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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO DIAZ, Defendant and Appellant.	B276523 Los Angeles County Super. Ct. No. TA136133

APPEAL from a judgment of the Superior Court of Los Angeles County, Pat Connolly, Judge. Affirmed as modified with directions.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On December 22, 2014 at 2:00 a.m., defendant Guillermo Diaz broke into his estranged wife's apartment and slashed her boyfriend's throat. A jury convicted him of residential burglary, first degree murder, resisting an officer, and dissuading a witness. On appeal, defendant contends the trial court should have granted his request to instruct the jury that provocation and heat of passion could negate the malice element of murder or raise reasonable doubt about the premeditation and deliberation element of first degree murder. We conclude any error was harmless because the jury's verdict also encompassed felony murder—and a defendant is guilty of felony murder even if the killing was unintentional or provoked.

In response to our request for letter briefs, defendant also contends, and we agree, that the court should have stayed his burglary sentence under Penal Code section 654. Accordingly, we modify the sentence to stay count 3 and affirm as modified.

PROCEDURAL BACKGROUND

By information filed June 25, 2015, defendant was charged with first degree murder (Pen. Code,[1] § 187, subd. (a); count 1); attempted first degree murder (§ 664/187, subd. (a); count 2); residential burglary (§ 459; count 3); rape (§ 261, subd. (a)(2); count 4); resisting an executive officer (§ 69; counts 5–6); and dissuading a witness (§ 136.1, subd. (b)(1); counts 7–8). As to count 1, the information also alleged that defendant personally used a deadly weapon (a knife). (§ 12022, subd. (b)(1).) Defendant pled not guilty and denied the allegation.

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[1] All undesignated statutory references are to the Penal Code.

After a jury trial at which he testified in his own defense, defendant was found guilty of counts 1, 3, and 5–8. As to count 1, the jury also found the deadly weapon allegation true. The jury was unable to reach verdicts on counts 2 and 4, and the court later dismissed them.

The court sentenced defendant to an aggregate determinate term of 2 years 8 months consecutive to an indeterminate term of 26 years to life. For the determinate term, the court selected count 5 (§ 69) as the base term and sentenced defendant to the midterm of two years. The court imposed 8 months for count 7 (§ 136.1, subd. (b)(1))—one-third the midterm of two years—to run consecutively, plus full-term concurrent sentences for counts 3 (§ 459), 6 (§ 69), and 8 (§ 136.1, subd. (b)(1))—the upper term of six years for count 3, the middle term of two years for count 6, and the middle term of two years for count 8. For the indeterminate sentence, the court imposed the mandatory term of 25 years to life for count 1 (§ 187, subd. (a)) plus one year for the knife enhancement (§ 12022, subd. (b)(1)), to run consecutively.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

Sarah met defendant in October 2009 and moved in with him soon after. They married in May 2010. She has two children, one of whom is defendant's biological child. In December 2010, Sarah moved with defendant and the children to a second-story two-bedroom apartment in Gardena.

On July 9, 2014, Sarah began dating Robert Villagran. Two weeks later, she told defendant she wanted to separate. Defendant finally moved out of the Gardena apartment in September 2014 after Sarah got a restraining order against him.

She had the locks changed the following month, and was in the process of getting a divorce.

On December 22, 2014, at around 2:00 a.m., defendant broke into the apartment through a window.[2] Sarah awoke to a crashing sound. She got out of bed to investigate, and saw defendant crouched down in the living room. Sarah screamed, "What the fuck are you doing here?" and demanded that defendant "get the fuck out." Defendant did not respond.

At that point, Villagran walked out of the bedroom and into the hallway. Defendant had never seen him before. Defendant said, "I knew you had somebody in here" and charged at Villagran with his fists raised. Defendant was cursing at Villagran and saying, "You stupid fuck. What the fuck are you doing here in my house, in my bed?" Defendant punched Villagran, and they began to fight.

