IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, Plaintiff, v. JESSE JAMES CAMACHO, Defendant.	Criminal Case No. 98-175 FCD Case No. J98-165 **ORDER DENYING DEFENDANT'S MOTIONS FOR NEW TRIAL AND FOR JUDGMENT OF ACQUITTAL**

I. INTRODUCTION

This matter came before the Court on April 21, 1999, in Courtroom A on Defendant's motions for new trial and for judgment of acquittal. Barry A. Hirshbein, Esq. appeared on behalf of Plaintiff. G. Anthony Long, Esq. appeared on behalf of Defendant. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

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FOR PUBLICATION

II. FACTS

On March 12, 1999, after a four-day jury trial, Defendant Jesse James Camacho ("Defendant") was found guilty of first degree murder under 6 CMC § 1101(a) and 6 CMC § 201.

On March 25, 1999, Defendant filed motions for new trial and for judgment of acquittal.

III. ISSUE

1. Whether Defendant has shown grounds for a new trial?

2. Whether Defendant is entitled to a judgment of acquittal?

IV. ANALYSIS

4. Motion for new trial

1. Com.R.Crim.P.33

Rule 33 of the Commonwealth Rules of Criminal Procedure provides, in pertinent part, that:

"The court on motion of a defendant may grant a new trial to him/her if required in the interest of justice . . . ".

Com.R.Crim.P.33. A motion for new trial is directed to the discretion of the trial court, which should grant it only in an exceptional case in which the evidence weighs heavily against the verdict. United States v. Merriweather, 777 F.2d 503, 507 (9" Cir.), cert. denied, 475 U.S. 1098, 106 S.Ct. 1497, 89 L.Ed.2d 898 (1986).

2. Prosecutorial misconduct

Defendant contends that the prosecutor made several references during his closing argument in regard to Defendant not testifying at trial. Moreover, Defendant contends that the prosecutor made improper references in regard to evidence in the government's possession which was not presented at trial.

A claim of prosecutorial misconduct must be viewed in the entire context of the trial to determine whether the alleged misconduct has denied the defendant a fair trial. United States v. Christophe, 833 F.2d 1296, 1300-1301 (9th Cir. 1987). It must appear more probable than not that the alleged misconduct materially affected the jury's verdict to justify a reversal. Id.

In the case at bar, the prosecution did comment on Defendant's extra-judicial statements which had been admitted during the trial and mentioned that such statements were to be given the same weight as though offered as testimony in open court." In doing so, however, the prosecutor reminded the jury that Defendant need not take the stand to refute the statements nor could the jury consider Defendant's failure to do so against him. Moreover, the Court notes that counsel for Defendant made no objection on the record to any of the statements alleged as improper. See Commonwealth v. Saimon, 3 N.M.I. 365,380 (1992)(failure to object to allegedly improper statements at trial ordinarily precludes appellate review). In any event, the Court finds that the references made by the prosecutor cannot be considered so egregious as to warrant a new trial.

As a second example of prosecutorial misconduct, Defendant contends that the prosecutor made statements in rebuttal at the close of the case concerning evidence in the government's possession supporting the charges against Defendant that was not presented at trial. However, Defendant makes no specific mention of what the comments were or how Defendant was prejudiced by them. Therefore, the Court will not rule as to whether any such statements warrant a new trial.

3. Defense instructions

a. Justification

Defendant contends a new trial is warranted because the Court erred in failing to instruct the jury on the common law defense of justification by necessity. In support of his argument, Defendant offers the case of Commonwealth v. Delos Reyes, 4 N.M.I. 340 (1996) wherein the court noted that although necessity is not statutory defense in the Commonwealth, it is an available defense at common law. Notwithstanding the availability of such a defense, at common law a defendant could not excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person. Watson v. State, 55 So.2d 441,443 (Miss. 195 1)(the fact that the command of another to commit the homicide is enforced by threats of death does not relieve the accused of criminal liability). Therefore, since

[1/] The four statements attributable to Defendant were: (1) Defendant's statement to the police that he did not leave his residence that day; (2) that Defendant ordered Ian Dela Cruz to steal the sword; (3) that Defendant ordered Ian Dela Cruz to kill; and (4), that Defendant told Carlos Sanchez not to return to the victim's house.

Ian Dela Cruz could not have availed himself of the common law defense of necessity, Defendant was not entitled to a similar instruction.

b. Duress

Defendant contends that he was entitled to an instruction on the defense of duress on the grounds that duress is a complete defense to murder. As such, if Ian Dela Cruz acted under duress he could not have committed murder and therefore, Defendant could not be convicted of murder either.

In making his argument, Defendant offers the case of Spunaunle v. State, 946 P.2d 246 (Okl.Cr. 1997) which held that duress is available as a defense to first degree murder. In doing so, however, the Spunaugle court based its decision on its interpretation of an Oklahoma duress statute. Here, the CNMI has no statute governing the defense of duress. Therefore, the Court finds it appropriate to look to the common law. 7 CMC § 3401. At common law, duress was no defense to the crime of murder. United States v. LaFleur, 971 F.2d 200, 205-206 (9th Cir.), cert.denied, 507 U.S. 924, 113 S.Ct. 1292, 122 L.Ed.2d 683 (1993). Therefore, since Ian Dela Cruz could not have availed himself of the defense of duress under the common law, Defendant was not entitled to a similar instruction.

c. Principal

Defendant contends that his common law defenses have been preserved under 6 CMC § 25 1 (d), which provides:

> "Nothing contained in this title is to be construed to deny a defendant the right to raise any defense available at common law."

