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SUPERIOR COURT OF CALIFORNIA
COUNTY OF FRESNO
CENTRAL DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MARCUS DELON WESSON, Defendant	Case No.: F049017856 **Defendant's Motion for a New Trial, and to Modify the Verdict** **DATE: July 27, 2005** **TIME: 9:00 a.m.** **DEPT.: 53**

I. The grounds for this motion are: Penal Code section 190.4, subdivision (e), and Penal Code section 1181, subdivisions 5, 6, and 7.

Penal Code section 190.4, subdivision (e), provides as follows:

> "In every case in which the [jury] has returned a verdict … imposing the death penalty, the defendant shall be deemed to have made an application

for modification of such verdict… pursuant to Subdivision 7 of Section 11."[1]

Penal Code section 1181, subdivision 5, provides as follows:

"[The court may grant a new trial] [w]hen the court has misdirected the jury in a matter of law…."

And Penal Code section 1181, subdivision 7, provides as follows:

"… in any case wherein authority is vested by statute in the … jury to recommend or determine as a part of its verdict … the punishment to be imposed, the court may modify such verdict … by imposing the lesser punishment without granting or ordering a new trial…."

II. Statement of the Salient Facts.

Of course, since the court heard all of the evidence, only the most salient facts are recited here.

Of course, since the court heard all of the evidence, only the most salient facts are recited here.

[1] The reference to Subdivision 7 of Section 11 is an error in the Initiative Proposition that passed this law. The correct reference is to Penal Code section 1181, subdivision 7. *People v. Rodriguez* (1986) 42 Cal.3d 730, 792 fn 25.

On March 3, 2005, opening statements in the above-entitled matter commenced. On June 2, 2005, closing arguments concluded. The jury began guilt phase deliberations on June 2, 2005.

The jury started their deliberations at about 4:00 on June 2. They continued their deliberations on June 3, 6, 7, 8, 13, 14, 15, 16 and announced that verdicts had been reached on the morning of June 17.

After lengthy deliberations, which included a number of readbacks, the jury found the defendant guilty on all 23 counts in the Information.

The jury did not find that Mr. Wesson personally used a firearm.

In order to find the defendant guilty of the "forcible" sexual assaults, the jury would have to find that the alleged victims were consenting to those sex acts based on duress. The Penal Code section 288.5 charges were predicated on findings made under Penal Code section 803g.

To find Mr. Wesson guilty of first-degree murder based on premeditation and deliberation while not personally using a firearm, the jury would have to find Marcus Wesson was either a co-conspirator to commit the murders and/or an aider and abettor to the murders.

The jury did not have to agree on the theory upon which a first-degree murder conviction was based. Some could have found the defendant guilty based upon a conspiracy theory; others could base their verdict of guilt upon an aider and abettor theory.

The conspiracy theory was based upon discussions Mr. Wesson initiated with his children and his wife Elizabeth's nieces over the years.

The precise times of these discussions were not established; however, a general time frame was set forth. The exact words used by the defendant were either not provided, or were the subject of the vagaries of human recollection and interpretation.

All witnesses who testified agreed with the following: that there were discussions; that they occurred five to ten or more years before March 12, 2004; that they involved "going to the Lord" should the condition precedent occur that the government attempt to break up the family; that these discussions may have occurred earlier in the family history; that they may have included words to the effect "kill the children then kill yourselves". These discussions included Mr. Wesson routinely asking family members if they were in agreement with these talks. Testimony by several witnesses included discussions about the best way to accomplish killing themselves. The defendant told them that placing a gun in the mouth, the heart, or the temple, was the most effective way.

Reference was generally to the "government" as the intervening force that would trigger the carrying out of the defendant's teachings; however, reference to "CPS" was also allegedly made.

The reason given by the defendant for this teaching was to prevent the world from corrupting and contaminating family members and their children. Witnesses uniformly described the defendant as a religious zealot who conducted family worships involving Bible readings and prayer. They described a man who was "very, very religious"; claimed to "walk as Christ" or "walk in the perfection of Christ"; and who talked earnestly and often about the imminent second coming of Jesus Christ.

Sometime, most likely in 1999, the "Sudan incident" occurred. Believing someone in what appeared to be a government vehicle on the shore was possibly planning to board the boat called "The Sudan" and do something to the family, Sofia gathered

everyone together, got the defendant's gun out, and directed the others to write notes. Kiani and one other person (Sebhrenah or Rosie) rowed to shore and contacted the defendant by phone. Mr. Wesson told them not to do anything and that he would be right there. Marcus got back to the boat within two hours. Sofia said when he arrived he was "scared," that he was "hugging" them, and said he could have come there and found them all dead. According to Sofia, he also told them that he would tell them when it was time.