During the fight, defendant and Villagran backed into the bedroom and fell onto the bed. Sarah tried unsuccessfully to separate them. She heard Villagran scream. Sarah got off the bed and saw defendant standing over Villagran, stabbing him.

At that point, the children came into the room and started screaming. Defendant picked them up and put them back to bed, then returned to Sarah's bedroom and resumed his attack on Villagran. When Sarah tried to get between them, defendant threw her to the edge of the bed, got on top of her, choked her, and tried to break her neck.

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[2] The screen was removed and defendant's fingerprints were discovered on the window. Surveillance footage from a nearby business showed him entering the apartment through the window.

Eventually, defendant got off Sarah and went after Villagran, who had gotten up. Defendant knocked him to the ground, and Villagran started crawling to the bedroom door. Defendant yelled, "Get the fuck out of here. You get the fuck out of here." Villagran responded, "I'll leave. I'll leave." But as Villagran continued crawling out of the bedroom, defendant walked over to him, crouched down, and slit his throat.

Villagran died of three stab wounds to the neck: a seven-inch "large gaping wound" that "cut[ ] into the muscle of the neck and into the jugular vein and segments of the carotid artery," a nine-inch "gaping big cut" across the neck that severed the carotid artery, and a six-inch cut that severed the jugular vein and carotid artery. Defendant also cut or stabbed Villagran's ears, face, hands, wrists, back, chest, and abdomen.

Meanwhile, Sarah had given her daughter her phone and told her to call 911. Defendant snatched the phone away, and Sarah begged him to call for help. Defendant refused. He explained, "My mom told me to man up, and I manned up. This is my family. I'm manning up." He told Sarah that Villagran was "done. He's gone. I'll take care of him later." Then he pushed Sarah into the bathroom shower to wash off Villagran's blood.

Neighbors had called the police after hearing Sarah and the children screaming for help. Sarah was in the shower when she heard a knock at the door. Still naked, she ran out of the shower and crouched next to the children in the living room. Defendant told the officers nothing was wrong. When they said they wanted to come in and see for themselves, defendant threw a box cutter

in a gift bag behind the Christmas tree. The box cutter was covered in blood.[3]

Defendant eventually opened the door and complied with the officers' order to step outside and put his hands behind his head. The officers noticed defendant was bleeding from the head and that his hands were covered in blood. As defendant left the apartment, Sarah screamed, "Help." "He just killed someone, he just killed someone." Defendant tried to flee, but officers struggled with him until backup arrived. After about 10 minutes, the officers were able to subdue him and take him into custody. A search of defendant's pockets revealed a screwdriver and Sarah's mobile phone.

Defendant testified on his own behalf that he went to the apartment that night after waking up from a nightmare about his children. When he arrived, he thought he heard his son crying, so when no one answered his knocks, he entered through the window. Defendant thought Sarah might not be home because her brother said she had been neglecting the children and leaving them alone, so after checking on the children, defendant knocked on her bedroom door. She emerged with Villagran, whom he had never seen before. Both of them started yelling at and hitting defendant. As defendant turned to leave, he was hit from behind and fell to the ground. Eventually, he began to fight back. Though the details were blurry, defendant remembered being scared and thinking Sarah and Villagran were trying to kill him.

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[3] Officers later recovered a small steak knife from the same gift bag. Blood on both knives matched Villagran's DNA.

Defendant acknowledged that he owned the box cutter, but said he did not bring it with him when he broke into the apartment.

DISCUSSION

Defendant contends the court erroneously denied his request to instruct the jury with CALCRIM Nos. 522 and 570, concerning provocation and heat of passion. The People argue the court properly refused these instructions because they were not supported by substantial evidence and, in any event, any error was harmless. In response to our request for letter briefs, defendant also contends the court should have stayed his sentence for count 3 under section 654. The People argue multiple punishment was appropriate because defendant harbored distinct objectives during the burglary and the murder, and defendant committed acts of violence against both Villagran and Sarah.