6 CMC § 251(d). Therefore, Defendant asserts that since he was not the primary actor in the crime, he cannot be convicted as a common law principal in the first degree.[2/] However, as Plaintiff points out, the Commonwealth abrogated the common law distinction between principals in the first and second degrees when it recodified 11 TTC § 2 at 7 CMC § 201. Although the text of the statutes

[2/] At common law, a principal in the first degree was the perpetrator, the primary actor, the person who engaged personally in the act or omission proscribed by law. Batt v. State, 901 P.2d 664, 666, n.2 (Nev. 1995).

ppears conflicting, the Court finds it logical to conclude that the legislature sought to preserve only hose common law defenses not previously addressed by codified Commonwealth law. Accordingly, he Court finds that no error was committed by refusing to instruct the jury on the common law lefense of being a principal in the first degree.

4. Gang membership.

Defendant contends that the Court erred when it allowed the government to introduce evidence of gang membership. Therefore, a new trial is warranted.

The Ninth Circuit has routinely held that evidence relating to gangs and other organizations s admissible when relevant to the issue of motive. See, e.g., United States v. Santiago, 46 F.3d 885, 389 (9th Cir.1995); United States v. Winslow, 962 F.2d 845, 850 (9th Cir.1992); United States v. Skillman, 922 F.2d 1370, 1374 (9th Cir. 1990). Here, the government introduced evidence of gang nvolvement to prove motive for an otherwise inexplicable act, to wit, why Mr. Dela Cruz would kill an innocent third party. Such evidence is readily admissible. State v. Cox, 908 P.2d 603, 609 (Kan. 1995). Therefore, the admission of gang evidence was proper.

5. Cumulative error

As a final argument, Defendant argues that cumulative error denied him a fair trial. Therefore, he is entitled to a new trial.

Cumulative error, in certain cases, may require reversal. Saimon, supra, 3 N.M.I. at 398. Here, the Court finds no merit to any of Defendant's arguments of error. Accordingly, his claim of cumulative error must also fail. See United States v. Move, 951 F.2d 59, 63 (5" Cir. 1992).

B. Motion for judgment of acquittal

1. Com.R.Crim.P.29(a)

Rule 29(a) of the Commonwealth Rules of Criminal Procedure provides, in pertinent part, that:

> "The court on motion of a defendant . . . shall order the entry of judgment of acquittal on one or more offenses charged in the information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. "

Com.R.Crim.P.29(a). The test applied in assessing a motion for judgment of acquittal is whether any rational trier of fact could have found the essential elements of the crime in question beyond a reasonable doubt. Commonwealth v. Ramangmau, 4 N.M.I. 227, 237-238 (1995). A trial court should deny a motion for a judgment of acquittal unless the government's evidence is insufficient to sustain a conviction. Id. In other words, the motion must be granted only if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. Id.

2. Evidence of underlying offense

As a primary argument, Defendant contends that he cannot be found guilty of first degree murder under an aiding and abetting theory because the prosecution failed to rebut the presumption under 6 CMC $253 that Ian Dela Cruz was capable of committing murder. Thus, without proof that Dela Cruz was capable of committing the underlying crime, Defendant cannot be held liable as a principal.

6 CMC § 253 which provides, in pertinent part, that:

> "Children between the ages of 10 and 14 are also conclusively presumed to be incapable of committing any crime, except the crimes of murder and rape, in which case the presumption is rebuttable."

6 CMC § 253. Regardless of the presumption issue, the Ninth Circuit has held that in a prosecution for aiding and abetting, a person who causes the commission of an offense is punishable as a principal even though the person who completes the wrongful act violates no criminal statute because of lack of criminal intent or capacity. United States v. Laurins, 857 F.2d 529, 535 (9" Cir. 1988).[3/] Therefore, the fact that Dela Cruz may have lacked the requisite criminal capacity to commit murder does not prevent Defendant from being punished as a principal.

[3/] See also Beausoliel v. United States, 107 F.2d 292, 297 (D.C.Cir.1939)(it is a general principal of criminal law that one may be guilty of a crime where the prohibited act is committed through the agency of a child acting under the direction and compulsion of the accused).

3. Dela Cruz testimony

As an alternative argument, Defendant contends that the testimony of Ian Dela Cruz was incredible and/or unsubstantial to prove that Defendant possessed the necessary mens rea to support a conviction of first degree murder.

The uncorroborated testimony of an accomplice is enough to sustain a conviction unless it is incredible or unsubstantial on its face. United States v. Lopez, 803 F.2d 969,973 (9" Cir. 1986) , cert. denied, 481 U.S. 1030, 107 S.Ct. 1958, 95 L.Ed.2d 530, reh'g denied, 483 U.S. 1012, 107 S.Ct. 3246, 97 L.Ed.2d 750 (1987). Only when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law. United States v. Lindell, 881 F.2d 1313, 1322 (5th Cir.1989).

Ian Dela Cruz, who was fourteen at the time of the murder, testified that Defendant had ordered him to murder Antonio Sablan or that gun-toting people watching from the "boonies" would kill him and his family if he didn't comply. To further his belief that the threat was legitimate, Dela Cruz testified that he even cried profusely when Defendant ordered him to kill. Defendant contends that the prosecution failed to present any evidence to give credence to the testimony of Dela Cruz. However, Dela Cruz's testimony was not incredible on its face - the jury could and did find it believable and credible. That was its proper prerogative. United States v. Clevenger, 733 F.2d 1356, 1359 (9" Cir. 1984). Viewing the evidence in the light most favorable to the government, there was sufficient evidence that Defendant committed the crime of which he was convicted.

V. CONCLUSION

For all the reasons stated above, Defendant's motions for new trial and for judgment of acquittal are **DENIED.**

So ORDERED this 21 day of June, 1999.

TIMOTHY H. BELLAS, Associate Judge