Filed 5/10/17 P. v. Miles CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEBRA LYNN MILES, Defendant and Appellant.	B269703 (Los Angeles County Super. Ct. No. SA082880)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathryn A. Solorzano, Judge. Affirmed.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Debra Lynn Miles of the following crimes: murder, with the special circumstance allegation that it was committed during a burglary and a robbery (Count 1; Pen. Code,[1] §§ 187, subd. (a); 190.2, subd. (a)(17)); robbery, with the finding that it was committed in an inhabited dwelling and in concert with two or more persons (Count 2; §§ 211; 213, subd. (a)(1)(A)); first degree residential burglary with another person, not an accomplice (Count 3; §§ 459; 667.5, subd. (c)); and conspiracy to commit robbery. (Count 4; §§ 182, subd. (a)(2); 211.) On appeal, Miles claims the prosecutor committed misconduct and the trial court erred in failing to instruct the jury on the lesser included offense of second degree murder. We affirm.

FACTS

The Attack

In December 2012, victim John Woods lived in an apartment on 126th Street in Hawthorne with Jerry Ammons. Woods slept on a couch in the living room, and sold drugs from a truck that he parked in front of the apartment building. Miles visited Woods at the apartment on a number of occasions, and Ammons knew Miles from her visits.

Early in the morning on December 23, 2012, Ammons was sleeping in his bed when he woke up from the sound of the bathroom door closing. A few minutes later, Ammons saw Miles walk from the bathroom and go into the kitchen toward the living room. Ammons remained in bed, but then heard a sound like glass breaking and got up and went to the living room to check it out.

---

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

When Ammons entered the living room, he saw Woods being pinned down on the couch and hit by Marques Borney. Borney ordered Ammons to sit down or be shot.[2] As Ammons watched, Borney continued to hit Woods in the face numerous times while repeatedly demanding, "Where's the money?" When Woods would reply that he did not know, Borney would repeat his demand for money. Woods continued to say he did not know, but eventually relented and said, "In my pants." At this point, Ammons looked around for Woods' pants, and noticed that they were no longer on a chair near the couch where he had seen Woods place them the previous evening. Ammons also noticed that Miles had left the apartment.

Borney stopped hitting Woods and told him to find his pants. Woods looked around and said his pants had been right there, indicating the chair, and that he did not know where they were. Borney repeatedly demanded that Woods find his pants. Woods looked for his pants under the couch, and Ammons began to help Woods. Ammons and Woods looked for the pants in the kitchen, the living room, and, then again, in and around the couch, but did not find them anywhere.

Borney again ordered Ammons to sit down, while he resumed hitting Woods in the face with his fist. Woods kept trying to get up to find his pants under the couch or behind a chair. At one point, Woods tried to resist the onslaught by swinging a bottle at Borney, but fell. Borney reacted by picking up a 750-milliliter bottle of vodka and hitting Woods in the head.

---

[2] At trial, Ammons testified he saw the shape of a gun through Borney's shirt. Miles and Borney were charged with an enhancement that a principal was armed as to counts 1 through 3, but the jury found the alleged enhancements to be not true.

Borney hit Woods in the head between eight and 15 times. Eventually, Borney got tired of beating Woods, and left the apartment.

After Borney left, Woods told Ammons that he did not want to call 911, but wanted to call his wife. Ammons gave his phone to Woods. Woods called Patricia Normis and told her that he had been robbed and hit on the head by a "400-pound man." Normis told Woods to get help. Ammons called 911, and police and paramedics responded to the scene. Woods was transported to a local hospital, where he died five days later.[3]

The Investigation

City of Hawthorne Police Department Detective The Vu investigated the Woods robbery and murder. Detective Vu and fellow police officers executed search warrants at Miles' residence and Borney's residence.

During the search at Miles' residence, police found Woods' blue denim jeans with a belt threaded through the loops in a trash can in the backyard. Miles was arrested at the scene,[4] and Detective Vu and his partner interviewed Miles about two hours after her arrest. She admitted that she had been at Woods' apartment, but denied that she had "set up" Woods. She said she

---

[3] At trial, a witness from the coroner's office testified that Woods died from blunt force trauma to his head.

[4] During his testimony at Miles's trial, Ammons viewed photographs of the pants and belt and identified them as belonging to Woods. Ammons said he specifically remembered the belt because he had given it to Woods as an early Christmas present. During Detective Vu's testimony, he recalled that Ammons had identified the pants and belt in a photograph shortly after they were found at Miles' residence.

had been in Woods' apartment for only one or two seconds, and implicated Borney ("Boss") in Woods' beating. She asserted that she ran out without trying to help Woods because she thought Ammons would do so. A recording of Miles' interview was played for the jury at her trial, and a transcript of the interview was introduced as an exhibit at her trial. We have listened to the taped interview and reviewed the transcript in addressing Miles' present appeal.