1. Any instructional error was harmless.

1.1. Murder and Felony Murder

Murder is "the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) Express malice is the intent to kill, whereas implied malice exists "where the defendant … acted with conscious disregard that the natural and probable consequences of the act or actions were dangerous to human life. [Citation.]" (*People v. Gonzalez* (2018) 5 Cal.5th 186, 197.)

"Not all murder requires the People to prove the defendant killed intentionally or with conscious disregard for life," however. (*People v. Rios* (2000) 23 Cal.4th 450, 460, fn. 6 (*Rios*).) A killing may also become murder by operation of the felony-murder rule.

"Under the felony-murder rule, a homicide is murder when it occurs in the course of certain serious and inherently dangerous felonies. [Citations.] In such cases, the intent to commit a dangerous felony that actually results in death is substituted for malice, thus establishing the extent of culpability appropriate to murder. [Citations.]" (*Ibid.*) "Felony-murder liability," therefore, "does not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony. [Citation.]" (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654 (*Gonzalez*).)

"Murder is divided into first and second degree murder. (§ 189.) 'Second degree murder is the unlawful killing of a human being with malice … .' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) "If the … killing was also deliberate and premeditated, the jury could convict the defendant of first degree murder." (*People v. Gonzalez*, *supra*, 5 Cal.5th at p. 197.) Felony murder, on the other hand, is divided into degrees based on the felony committed. "If the felony is listed in section 189, the murder is of the first degree; if not, the murder is of the second degree. [Citations.]" (*Gonzalez*, *supra*, 54 Cal.4th at p. 654.) Burglary, the felony at issue here, is listed in section 189.

1.2. Manslaughter

An intentional, unlawful killing *without* malice is manslaughter. (§ 192; *Rios*, *supra*, 23 Cal.4th at p. 460.) "A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" [citation], or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citations].' " (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

"These mitigating circumstances reduce an intentional, unlawful killing from murder to voluntary manslaughter 'by *negating the element of malice* that otherwise inheres in such a homicide [citation].' [Citation.] *Provocation* has this effect because of the words of section 192 itself, which specify that an unlawful killing … committed 'upon a sudden quarrel or heat of passion' is voluntary manslaughter. [Citation.] *Imperfect self-defense* obviates malice because that most culpable of mental states 'cannot coexist' with an actual belief that the lethal act was necessary to avoid one's own death" or serious bodily injury. (*Rios*, *supra*, 23 Cal.4th at p. 461.) As we have discussed, however, felony murder does not require malice. (*Gonzalez*, *supra*, 54 Cal.4th at p. 654.) Accordingly, provocation and heat of passion are irrelevant to felony murder. (*People v. Robertson* (2004) 34 Cal.4th 156, 165, overruled on other grounds by *People v. Chun*, *supra*, 45 Cal.4th at pp. 1199–1201.)

1.3. Instructions Below

Here, the court instructed on murder, felony murder, voluntary manslaughter due to imperfect self-defense, and the legally exonerating effect of actual self-defense. But defendant also asked the court to instruct with CALCRIM Nos. 570 and 522. CALCRIM No. 570 informs the jury that murder may be reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. CALCRIM No. 522 allows the jury to reduce malice murder from first degree to second degree if the defendant was provoked. The court refused both instructions based on its conclusion that the evidence of a sudden quarrel or heat of passion was too insubstantial for the theory to merit consideration by the jury.

Defendant contends the court erred because the facts supporting the self-defense instructions also supported heat-of-passion and provocation instructions. (See, e.g., *People v. Breverman* (1998) 19 Cal.4th 142, 148, 162–164 [error not to give heat-of-passion instruction where jury was instructed on both theories of self-defense]; *People v. Barton* (1995) 12 Cal.4th 186, 202–203 [sufficient evidence supported giving both heat-of-passion and imperfect-self-defense instructions]; *People v. St. Martin* (1970) 1 Cal.3d 524, 531 [" 'In the usual case,' " a heat-of-passion instruction " 'supplements the self-defense instruction.' "]; *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1138–1143 [error not to give provocation instruction in addition to imperfect self-defense instruction].) We do not reach that issue, however, because, as we explain below, any error was harmless.[4] (*People v. Demetrulias* (2006) 39 Cal.4th 1, 24–25 ["We need not decide whether the trial court was required to instruct on heat-of-passion voluntary manslaughter, because any error in failing to do so was clearly harmless, even under the standard" for federal constitutional errors].)

