

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>STATE OF WASHINGTON,</b>	)	<b>No. 27343-1-III</b>
	)	
<b>Respondent,</b>	)	
	)	
<b>v.</b>	)	<b>Division Three</b>
	)	
<b>MARIANO FIGUEROA DIAZ,</b>	)	
<b>aka JONATAN DIAZ-AGUIRRE,</b>	)	
	)	
<b>Appellant.</b>	)	<b>UNPUBLISHED OPINION</b>

Korsmo, J. — Jonatan Aguirre challenges his second degree murder conviction on the basis of the jury’s composition, the trial court’s rulings concerning photographic evidence, and the sufficiency of the evidence. We find no error and conclude the evidence amply supported the jury’s verdict. The conviction is affirmed.

**FACTS**

The charges in this case arose from the restraint and eventual death of 18-year-old Aracely Alvarez-Lopez in Yakima on November 12 and 13, 2005. Mr. Aguirre was initially charged with first degree felony murder and first degree kidnapping. The charges

ultimately were amended to add alternative offenses of second degree intentional and felony murder. The first degree felony murder count was predicated on the felony offenses of first or second degree kidnapping. The second degree felony murder count was predicated on the felonies of second degree assault or unlawful imprisonment.

Trial testimony established that the victim lived in an apartment on Roosevelt Street in Yakima. Also living in the building were Luisa Sanchez and her sister Gregoria Sanchez. Aracely and Luisa were friends. On the evening of November 11, Aracely and Gregoria were playing cards. Needing cigarettes, Aracely called David Moren, a friend of Luisa's, for a ride to the store. He picked her up and they drove to a store.

An angry Moren called the apartment looking for Aracely and alleging that she had stolen his car while he was in the store purchasing cigarettes for her. Soon Aracely returned home and went into her bedroom; she appeared scared or frantic. Moren then arrived and confronted Aracely in the bedroom. Gregoria heard fighting and looked in the room; she saw Moren choking Aracely. Moren loosened his grip and Aracely escaped.

Luisa helped Moren look for the girl, but they were unsuccessful. Luisa promised Moren that she would let him know the next time she saw Aracely. The next day, Luisa was with her boyfriend, Jonatan Aguirre, when Aracely returned to the apartment. The

two young women started fighting. Luisa blocked Aracely from leaving; Aracely pulled a knife on Luisa. Aguirre disarmed Aracely and she bit him. He and Luisa grabbed Aracely and tied her hands and feet with duct tape. Aracely threatened to have friends come over and give the two a severe beating. Luisa put tape over Aracely's mouth.

Luisa called Moren, who told her he was busy and would not be coming over to release Aracely. Sometime later, Aracely managed to get the duct tape off her mouth and started screaming for help. At Aguirre's direction, Luisa silenced Aracely by putting a piece of cloth in her mouth. She then secured the cloth by tying a tank top across Aracely's mouth. Several hours later Aracely managed to free herself and open a window. Mr. Aguirre told Luisa not to release Aracely or let her get away. Luisa closed the window. Aracely fell onto a bed.

Mr. Aguirre struggled with her on the bed; she was face down. Mr. Aguirre pulled on the tank top around her neck. Luisa repeatedly told him not to do so because he would kill her. He responded that he would keep going until she was no longer moving. Aracely went limp and did not have a pulse. They left her body in the room overnight.

The next morning Mr. Aguirre decided to burn the body. He borrowed a laundry basket and used it to transport Aracely's body. He and Luisa purchased gasoline at a gas station and then drove to a remote location where he sometimes engaged in target

practice. Luisa poured gasoline over the body and lit it on fire. On November 19, 2005, some six days after the killing, the body was discovered. The Yakima County Sheriff's Office investigated and distributed photos of the remains in an effort to obtain an identification of the body. Two photos showed tattoos and the name Aracely scrolled underneath one of the tattoos. Another photograph was of a ring found during the autopsy. Aracely's mother identified both the ring and the tattoos. The medical examiner determined that she had been asphyxiated before being burned.

Mr. Aguirre told Luisa to take the blame if she were arrested because she would serve less time than he would. Both were arrested. Luisa initially confessed to the crime, but later admitted that Mr. Aguirre had actually killed Aracely. She later testified that she had confessed to protect him.

Prior to trial, the defense moved to exclude 19 gruesome photographs of the burned body. The trial court examined each photograph and heard arguments before balancing the probative and prejudicial value of each exhibit. The court admitted ten photographs and excluded one. The other eight were withdrawn during the examination process.

The defense theory of the case was that Moren was probably the killer and Luisa should not be believed. The jury apparently was unable to decide on whether a

kidnapping occurred and did not return verdicts on that count or on the first degree felony murder. The jury did find Mr. Aguirre guilty of second degree felony murder. Special interrogatories revealed that the jury found that the killing had been committed in the course of the crimes of both second degree assault and unlawful imprisonment.

Mr. Aguirre timely appealed to this court.

#### ANALYSIS

##### *Jury Composition*

Mr. Aguirre first contends that the jury that heard his case was not representative because only two people with Hispanic surnames were seated. This argument fails on several levels.