During the search at Borney's place, police recovered a .357 revolver hidden inside a heater, high school transcripts bearing his name, and parole paperwork with his name and a Department of Corrections number. Shelbie Brooks was Borney's parole agent. In May 2012, Brooks had caused a global positioning system tracking device to be placed on Borney's ankle. At Miles' trial, an expert on the "satellite tracking of people" testified that, on December 23, 2012, Borney's tracking device was within 50 meters of Ammons' (i.e., Woods') apartment at 1:40 a.m., and remained there for about 25 minutes until 2:05 a.m. Borney's tracking device was within 35 meters of Miles' residence from 1:23 a.m. to 1:31 a.m., and then again from 2:17 a.m. until 2:28 a.m.

The Criminal Case

In September 2013, the People filed an information against Miles and Borney and a third defendant, Stephanie Jackson. Later, in October 2014, the People filed an amended information jointly charging Miles, Borney, and Jackson with the crimes and special allegations detailed at the outset of this opinion. Further, the information alleged that Miles was convicted of three prior felonies within the meaning of section 1203, subdivision (e)(4). The charges against Miles and Jackson were tried to two juries in

November 2014, at which time the prosecution presented evidence establishing the facts summarized above as to Miles.[5]

Miles testified in her defense. Miles' testimony was that she and Jackson were going to Woods' apartment and that Borney on his own asked to go with them. Miles asked Jackson to let Borney come with them because Miles was "afraid of him." Miles had planned either to (1) retrieve a video theater system that she had sold to Woods, but which he had failed to pay for, or (2) get some rock cocaine. Miles testified that Borney decided, after the group arrived at Woods' apartment, that he had not gone there "for nothing," and that Borney, on his own volition, had beaten Woods. Miles admitted that, when she ran from the apartment just as Borney started his attack, she had grabbed a pair of pants with the idea of placating Borney. She explained that she had wanted to ensure that Borney would not feel that he had left "with nothing." After the events at Woods' apartment, Borney threatened Miles not to say anything to anyone or he would "blow up [her] house" and "fuck her up." Miles' trial counsel argued that Miles acted under duress; the trial court instructed the jury on duress as a defense pursuant to CALCRIM No. 3402. The court denied Miles' requests for instructions on the lesser included offense of second degree implied malice murder.

The jury returned verdicts finding Miles guilty as noted above.

---

[5] Jackson is not involved in Miles' present appeal. There are indications in the record that the criminal case against Borney proceeded separately. We are concerned in this appeal only with the outcome of the jury trial against Miles.

Miles filed a motion for new trial in which she urged the trial court to reweigh the evidence and assess credibility. Further, Miles argued that the trial court erred in failing to instruct on the "lesser crime . . . of implied malice murder." Finally, Miles argued that, in lieu of granting a new trial, the court should reduce Miles' conviction to "malice murder." Later, Miles filed supplemental memoranda of points and authorities focusing on her claim of instructional error. Within these papers, Miles also generally raised the specter of "prosecutorial error."

At a hearing on the motion, Miles' counsel and the trial court engaged in extensive exchanges on the claim of instructional error, at the end of which the court denied the motion. At that same hearing, the court rejected Miles' argument that prosecutorial error occurred when the prosecutor misstated the law as to the presumption of innocence.

At a subsequent hearing, the trial court sentenced Miles to a term of life without the possibility of parole as follows: on the special circumstance murder conviction in count 1, the court imposed a term of life without the possibility of parole. As to the robbery conviction in count 2, the court imposed a concurrent high term of six years. As to the burglary in count 3, the court imposed a concurrent high term of nine years. And, as to the conspiracy to commit robbery conviction in count 4, the court imposed a concurrent five year term. The court ordered execution of the terms on counts 2,3 and 4 to be stayed pursuant to section 654.

Miles filed a timely notice of appeal.

DISCUSSION

I. The Prosecutorial Error Claim

Miles contends all of her convictions must be reversed because the prosecutor "grossly" misstated the law as to the presumption of innocence during her final argument, and, in so doing, "reduced the People's burden of proof beyond a reasonable doubt." We disagree.

The Challenged Argument

During argument by Miles' trial counsel, he regularly pressed the idea that the prosecution had failed to meet its burden of proving that Miles was guilty beyond a reasonable doubt. As defense counsel stated at one point in his argument: "All I have to do is raise a reasonable doubt as to any of this, okay?"

In the prosecutor's final argument, she addressed the defense's argument regarding the burden of proof beyond a reasonable doubt with the following, basically one-page responsive argument:

> "[The Prosecutor]: When you walked in here, there was a presumption of innocence over this table. When you walk out of here, into that jury deliberation room, that [veil] of innocence is gone. That presumption is gone. Because the People have established this case - -
>
> "[Defense Counsel]: I'm going to object to that, that the presumption is gone when they walk into the jury room.
>
> "[The Prosecutor]: I'm not finished with my comments.
>
> "[The Court]: Go ahead.

