I agree with the majority that under Sigler v. State, 881 So. 2d 14 (Fla. 4th DCA 2004), if reversal is required, the proper remedy is to remand the case for retrial on the third degree felony murder charge. Although it is not an issue here, I maintain that Sigler v. State, 805 So. 2d 32 (Fla. 4th DCA 2001), was wrongly decided for the reasons given in my concurring opinion in Michelson v. State, 805 So. 2d 983, 986-87 (Fla. 4th DCA 2002) (Gross, J., concurring specially).

NOT FINAL UNTIL DISPOSITION OF ANY TIMELY FILED MOTION FOR REHEARING.