Everyone who testified regarding the defendant's plan said that he never taught any of them to use a gun, and they never practiced any trial runs.

All who testified, with the exception of Sofia, said they knew they could never carry out the plan. They also testified that they did not take it seriously because the police had come to their residence many times and nothing ever happened.

With the exceptions of statements to Gypsy to the effect of "are you still willing to die for the Lord," there was no evidence of any ongoing discussions (similar to those that had occurred five and six years earlier) within several years of March 12, 2004.

In fact there was considerable evidence that the defendant had become more relaxed in his enforcement of rules regarding family worship, diet, television, and lifestyle practices in general. Additionally, he was gone more often. Dorian observed that his father had become "more lenient" and that family members were doing more of their "own free will."

On the other hand, evidence/testimony concerning Sebhrenah's fascination with guns, knives, survival gear, and death, was substantial and uncontested.

The circumstantial evidence and evidence from all the experts that testified indicated that Sebhrenah likely commenced killing the children long before any discussion of calling CPS occurred, and before any officers (which the defendant had been asking for) had even arrived.

When the evidence is viewed in a neutral and objective manner, it is probable that Sebhrenah acted outside the scope of any actual agreement (if such an agreement existed and was still operative); it was further entirely possible that, if given that option, the jury would have found Mr. Wesson guilty of wanton and willful conduct that was inherently dangerous to human life; the natural and probable consequences of which could include the deaths of his children.

Unfortunately, in order to make either or both of these findings proper instructions on the law would have to be provided to the jury. The full panoply of conspiracy instructions were given at the Prosecution's request; however, the single instruction requested by the defense (CALJIC 6.16) was denied.

Additionally, implied malice second-degree murder instructions should have been given *sua sponte*, but these also were denied. (Further, the court crafted its own expanded "duress" instruction for charges that required a showing of duress.)

The following summary includes only some of the circumstantial evidence established at trial upon which the conclusion could be drawn that Sebhrenah killed the children and that her actions were not necessarily within the scope of the alleged conspiracy; and that Marcus Wesson was either not guilty or guilty of implied malice second-degree murder, at most. The summary includes: 1) the testimony as to time of death by Dr. Gopal and Dr. Lawrence; 2) the violent confrontation between Sofia and Sebhrenah between 2:10 and 2:20; 3) Sebhrenah's reaction to the confrontation (and the fact that ten of Sofia's relatives came to back her up); 4) Sofia's declaration that she was not leaving without Jonathan even if it was to the death; 5) Sebhrenah's documented fascination with weapons and firearms (her purse contents), and the ready access in her room to the .22 Ruger; 6) the last observation of Sebhrenah by Sofia that she was digging in a black duffle bag in the middle of the room (undoubtedly, the bag the gun was in) and

barricading the door. (RT 4893, 4372). The approximate time of this was between 2:15 and 2:20; 7) the digital tape which showed possible muffled gunshots between 2:18 and 2:55; 8) no sign of any children after Sofia is pushed from the room (except the possible one- or two-second cry of an infant, possibly at about 2:50); 9) no evidence of an order by the defendant; 10) evidence to the contrary (if certain presumptions are made) that he said "no"; 11) Jonathan and Aviv were shot first very early in the confrontation; 12) most witnesses said they never saw Sebhrenah again after she entered the room; 13) Sebhrenah's demeanor at the door when she spoke to Serafino (RT 7346:13 – 7347:19); 14) the defendant's statements and demeanor including requests to call the police, invitations to the police to come in (RT 11385, 11386); statements well after 3:00 to Rosie and Kiani about letting Jonathan and Aviv go; follow-up statements to Serafino to the same effect (RT 7468:20 – 7469:18); 15) the defendant's entry of the southeast bedroom while Officer Nelson was at the front door watching him; 16) Nelson's testimony at the preliminary hearing that the defendant was only in the bedroom thirty to sixty seconds before the girls came out and the screaming started and he ran into the living room and did a "Code 3" (at trial, he said it was less than thirty seconds [RT 4043:12-20]); 17) Louis Garcia's statement to police detectives referencing the same period of time to be no more than two minutes, if that; and his testimony at trial that confirmed this (RT 11698:26 – 11700:23; 11719:21 – 11720:7); 18) Elizabeth Wesson's looking into the southeast bedroom shortly after the defendant entered that room and her declarations to Rosie that "they're all gone:; 19) The final shots being fired within seconds of the "Code 3" (RT 4009:5-9); 20) the evidence that Sebhrenah's wound was self-inflicted; that it occurred within a minute or two of the defendant entering the room; 21) that it is illogical to believe that, if he did not order or direct the killing of the seven children, he would order and direct the killing of Elizabeth, Jr. and Sebhrenah; 22) the

