



## People v. Patton

2003 | Cited 0 times | California Court of Appeal | October 20, 2003

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Defendants, Derrick Terrell Patton and Tyrone Andre Miller, appeal from their multiple felony convictions. On appeal, they contend: there was no substantial evidence to support the Penal Code <sup>1</sup> section 190.2, subdivision (a)(17) robbery special circumstance finding; there was no substantial evidence to support the section 186.22, subdivision (b)(1) gang enhancement; the trial court should not have given CALJIC No. 3.16; and the sentences constitute cruel or unusual punishment. We affirm.

First, defendants contend the evidence was insufficient to support the robbery special circumstances finding. We examine this contention for substantial evidence. (People v. Michaels (2002) 28 Cal.4th 486, 515; People v. Mayfield (1997) 14 Cal.4th 668, 790-791.) Circumstantial evidence may be sufficient to support a special circumstance finding. (People v. Stanley (1995) 10 Cal.4th 764, 792-793; People v. Cain (1995) 10 Cal.4th 1, 39.) We view the evidence in a light most favorable to the judgment. (Jackson v. Virginia (1979) 443 U.S. 307, 318-319; People v. Osband (1996) 13 Cal.4th 622, 690; Taylor v. Stainer (9th Cir. 1994) 31 F.3d 907, 908-909.)

Defendants contend there is no substantial evidence to support the robbery special circumstance finding. They rely on section 190.2, subdivision (d), which states in part: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4." When there is substantial evidence that section 190.2, subdivision (d) applies, there is no requirement that the accused intend that a killing occur in order for robbery special circumstances to arise. (People v. Williams (1997) 16 Cal.4th 635, 688, fn. 21; People v. Estrada (1995) 11 Cal.4th 568, 575.) Defendants argue that there was insufficient evidence they acted "with reckless indifference to human life and as a major participant" in the killing. We disagree.



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The following constituted substantial evidence defendants acted "with reckless indifference to human life and as a major participant" in the killing. Defendants were members of a street gang. The gang's primary activities were committing robberies, selling drugs, and using narcotics. Committing robberies benefited the gang by providing it with money to purchase weapons and narcotics and enhanced its reputation. The gang was responsible for a significant number of follow-home style robberies such as occurred in this case.

Melvin Tate was a gang member along with Mr. Miller and Mr. Patton. Between March and July 2000, the three gang members committed several follow-home robberies. They committed these robberies together and with other gang members. One of the gang members would go into a bank and watch a customer make a large cash withdrawal. The identity of the customer making the large cash withdrawal would then be relayed to other gang members. The other gang members would follow the bank customer. Eventually the other gang members would rob the bank customer.

On May 23, 2000, Mr. Patton went to a bank. Mr. Patton spotted Miguel Deanda make a large cash withdrawal. Upon arriving at home, Mr. Deanda was robbed by two men. Mr. Deanda was grabbed by the neck. One of the two robbers was armed with a handgun.

On May 26, 2000, Mr. Miller and Mr. Patton went to Mr. Tate's residence. Mr. Miller and Mr. Patton asked Mr. Tate to join them in committing a robbery. Mr. Tate, who was a juvenile and considerably younger than Mr. Miller and Mr. Patton, agreed to assist in the robbery. Mr. Tate participated in the robberies because it was "something that the gang was doing." Mr. Miller and a four-year-old daughter got into one car. Mr. Tate and Mr. Patton got into a separate car. Mr. Miller and his daughter went into a bank. Mr. Miller saw Ana Savaria and Rene Franco withdraw \$7,500 in cash. Mr. Miller pointed out Ms. Savaria and Mr. Franco to Mr. Tate and Mr. Patton.

Mr. Patton drove the car with Mr. Tate as his passenger. They followed Ms. Savaria and Mr. Franco. Eventually, Ms. Savaria and Mr. Franco parked next to a car dealership. Mr. Patton parked his car nearby. Mr. Patton gave Mr. Tate a loaded gun and said, "Make sure you get the purse." Mr. Tate got out of the car, grabbed Ms. Savaria's purse, and knocked her down. Mr. Franco moved to aid Ms. Savaria. Mr. Tate then shot Mr. Franco. Thereupon, Mr. Tate returned to Mr. Patton's car who drove off. Mr. Patton and Mr. Tate then met with Mr. Miller. Mr. Patton and Mr. Miller divided the \$7,500 giving \$500 to Mr. Tate. Later, Mr. Tate pled guilty to first degree murder and testified against Mr. Miller and Mr. Patton.

The foregoing constituted substantial evidence of the major participant and reckless indifference elements of section 190.2, subdivision (d). Defendants' repeated participation in armed robberies could reasonably be found by the jury to constitute the knowing commission of acts involving the grave risk of death. (*Tison v. Arizona* (1987) 481 U.S. 137, 157; *People v. Estrada*, supra, 11 Cal.4th at p. 577.) Robbery is an inherently dangerous felony. (*People v. Terrill* (1979) 98 Cal.App.3d 291, 305.) The use of a firearm during the commission of a felony creates a substantial danger that the victim



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will be killed. (In re Tameka C. (2000) 22 Cal.4th 190, 196; People v. Bland (1995) 10 Cal.4th 991, 996.)