There is no right to a representative petit jury. *Swain v. Alabama*, 380 U.S. 202, 208, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965); *Fay v. New York*, 332 U.S. 261, 284, 91 L. Ed. 2043, 67 S. Ct. 1613 (1947); *State v. Hilliard*, 89 Wn.2d 430, 442, 573 P.2d 22 (1977). Instead, there is a Sixth Amendment right that the pool from which the petit jury is selected represent a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 526, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975). The fair cross-section requirement is violated when there is a showing that (1) a “distinctive” segment of the community (2) is substantially underrepresented in the jury pool (3) as a result of a “systematic exclusion”

of the group. *Duren v. Missouri*, 439 U.S. 357, 364, 58 L. Ed. 2d 579, 99 S. Ct. 664 (1979).

Against this clearly settled law Mr. Aguirre's challenge founders. First, his challenge is misplaced. He has no right to a particular composition of the trial jury, yet that is what he is attacking. Second, he does not claim that Hispanics were actually underrepresented on the panel; instead, he claims that Hispanic *names* were underrepresented. While he presumably treats names as proxies for race, he cites no authority suggesting it is proper to do so.

Finally, while acknowledging that the constitutional right is to a fair cross-section jury venire, he does not point to any systematic flaws in the selection process. He also has presented no evidence to suggest that the venire, as opposed to the petit jury, underrepresented Hispanics. For all of these reasons, Mr. Aguirre's initial argument fails.

An allegedly unrepresentative petit jury is not evidence that the jury pool was unrepresentative, let alone the product of a flawed selection system.

#### *Gruesome Photographs*

Mr. Aguirre next argues that the trial court erred in admitting eight of the proffered photographs. He has not shown that the trial court abused its considerable discretion in the admission of this evidence.

A trial court's evidentiary rulings, including decisions on admitting photographs of a crime, are reviewed for abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 812, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999); *State v. Pirtle*, 127 Wn.2d 628, 653-654, 904 P.2d 245 (1995), *cert denied*, 518 U.S. 1026 (1996). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court is required to balance the probative value of the photographs against the prejudicial impact of the evidence. *Finch*, 137 Wn.2d at 812.

The essence of Mr. Aguirre's argument here is that the photographs depicting the condition of the body after burning and predation by animals were more inflammatory than informative. The record reflects that the trial court gave careful consideration to each photograph and the argument concerning its probative and prejudicial nature before ruling. In each instance the court weighed the two factors before admitting or excluding the photograph. There was no abuse of discretion. The photographs depicted the efforts made to identify the body and determine the cause of death. They also served to bolster the testimony of Luisa Sanchez. In light of the fact that she was the only one who identified Mr. Aguirre as the killer and that the defense case was aimed at discrediting her, the photographic evidence was important corroboration of her story, particularly

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about the disposal of the body.

The trial judge was in the best position to consider the probative nature of the photographs and their prejudicial impact in light of the evidence and theories of the case.

The court gave the evidence the careful consideration required by our rules. There was no abuse of discretion. The court did not err in admitting the photographs.



*Sufficiency of the Evidence*

Mr. Aguirre also challenges the sufficiency of the evidence to support the conviction. Properly viewed, the evidence permitted the jury to reach the verdict that it returned.

The sufficiency of the evidence to support a verdict is reviewed according to long-settled principles. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

The jury convicted Mr. Aguirre of second degree felony murder. The jury was instructed that the elements of that crime were: (1) Aracely Alvarez-Lopez was killed on or about November 13, 2005; (2) that the defendant or an accomplice was committing the crimes of either second degree assault or unlawful imprisonment; (3) the defendant or an accomplice killed Aracely in the course of committing either second degree assault or unlawful imprisonment; (4) she was not a participant in those crimes; and (5) the acts

occurred in the State of Washington.<sup>1</sup> The jury was instructed that a person commits the crime of second degree assault when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.<sup>2</sup> The jury also was instructed that unlawful imprisonment occurs when he or she without lawful authority knowingly restrains another in a manner that substantially interferes with that person's liberty and the restraint is without the consent of the victim and/or accomplished by force.<sup>3</sup>

The evidence permitted the jury to find all of these elements. Aracely was captured by Luisa and Mr. Aguirre on November 12 and restrained by them for many hours. Luisa testified that Mr. Aguirre strangled Aracely—an intentional act that actually inflicted substantial injury on Aracely. These acts permitted the jury to conclude that the crimes of both second degree assault and unlawful imprisonment were committed against Aracely. The second element of felony murder was thus established. The first and third elements were established by Luisa's testimony that Mr. Aguirre held Aracely face down on the bed and twisted the tank top until she died. The evidence also established that Aracely was not a participant in the crime but, rather, was the victim of both predicate felonies. Finally, there was testimony that the killing took place at an apartment in Yakima, Washington. All five elements of second degree felony murder were supported

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<sup>1</sup> Instruction 11. Clerk's Papers (CP) 58.

<sup>2</sup> Instruction 14. CP 61.

<sup>3</sup> Instruction 17. CP 64.

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by testimony.

There was evidence from which the jury could find each element of the crime was committed. It was sufficient. *State v. Green, supra*.

The conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.