spontaneous declaration of Mr. Wesson at the jail that: "I thank God those other two girls were not in that room"; 23) the fact the defendant never taught anyone to use any gun; 24) the alternate explanations of the blood on Mr. Wesson's clothing (consistent with post-injury contact with the victims – though Mr. Wesson's statement to the police did not come in, Officer Escarena's own experience in the southeast bedroom demonstrated the consistency of such an inference which was supported by expert testimony; coincidentally, both Wesson and Escarena had been Army medics);
25) Sebhrenah's declarations to Gypsy that she could not wait to die, and could not wait to get to heaven; 26) no other family members were recruited at the scene to participate; 27) It is common knowledge that mothers are capable of killing their children and also themselves – and that such tragedies have occurred in recent times.

There was much evidence introduced at trial upon which a convincing argument to the jury could be made that Sebhrenah was not acting within the scope of an alleged conspiracy when the homicides and suicide occurred. Proof beyond a reasonable doubt is an extremely high burden of proof, any credible evidence that challenges that standard is entitled to be recognized by the court and dignified by time-tested CALJIC instructions.

III. The Three Instructional Errors.

A. *The Failure to Give CALJIC 6.16, "When Conspirators Not Liable For Act or Declaration of Co-Conspirator."*

This instruction provides as follows (CALJIC, Jan. 2005 edition):

"Where a conspirator commits an act … which is neither in furtherance of the object of the conspiracy nor the natural and probable consequence of an attempt to attain that object, … [she] alone is responsible for and is bound by that act … and no criminal responsibility therefor attaches to any of [his] [her] confederates."

Witkin notes the "… repeated affirmation of this accepted principle…." Witkin & Epstein, *California Criminal Law* (3d Ed. 2000) Ch. II, Sec. 94.

Witkin also notes that "… cases actually holding that an act was outside the scope of the conspiracy are scarce…." *Id.*

But that scarcity does not make the principle inapplicable.

When the court gives conspiracy instructions, therefore, as was done in this case, where there is some evidence that a co-conspirator acted outside the scope of the conspiracy, as there was in this case (see Part II, Salient Facts, above), and where the defense request it CALJIC 6.16 must be given.

When the defendant requests an instruction, the evidence supporting the defendant's theory of the case can be "weak or unconvincing," and the court still must instruct on the defendant's theory. This is black-letter law. Witkin & Epstein, *California Criminal Law* (3d Ed. 2000) Ch. XIV, Sec. 607, states the following:

> "… [T]he judge must give any correct instruction [proposed by the defendant] on the defendant's theory of the case that the evidence justifies, no matter how weak or unconvincing that evidence may be."

In support of that statement, Witkin cites a number of cases, the most important of which are set out in the footnote.[2]

This section of Witkin goes on to quote *People v. Burns* (1948) 88 Cal.App.2d 867, 871, as follows:

> It is elementary that the court should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever. ... The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. ... However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true.

Witkin also quotes *People v. Jeffers* (1996) 41 Cal.App.4th 917, 925, as follows:

> "Disbelief is no justification for refusing a requested instruction if there is evidence to support defendant's theory."

It is true, of course, that one case, *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1050 – 1051, said "[a]ppellant's attempt to engraft … CALJIC 6.15… on to *the aider and abettor instructions the court gave (fn 2, supra)*… must wholly fail as foreign to the law of aider and abettor liability ….' (Emphasis added).

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[2] (People v. Kane (1946) 27 C.2d 693, 698, 166 P.2d 285; People v. Carmen (1951) 36 C.2d 768, 773, 228 P.2d 281; People v. Carnine (1953) 41 C.2d 384, 389, 260 P.2d 16; People v. Wilson (1967) 66 C.2d 749, 762, 59 C.R. 156, 427 P.2d 820; People v. Garcia (1967) 250 C.A.2d 15, 19, 58 C.R. 186; see People v. Keel (1928) 91 C.A. 599, 605, 267 P. 161 [inconsistent defenses; defendant denied killing, but evidence raised issue of self-defense, and he was entitled to instruction on it];

But in *Brigham*, "the aider and abettor instructions the court gave" were, as noted, set out in footnote 2 of *Brigham*, 216 Cal.App. 3d at 1045. They were the standard CALJIC aider and abettor instructions, 3.00, 3.01, 3.02, and 3.03.