In this case, Mr. Patton, Mr. Tate, and Mr. Miller participated in the gang activity of committing so-called "follow home" robberies. Mr. Patton drove the car with Mr. Tate to the robbery of Mr. Franco and Ms. Savaria. Mr. Patton gave the gun to Mr. Tate who shot Mr. Franco. Mr. Tate was instructed to be certain he got Ms. Savaria's purse. After Mr. Tate shot Mr. Franco, defendants fled the scene. Mr. Patton made no effort to assist Mr. Franco who laid dying at the scene of the robbery.

This was sufficient to constitute reckless indifference within the meaning of section 190.2, subdivision (d) as to Mr. Patton. The question is somewhat closer as to Mr. Miller who was not physically present at the scene. However, the circumstantial evidence indicated Mr. Miller regularly participated in the gang's practice of committing robberies. Further, Mr. Miller identified Mr. Franco and Ms. Savaria as they withdrew \$7,500 in cash. From the evidence regarding his participation in earlier armed robberies and what transpired, it was reasonable to infer that Mr. Miller certainly knew that a armed robbery would occur in an effort by his fellow gang members to recover the \$7,500 in cash that had been withdrawn from the bank. Under these circumstances, there is substantial evidence to support the major participant and reckless indifference elements of section 190.2, subdivision (d) as to both Mr. Patton and Mr. Miller. (People v. Proby (1998) 60 Cal.App.4th 922, 928-931; People v. Mora (1995) 39 Cal.App.4th 607, 617.)

Second, defendants contend there was insufficient evidence to support the section 186.22, subdivision (b)(1) gang enhancement. This contention has no merit. We examine this contention for substantial evidence. (People v. Augborne (2002) 104 Cal.App.4th 362, 371; People v. Ortiz (1997) 57 Cal.App.4th 480, 484.) Two detectives testified: defendants' gang was responsible for a large number of follow home robberies; the robberies were committed for purposes of funding other illegal activities; only members of the gang participated in the robberies; and Mr. Patton, Mr. Miller, and Mr. Tate were all members of the gang. Additionally, Mr. Tate admitted that he participated in the robberies because it was "something that the gang was doing." This constituted substantial evidence to support the section 186.22 gang enhancement. (People v. Castaneda (2000) 23 Cal.4th 743, 745-753; People v. Gardeley (1996) 14 Cal.4th 605, 610-619; People v. Duran (2002) 97 Cal.App.4th 1448, 1457, 1466 & fn. 8.)

Third, defendants argue that the trial court erroneously instructed the jury pursuant to CALJIC No. 3.16. <sup>2</sup> Defendants argue that CALJIC No. 3.16 improperly implied that they were accomplices of Mr. Tate. This contention has no merit. Jury instructions are evaluated to determine whether there is a reasonable likelihood the jurors were misled. (People v. Catlin (2001) 26 Cal.4th 81, 152; People v. Frye (1998) 18 Cal.4th 894, 957.) There is no reasonable likelihood that any juror would have construed CALJIC No. 3.16 as implying that defendants were accomplices of Mr. Tate. We agree with the Attorney General that even if there was a remote possibility of such, the giving of CALJIC No. 3.16 was harmless error. (Chapman v. California (1967) 386 U.S. 18, 24; People v. Jones (2003) 30 Cal.4th 1084, 1120.)



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Fourth, defendants contend their sentences constituted cruel or unusual punishment. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) This contention is meritless. Defendants have engaged in a brutal gang-motivated homicide of a defenseless unarmed victim. Defendants participated in this brutal activity as part of an ongoing series of follow home robberies in South Los Angeles. Mr. Miller, who previously had been sentenced to prison, had been convicted of: two felony drug offenses; misdemeanor battery; and robbery. The robbery arose out of what Mr. Miller characterized as a "drug deal that went bad." Mr. Miller was interviewed by a probation officer. During the interview, Mr. Miller lied about his gang involvement. Mr. Patton was subject to three separate wardship orders for various drug and one firearm offenses for which he ultimately was committed to the youth authority. As an adult, Mr. Patton had been convicted of misdemeanors or felonies on six separate occasions. Mr. Patton had previously served sentences in state prison and repeatedly violated the terms of his parole. Mr. Patton was on parole at the time of the killing in this case. Mr. Patton refused to even speak with the probation officer. The probation officer recommended that both Mr. Miller and Mr. Patton received the maximum terms in state prison. The probation officer was unable to find any mitigating circumstances as to either Mr. Miller or Mr. Patton. As to Mr. Miller, the probation officer identified seven aggravating circumstances. As to Mr. Patton, the probation officer identified eight aggravating circumstances. No constitutional violation occurred as result of their sentences. (Rummel v. Estelle (1980) 445 U.S. 263, 268; Spencer v. Texas (1967) 385 U.S. 554, 560; People v. Alvarado (2001) 87 Cal.App.4th 178, 199-200.)

The judgments are affirmed.

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We concur:

GRIGNON, J.

MOSK, J.

1. All future statutory references are to the Penal Code.

2. Pursuant to CALJIC No. 3.16, the jury was instructed as follows, "If the crimes of murder and robbery in Counts 1 and 2 were committed by anyone, the witness Melvin Tate was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration."

