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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES FREDDIE CAVITT, Defendant and Appellant.	A081492 (San Mateo County Super. Ct. No. SC38915)
THE PEOPLE, Plaintiff and Respondent, v. ROBERT NATHANIEL WILLIAMS, Defendant and Appellant.	A088117 (San Mateo County Super. Ct. No. SC38915)

The juvenile court found James Freddie Cavitt and Robert Nathaniel Williams unfit for treatment under juvenile law, and referred them to the District Attorney for prosecution. Separate juries convicted Cavitt and Williams of the first degree murder of Betty McKnight, with the special circumstances that the killing occurred during the commission of robbery and burglary. Cavitt was also convicted of robbery and burglary with personal infliction of great bodily harm, and grand theft. Williams was convicted of grand theft, after the prosecutor dismissed the robbery and burglary charges against him. Both defendants were sentenced to prison terms of 25 years to life, with other terms stayed under Penal Code section 654.

In these consolidated appeals, Cavitt and Williams raise closely related claims of error, contending the instructions given to their juries unduly expanded the scope of the

felony-murder rule and operated to deprive them of their defenses to the murder charges. Cavitt argues further that the court improperly excluded evidence supporting his defense, erroneously instructed the jury on attempted suppression of evidence, and admitted irrelevant, unreliable evidence of a statement he made after his arrest. Williams contends his privilege against self-incrimination was violated by the admission of Cavitt's statement, with a jury instruction that Williams's silence after the statement could be considered an adoptive admission.

We affirm appellants' convictions.

FACTS

The facts may be briefly stated for background purposes. Further details will be provided where relevant in our discussion of appellants' contentions.

In November 1995, 17-year-old Mianta McKnight moved in with her father Philip and his second wife Betty in Brisbane. Betty was 58 years old. A few years earlier Mianta had moved into her brother's apartment, and then lived with other relatives, because she and Betty did not get along. Their frequent disagreements resumed after Mianta returned in 1995. Mianta told school friends how much she hated Betty. Mianta sometimes said she wanted to kill or strangle Betty.

Mianta had begun a relationship with the 17-year-old Cavitt at the beginning of 1995. Williams was a friend of Cavitt's. Toward the end of November, the three teenagers developed a plan to rob the McKnight house and tie Betty up. Mianta was the one who brought up the idea. On December 1, Mianta bought rope and packing tape on the way home from school. That evening around 7:00, while Philip was at work, Cavitt and Williams came to the house. They dressed in black, wore gloves and hockey masks, and brought duct tape. Betty was in bed. Mianta helped as Cavitt and Williams threw a sheet over Betty and tied her up with the rope. Williams bound Betty's hands behind her with a plastic garbage bag tie. Cavitt wrapped duct tape around Betty's neck, over the sheet. Tape was also wrapped around other parts of the sheet. One or both of the boys punched Betty in the back and neck in an attempt to keep her quiet. Betty sustained

extensive bruising consistent with blunt trauma on her neck, shoulders, arms, and head. Someone at some point put a 6-inch piece of duct tape — of a different type than the tape around the sheet — over Betty's mouth.

Cavitt, Williams, and Mianta ransacked the bedroom, taking cash, a camcorder, jewelry, and two handguns. Then Cavitt tied up Mianta and he and Williams drove away, going to Cavitt's house. According to Cavitt and Williams, Betty was still breathing when they left. Mianta freed herself, turned Betty over so she was lying on her back, and removed the tape from Betty's mouth. Mianta called her father at about 7:40 to report the robbery, telling him that Betty was unconscious. Philip immediately called the police, reaching a dispatcher at 7:44. A policeman arrived at the front door at 7:52. Mianta took him to the bedroom where Betty was, and officers began attempting cardiopulmonary resuscitation. Fire department personnel soon took over, and then paramedics, who succeeded in inducing a pulse at about 8:25. Betty was taken to the hospital. She died at 11:30 the next morning. Oxygen deprivation was the cause of death.

Mianta eventually confessed in the early morning hours on December 2. Cavitt and Williams were arrested later that day, and they also confessed. Stolen property was found in Cavitt's home. One of the stolen handguns was recovered from a hiding place in Cavitt's yard, wrapped in tape of the same kind as the roll purchased by Mianta the day before.

DISCUSSION

1. *The Felony-Murder Rule*

Both Cavitt and Williams attempted to defend themselves at trial by arguing that Mianta killed Betty for personal reasons after the burglary and robbery had been completed. They contend the jury instructions given by the trial court deprived them of this defense against felony murder. Cavitt also claims the court improperly excluded evidence that would have supported the defense. Appellants base their arguments primarily on our Supreme Court's decision in *People v. Pulido* (1997) 15 Cal.4th 713 (*Pulido*). *Pulido* does not support their position.