1.4. Any error was harmless.

Even assuming the court committed instructional error, we will not reverse the judgment unless we also determine the error was prejudicial. But the law is presently unsettled on which prejudice test applies to the failure to instruct on heat of passion or provocation. (See *People v. Breverman*, *supra*, 19 Cal.4th at

[4] At trial, defense counsel argued that the court's initial ruling on this point violated the California and federal constitutions by forcing defendant to testify to obtain the instructions. Defendant has not raised that issue on appeal and we do not address it.

p. 170, fn. 19 [declining to decide issue]; *id*. at pp. 188–191 (dis. opn. of Kennard, J.) [suggesting the erroneous refusal of instructions on heat of passion is federal constitutional error due to the "unique relationship between murder and voluntary manslaughter"]; *People v. Moye* (2009) 47 Cal.4th 537, 558, fn. 5 [declining to decide issue]; *People v. Lasko*, *supra*, 23 Cal.4th at p. 113 [same]; *People v. Millbrook*, *supra*, 222 Cal.App.4th at pp. 1143–1146 [declining to decide the "difficult issue" because the error was prejudicial even under state law]; *People v. Thomas* (2013) 218 Cal.App.4th 630, 641–644 [on transfer from California Supreme Court, refusal to give requested instruction was federal constitutional error].)

Defendant argues the error violated his federal due process right to have the jury consider his theory of the case and every element of the crime, therefore requiring the People to prove beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 23–24.) The People assert the error is one of state law, which requires defendant to establish that it is reasonably probable he would have achieved a more favorable result absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We need not wade into this debate, however, because we conclude any error was harmless even under the more stringent *Chapman* test.

The People contend that because the jury found defendant acted willfully, deliberately, and with premeditation, it necessarily found that he did not act under the heat of passion; that the evidence was overwhelming; there was no evidence defendant was provoked; and that the jury could have relied on a felony-murder theory. Defendant responds that because provocation and heat of passion can negate malice or raise doubts

about the presence of premeditation and deliberation, the jury's conclusion that he acted with malice aforethought is not dispositive, and that the jury's lengthy deliberations, numerous requests, and inability to reach verdicts on two counts indicate the case was close. He does not address felony murder. We agree with the last of the People's contentions and conclude beyond a reasonable doubt that any error was harmless in light of the jury's verdict on the burglary count.

"Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Demetrulias*, *supra*, 39 Cal.4th at p. 25 [failure to instruct on heat-of-passion "voluntary manslaughter was … harmless, as the jury necessarily determined the killing was first degree murder, not manslaughter, under [felony murder] instructions"].)

In this case, the jurors were instructed on alternative theories of first degree murder: deliberate, premeditated murder with malice aforethought and felony murder. They were also instructed that they did not need to agree on which theory applied. (CALCRIM No. 548; see *People v. Moore* (2011) 51 Cal.4th 386, 412–413 [lesser offenses of second degree murder and manslaughter are not legally available if defendant killed the victim in the commission of a burglary or robbery].) In closing argument, the prosecutor explained that the jury could convict on either theory.

Defendant concedes that in "this case, there was no question that appellant fatally stabbed Villagran," and asserts

that the "sole question for the jury was appellant's degree of culpability." We disagree.