No conspiracy instructions were given in *Brigham*.

Our case is quite different. Wesson was not trying to "engraft" onto the aider and abettor instructions something that was "foreign to th[at] law." Nor was our case tried solely on an aider and abettor theory as was *Brigham*. Our case was also tried on a conspiracy theory.

Wesson was only trying to get the normal CALJIC pattern of conspiracy instructions given, and nothing more. *Brigham* is inapposite. (So, likewise, and for the same reasons, is the main case to cite *Brigham* on this point, *People v. Anderson* (1991) 233 Cal.App.3d 1646.)

The conclusion is inescapable: by failing to instruct the jury in CALJIC 6.16, con-conspirator acting outside the scope of the conspiracy, "... the court has misdirected the jury in a matter of law...." Penal Code section 1181, subdivision (5).

Wesson was prejudiced by the failure to give these instructions. The length of jury deliberations, their questions and requests for readback –– particularly on conspiracy –– , and its acquittal on personal-use-of-gun, all show that it is reasonably probable that had the jury been properly instructed on this subject, it would not have convicted him of first-degree murder.

The court must grant a new trial or modify the verdict.

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B. *The Failure to Give CALJIC 8.31 and the Implied-Malice Portion of CALJIC 8.11.*

On the evidence in this case, implied-malice second-degree-murder was a necessarily lesser included offense to the charged-offense of first degree murder. Although the facts are different, the reasoning of *People v. Coddington* (2000) 23 Cal.4th 529 applies fully to our case.

In *People v. Coddington*, the Supreme Court "agree[d]" with the defendant that "the trial court erred"[3] "in instructing on second degree murder by describing only intentional but unpremeditated second degree murder."[4] The court, after analysis, found "[t]here was evidence here from which the jury could have inferred that appellant acted without intent to kill even though his conduct posed a high risk of death, but the instructions given defined only the express malice theory of second degree murder."[5]

The court must instruct on all lesser-included lesser offenses that are shown or suggested by evidence that is substantial enough to be considered by the jury. *People v. Hagen* (1998) 19 Cal.4th 652, 672.

The court must do this *sua sponte*, and, indeed, would have had to do so even if Wesson had objected. *People v. Breverman* (1998) 19 Cal.4th 142; and *People v. Barton* (1995) 12 Cal.4th 186.

Here, of course, in addition to being shown by the evidence, and in addition to the court's *sua sponte* duty, Wesson did specifically requested that implied-malice second degree murder instructions be given, specifically citing to CALJIC 8.11 and 8.32.

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[3] *People v. Coddington*, *supra*, 23 Cal.4th at 591.

[4] *People v. Coddington*, *supra*, 23 Cal.4th at 591.

[5] *People v. Coddington*, *supra*, 23 Cal.4th at 593.

Indeed, when the defendant requests an instruction, the evidence supporting the defendant's theory of the case can be "weak or unconvincing," and the court still must instruct on the defendant's theory. This is black-letter law, as shown by the extended discussion of Witkin & Epstein, *California Criminal Law* (3d Ed. 2000) Ch. XIV, Sec. 607, in Part III, Subpart B, "… Failure to Give CALJIC 6.16…" above

The conclusion is inescapable: by failing to instruct the jury on implied-malice second-degree murder, "… the court has misdirected the jury in a matter of law…." Penal Code section 1181, subdivision (5).[6]

Wesson was prejudiced by the failure to give these instructions.

The length of jury deliberations, their questions (particularly on conspiracy) the failure to give proper conspiracy instructions, and its acquittal on personal-use-of-gun, all show that it is reasonably probable that had the jury been given the choice of convicting Wesson of implied-malice second-degree murder, that it would have chosen that instead of first-degree murder.

Accordingly, a new trial or a modification of the verdict is necessary.

C. *Departure from the CALJIC Definition of "Duress" in CALJIC 10.00.*

The Standards for Judicial Administration Recommended by the Judicial Council, Standard 5, states the following about CALJIC:

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[6] The case of *People v. Woods*, 8 Cal.App.4th 1570 (1992) held that an aider and abettor may be found guilty of a lesser degree of murder than the actual shooter.

> "Whenever … CALJIC contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the CALJIC instruction unless he or she finds that a different instruction would more adequately, accurately, and clearly state the law."

Here even prosecution requested that the standard CALJIC instruction on duress in sex offenses be given unmodified. The most complete CALJIC instruction on this subject is CALJIC 10.00. Despite that, the court departed from CALJIC on its own motion.