At issue in *Pulido* was whether an accomplice whose participation in a robbery begins only after the victim is killed can be guilty of felony murder. The Supreme Court decided this question in the negative, stating as a general rule: "Under long-established rules of criminal complicity, liability for [felony] murder extends to all persons 'jointly engaged at the time of [the] killing in the perpetration of or an attempt to perpetrate the crime of robbery' [citation] 'when one of them kills while acting in furtherance of the common design.' [Citation.]" (15 Cal. 4th at p. 716.) Appellants insist that a killing "while acting in furtherance of the common design" is an element of felony murder, which was missing in their cases if Mianta killed Betty for her own purposes. However, the *Pulido* court expressly distinguished the line of cases mentioning "furtherance of the common design" from another line of California authority requiring only that "the killer and accomplice be jointly engaged, at the time of the killing, in a robbery." (15 Cal. 4th at p. 721.) Under the broader rule, "the killing need have no particular causal or logical relationship to the common scheme of robbery; accomplice liability attaches, instead, for any killing committed while the accomplice and killer are 'jointly engaged' in the robbery." (15 Cal. 4th at p. 722.)

The *Pulido* court took particular note of one case in which a defendant was convicted of a murder that clearly did not further the common design of the robbery. In *People v. Cabaltero* (1939) 31 Cal.App.2d 52, "the defendant was a participant in a robbery in the course of which another of the robbers impulsively shot and killed a third member of the group, angry at the third man's having fired his own gun at some witnesses. (*Cabaltero*, *supra*, 31 Cal.App.2d at pp. 55-56.) The Court of Appeal held the evidence supported murder convictions for all the conspirators, whether or not the killing was in furtherance of the common design, because the killing was committed by one of the conspirators during the robbery." (*Pulido*, *supra*, 15 Cal.4th at p. 722, fn. 2.) While the *Pulido* court noted that *Cabaltero* has been criticized by commentators, it did not disapprove the case or the line of authority on which it relied. (*Ibid*.)

"[B]ecause the *Pulido* court did not disapprove either line of felony-murder cases, both are still valid and we are duty-bound to comply with the Supreme Court's directives

in each." (*People v. Smithson* (2000) 79 Cal.App.4th 480, 501; see also *People v. Anderson* (1991) 233 Cal.App.3d 1646, 1659-1660 [affirming *Cabaltero*'s validity].) Therefore, we must reject appellants' various claims depending on the notion that their liability for felony murder required a finding that Betty's killing was committed in furtherance of a common design to commit the underlying felonies.

Appellants further contend their juries should have been instructed that if they had escaped to a place of temporary safety (Cavitt's house) before Mianta killed Betty, the murder was not committed during the burglary or robbery and thus could not be felony murder. There was evidence that it took only around 10 minutes to drive from the McKnights' to Cavitt's house.

In both trials, the court instructed the jury that "[a] killing is committed in the commission of a felony if the killing and the felony are part of one continuous transaction. There is no requirement that the homicide occur while committing or while engaged in the felony or that the killing be part of the felony other than that the two acts be part of one continuous transaction." In Williams's trial, the court also gave CALJIC No. 8.21.1, telling the jury "[a] robbery is complete when the perpetrators have eluded any pursuers and reached a place of temporary safety and are in unchallenged possession of stolen property." CALJIC 8.21.2 gave the jury the same instruction regarding burglary. However, the court added the following qualification to both instructions: "The perpertrators have not reached a place of temporary safety if, having committed the robbery with other perpetrators, any one of the perpetrators continues to exercise control over the victim. Only when all perpetrators have relinquished control over the victim[,] are in unchallenged possession of the stolen property[,] and have effected an escape can it be said that any one of them has reached a place of temporary safety."

These instructions are consistent with California felony-murder doctrine. The "escape rule" has never been considered a strict limit on felony-murder liability, although of course such liability does not attach to a homicide occurring long after a completed felony. (See, e.g., *People v. Ford* (1966) 65 Cal.2d 41, 55-57, overruled on other grounds in *People v. Satchell* (1971) 6 Cal.3d 28, 35 [defendant drove around for hours after

robbery before killing].) Instead, the "escape rule" was developed to *extend* felony-murder liability beyond the technical completion of the felony. (*People v. Bodely* (1995) 32 Cal.App.4th 311, 313-314.)

Our Supreme Court has long maintained that the felony-murder statute "was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker, and this court has viewed it as obviating the necessity for, rather than requiring, any technical inquiry concerning whether there has been a completion, abandonment, or desistance of the felony before the homicide was completed. ¶ . . . The homicide is committed in the perpetration of the felony if the killing and felony are parts of one continuous transaction. [Citation.]" (*People v. Chavez* (1951) 37 Cal.2d 656, 669-670; accord, e.g., *People v. Mason* (1960) 54 Cal.2d 164, 168-169; *People v. Sakarias* (2000) 22 Cal.4th 596, 624; see also *Pulido, supra*, 15 Cal.4th at p. 723.) Thus, the "escape rule" does not operate to protect some perpetrators who abandon the premises while others remain behind to participate in a continuing criminal transaction during which a victim is killed. (See *People v. Manson* (1976) 61 Cal.App.3d 102, 208-209; *People v. Ross* (1979) 92 Cal.App.3d 391, 400-402.)