Certainly, provocation or heat of passion can reduce an unlawful, intentional killing from first degree to second degree murder, or to voluntary manslaughter, by negating malice or by raising a reasonable doubt about the premeditation and deliberation element of first degree murder. (See *Rios*, *supra*, 23 Cal.4th at p. 461.) Yet even assuming a properly instructed jury would have agreed that provocation or heat of passion negated malice and reduced the killing to voluntary manslaughter, or raised a reasonable doubt about whether defendant acted with premeditation and deliberation and reduced the killing to second-degree murder, that conclusion would not have helped defendant under the *felony-murder* theory—because, as discussed, provocation and heat of passion are irrelevant to felony murder. (*People v. Robertson*, *supra*, 34 Cal.4th at p. 165.) And this jury was properly instructed on felony murder.

The elements of felony murder by burglary are:

- The defendant committed or attempted to commit burglary;
- The defendant intended to commit burglary; and
- While committing or attempting to commit burglary, the defendant caused the death of another person.

(§ 189; see CALCRIM No. 540A.)

Here, the jurors convicted defendant of burglary. And they concluded he killed Villagran. Those conclusions, taken together, established that defendant was guilty of felony murder. No malice was required. Indeed, the jury may well have accepted

that defendant acted in imperfect self-defense. (See, e.g., *People v. Balderas* (1985) 41 Cal.3d 144, 197 ["neither 'heat of passion' nor provocation can ever reduce a *murder properly based on the felony-murder doctrine* to voluntary manslaughter, and an instruction to that effect would be error"]; see *People v. Seaton* (2001) 26 Cal.4th 598, 613 ["under the felony-murder rule, a killing in the commission of certain felonies specified in [section] 189, is first degree murder, not manslaughter, even if the killer acts in unreasonable self-defense"].)

"Under the felony-murder rule, [defendant's] commission of burglary, together with the killing of the victim[ ] in the commission of the burglary, made him liable for murder." (*People v. Cain* (1995) 10 Cal.4th 1, 31; *People v. Hardy* (2018) 5 Cal.5th 56, 100 [failure to instruct on provocation harmless where court also instructed on felony murder and jury found the predicate felonies true because "the jury necessarily found that [the] murder was first degree murder under a felony-murder theory"]; *People v. Visciotti* (1992) 2 Cal.4th 1, 57, fn. 25 ["The jury found under properly given instructions that the murder was intentional, and was committed in the perpetration of the robbery, thus establishing that the killing was murder of the first degree under the felony-murder rule and section 189 without the necessity of proving malice. Any error in failing to instruct on voluntary manslaughter was harmless. [Citations.]"].)

Thus, even if the jury had been instructed on provocation and heat of passion, and even if the jury had accepted defendant's testimony that Villagran and Sarah attacked him, the verdict would be the same. Accordingly, any error was harmless beyond a reasonable doubt.

2. Count 3 must be stayed under section 654.

Under section 654, when a criminal defendant commits multiple offenses incident to a single objective, he may be punished for only one offense. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Whether a course of conduct is divisible depends on the actor's intent and objective. (*Id.* at pp. 1205–1206; *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) That issue is a question of fact for the trial court. (*People v. Porter* (1987) 194 Cal.App.3d 34, 38.) We uphold all implied or express factual determinations supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730–731.)

Here, the court opted to run count 3 (burglary) concurrently to the remainder of the sentence because the burglary was "part and parcel of the first degree murder, as far as the court sees it." This conclusion was supported by substantial evidence because, as discussed, burglary was the predicate felony supporting the felony-murder conviction. Based on its own factual finding, therefore, the court was required to stay count 3 under section 654.[5] (See *People v. Islas* (2012) 210 Cal.App.4th 116, 129 [concurrent terms for false imprisonment should have been stayed when burglary was based entirely on entry with intent to commit false imprisonment].)

[5] We disagree with the People that this language indicates the court believed defendant had separate intents.

DISPOSITION

The judgment is modified to stay count 3 (Pen. Code, § 459) under Penal Code section 654. As modified, the judgment is affirmed.

Upon issuance of the remittitur in this case, the court is directed to correct the June 27, 2016 minute order and the abstract of judgment to reflect the judgment as modified and to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.