CALJIC 10.00 does already "adequately, accurately, and clearly" state the law. As will be shown, the court's additions do not.

Also, although Standard 5 does not state the standards for the court to use when it determines that a CALJIC instruction must be modified, it does state the following:

> "… [W]hen a CALJIC instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument."

Surely this same standard must be used when the court modifies a CALJIC. Together, these say that any court-modification of CALJIC should be "[1] adequate[ ], [2] accurate[ ], and [3] clear[ ]," and "[4] brief, [5] understandable, [6] impartial, and [7] free from argument."

The court's addition to CALJIC 10.00 did not meet any of those 7 standards. The court added two sentences to CALJIC 10.00, at Reporter's Transcript Volume CV, page 13548, lines 18 to 24:

> "[First sentence:] Also, in determining the existence of duress, factors such as the alleged position of dominance and authority of the perpetrator and continuous exploitation of the alleged victim may be considered.

"[Second sentence:] Duress by means of implied threats may be shown by the totality of the circumstances, including the relationship of the perpetrator and the alleged victims and the relative ages and sizes."

The first sentence is not "[6] impartial" and not [7] "free from argument." The word alleged" applies to the first phrase but does not appear to apply to the second phrase; by not repeating "alleged," or by not adding a cautionary phrase such as "if any," the instruction seems to instruct the jury that Wesson did engage in "continuous exploitation" of the alleged victims.

The second sentence is not [3] "clear," nor [5] "understandable" and so also not [2] "accurate." The second sentence omits to give the jury any guidance on how it is to decide what the implied threat was.

The second sentence, by repeating the words "relationship" (Page 13548, line 11, part of CALJIC 10.00), "age," which are already part of CALJIC 10.00, and had just been given on Page 13548, line 11, the court's modification placed undue emphasis on those two factors, making the modification [6] not "impartial" and [7] not "free from argument."

Taken together, these added two sentences mean that this instruction is no longer [4] "brief."

Since the modification of the standard duress instruction fails all seven standards for modification, the conclusion is inescapable: "the court [by its modification of CALJIC 10.00] has misdirected the jury in a matter of law...." Penal Code section 1181, subdivision (5).

Wesson was prejudiced by this misdirection. Without this modification it is reasonably probable that the jury would not have convicted Wesson of one or more of the

sex offenses in which non-consent was alleged. A new trial must be granted on those offenses.

Indeed, it appears manifest that the jury relied on this duress instruction for all of the sex offenses, so in fact a new trial must be granted on all of the sex offenses.

And since it appears manifest that the jury relied on the sex offenses as support for the murder convictions, a new trial must be granted on those as well.

IV. A New Trial Should Be Granted or the Verdict Should Be Modified.

Part III, above, shows that, if the jury's verdict had been for life-without-parole, a new trial must be granted, despite the five months and vast expenditure of judicial resources consumed by the first trial.[7]

But because a death verdict was returned, this court does have another choice. The court can modify the verdict to second degree (implied malice) murder. Penal Code section Penal Code section 190.4, subdivision (e), (automatic motion to modify the verdict), and Penal Code section 1181, subdivision 7 ("where[ ] … the jury [has] determine[d] … the punishment …, the court may modify such verdict … by imposing the lesser punishment without granting or ordering a new trial….")

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[7] If the court determines that the evidence does not show guilt of first degree murder, but only of second degree, then the court can, instead of granting a new trial, modify the verdict accordingly. Penal Code section 1181, subdivision(6).

The court must do one or the other.

Respectfully Submitted,

George Cajiga, Fresno County Public Defender

7/18/05
Date

Peter M. Jones

July 18, 2005
Date

Garrick Byers

Attorneys for Marcus Delon Wesson

AFFIDAVIT OF PROOF OF SERVICE
(2009, 2015.5 C.C.P.)

State of California)
)
County of Fresno)

Comes now the undersigned, who hereby declares as follows:

I am a citizen of the United States of America and am employed in the county aforesaid. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Public Defender's Office, County of Fresno, 2220 Tulare Street, Suite 300, Fresno, California 93721.

On the 18th day of July, 2005, I served a copy of the attached DEFENDANT'S MOTION FOR NEW TRIAL, AND TO MODIFY THE VERDICT on the District Attorney's Office of Fresno County by delivering and depositing a true copy thereof with an employee of said office.

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

Dated: July 18, 2005.

Maryann Mejia

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

DATE: _____

BY: _____

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

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BY: _____

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