We note that appellants were not foreclosed by the jury instructions from arguing that the killing and the underlying felonies were *not* a part of one continuous transaction. The juries might have made such a finding if they were convinced that Mianta had embarked on a project of her own to murder Betty after appellants left with the proceeds of the robbery. Appellants' infliction of a serious beating and restrictive binding on the 58-year-old victim, however, did not present a sympathetic scenario for avoiding application of the felony-murder rule. Although a strict causal connection between the felony and the murder is not required (see, e.g., *Pulido*, *supra*, 15 Cal.4th at p. 723), such a connection was amply supported by expert testimony that the beating and binding could have been contributing causes of Betty's death.

Cavitt raises one meritorious argument. The trial court in his case refused to permit the jury to consider evidence of Mianta's ill will toward Betty in connection with the murder charge. The court instructed the jury to consider that evidence only for

purposes of resolving the special circumstances allegations that the killing occurred during the commission of robbery and burglary. This was error. While Cavitt's reliance on *Pulido* as requiring a killing in furtherance of the common design was misplaced, as we have discussed above, the court should nevertheless have allowed Cavitt to argue that Mianta's independent motive to kill Betty tended to show the killing was not part of a continuous transaction including the robbery and burglary.

However, the jury's true findings on the special circumstance allegations renders the error harmless. In order to make those findings, Cavitt's jury had to determine that "the murder was committed during the commission of or in order to carry out or advance the commission of the crimes of robbery or burglary or to facilitate the escape therefrom or to avoid detection." The instructions emphasized that "the special circumstance referred to in these instructions is not established if the robbery or burglary . . . was merely incidental to the commission of the murder." Accordingly, the jury could not have returned a true finding without concluding that the burglary, robbery, and homicide were all parts of a continuous transaction. Cavitt's arguments against this conclusion fail, because they depend on his misapplications of *Pulido* and the "escape rule."

2. *The Statement in the Police Car*

On the evening of December 2, 1995, Officer Kelly Smith was driving Cavitt and Williams to Juvenile Hall after they had been arrested and interrogated. Both were in the back seat, Cavitt directly behind Smith. Smith overheard one say to the other: "Man, we fucked up. We should have just shot her." Smith thought it was Cavitt who spoke, but he wasn't sure. In August 1997, Cavitt moved to exclude any testimony by Smith about the statement, contending the identification was unreliable and the statement unduly prejudicial. Thereafter, Smith was asked to listen to tapes of the statements Cavitt and Williams had made to the police, in order to help him make a more positive voice identification. Smith was working in the jail, and had spoken a number of times with Cavitt, who was an inmate worker. After listening to the tapes in a room by himself, Smith confirmed that Cavitt was the speaker. The trial court ruled that the identification

was sufficiently reliable, and the evidence sufficiently probative, to be introduced at trial for purposes of the murder charge and the special circumstances allegations.

The statement was also presented at Williams's trial. Smith testified that Williams had not responded to Cavitt's comment in any way, and the court admitted the statement as an adoptive admission, over Williams's objection that his right to remain silent was being violated.

Cavitt claims the court erred by admitting his statement because the evidence was irrelevant, and the voice identification was unreliable. We disagree. To establish the special circumstances, the prosecutor had to prove that Cavitt either killed Betty himself, helped someone else murder her with intent to kill, or participated in the robbery or burglary with reckless indifference to human life. Cavitt's statement in the police car tended to support a true finding on each of these factors; it could be understood as a comment on the fact that tying up and smothering Betty had left evidence in the form of the rope, the tape, and the sheet. We cannot say the court abused its discretion by finding Smith's voice identification sufficiently reliable. Smith had the opportunity to firm up his initially tentative identification when he spoke with Cavitt in jail, and when he listened to the taped statement. As the court noted, the defense had the opportunity to attack the reliability of Smith's testimony before the jury.

We also reject Williams's claim that the admission of Cavitt's statement as an adoptive admission violated the Fifth Amendment. If a defendant fails to respond to an accusatory statement in circumstances that do not lend themselves to an inference that he was relying on his right to remain silent, the evidence is properly admitted. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) This is such a case. Williams had just waived his *Miranda* rights and given a full statement to the police before he entered Smith's police car. In the car, he voluntarily engaged in a conversation with Cavitt in the back seat, despite Smith's presence. The conversation included not only the statement at issue but also inquiries over whether the police had discovered weapons in their investigation, and the likelihood of going to prison, which prompted both Williams and Cavitt to laugh.

These circumstances do not suggest any reliance by Williams on his privilege against self-incrimination.

3. *The Instruction on Suppression of Evidence*

In Cavitt's trial, the prosecution requested and was granted an instruction on attempt to suppress evidence as a circumstance tending to prove a consciousness of guilt. The prosecution sought the instruction because one of the stolen handguns had been found in a hiding place in Cavit's front yard, though Cavitt had denied knowing anything about guns when he was interviewed after the crimes. Cavitt contends the instruction was unduly prejudicial because he had confessed to the theft charges, and the prosecutor's intent was to unfairly focus the jury's attention on the gun. These claims are meritless. Cavitt denied any knowledge of the missing guns, and he refers us to no point in the record where the prosecutor used the instruction in a prejudicial manner.

DISPOSITION

The judgments are affirmed.

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Parrilli, J.

We concur:

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McGuiness, P. J.

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Corrigan, J.