"[The Prosecutor]: It is gone because you have heard the People prove this case to you beyond a reasonable doubt, and when that happens, the presumption of innocence is gone. And it is the People's position, as I stand before you, that that presumption of innocence is gone. Ms. Miles is guilty.

"Now I can say it in a very soft tone or I can say it in a loud tone, but the bottom line is she's guilty, there is no more presumption of innocence, and that's what a jury trial is all about.

"Robbery, burglary, conspiracy. Proof beyond a reasonable doubt. Mr. Woods was killed during the course and scope of those crimes; that is felony murder. Intent, accidental doesn't apply. That murder occurred during the course of those three felonies. She's guilty.

"The special circumstance, oh, she was a major participant. No question about it. The evidence doesn't suggest[] anything less than that. And based upon all of what you have heard, you must find her guilty. Thank you."

Analysis

1. The Defense Parses the Prosecution's Argument Unreasonably

A prosecutor has "'a wide-ranging right'" to discuss the case during his or her arguments to the jury. (*People v. Thomas* (1992) 2 Cal.4th 489, 526.) Here, we see only a possibility that the jury could have misconstrued the prosecutor's argument such that it would step into discourse beyond this range in Miles's

present case. (See, e.g., *People v. Luparello* (1986) 187 Cal.App.3d 410, 420 [a prosecutor "is not limited to Chesterfieldian politeness" during argument].) Reading the entirety of the prosecutor's closing argument challenged by Miles, we find no likelihood that the jury misconstrued or misapplied the prosecutor's remarks to mean that the People's burden to prove guilt beyond a reasonable doubt was somehow lessened. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072.) At its essence, the prosecution argument was that the evidence satisfied the People's burden of proof. The record simply does not support a finding that the prosecutor engaged in an improper attempt to persuade the court or the jury by deceptive, reprehensible methods. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) Rather, the prosecutor urged that the evidence showed Miles was guilty beyond a reasonable doubt.

We acknowledge that the following language could possibly be construed to suggest that the presumption of innocence evaporates the moment the jurors take their first step out of the jury box and onto the carpet leading to the deliberation room:

> "[The Prosecutor]: When you walked in here, there was a presumption of innocence over this table. When you walk out of here, into that jury deliberation room, that [veil] of innocence is gone. That presumption is gone. Because the People have established this case - - "

"It is misconduct to misinform the jury that the presumption of innocence is 'gone' prior to the jury's deliberations." (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159 (*Cowan*).)[6] But the prosecution did not make the statement quoted above in isolation.

Miles's contention on appeal essentially asks us to dissect the prosecution's argument word by word as if the prosecutor had stopped her argument at the very moment quoted above. Such a contrivance would ignore the totality of what the prosecution said to the jury. The quoted statement was immediately followed by a more accurate explanation that when the deliberating jury concludes that the prosecution has established a crime beyond a reasonable doubt, there is no longer a presumption of innocence – the defendant has been proven guilty. Defense counsel acknowledged as much when at the end of argument he did not seek a ruling on his earlier objection and did not renew the objection.

Read in that context, the argument here was similar to the one made in *People v. Booker* (2011) 51 Cal.4th 141 (*Booker*), where our Supreme Court found no error. There the prosecutor told the jury: " 'I had the burden of proof when this trial started

---

[6] The argument in *Cowan* clearly crossed the line. There the prosecutor argued to the jury: " 'Let me tell you that presumption [of innocence] is over. Because that presumption is in place only when the charges are read. But you have now heard all the evidence. That presumption is gone.' " (*Cowan, supra*, 8 Cal.App.5th at p. 1154.) The court called this part of the prosecution argument a "grossly inaccurate explanation of reasonable doubt." (*Ibid.*)

to prove the defendant guilty beyond a reasonable doubt, and that is still my burden. It's all on the prosecution. I'm the prosecutor. That's my job.' [¶] 'The defendant was presumed innocent until the contrary was shown. *That presumption should have left many days ago.* He doesn't stay presumed innocent.' " (*Id.* at p. 183; italics added.) In rejecting the contention that the remarks constituted misconduct, the Supreme Court stated: "Although we do not condone statements that appear to shift the burden of proof onto a defendant (as a defendant is entitled to the presumption of innocence until the contrary is found by the jury), the prosecutor here simply argued the jury should return a verdict in his favor based on the state of the evidence presented." (*Id.* at p. 185.) As in *Booker*, we also apply its conclusion that "the prosecutor here simply argued the jury should return a verdict in his favor based on the state of the evidence presented." (*Ibid.*)

2. No Prejudice Resulted From Any Asserted Error

Assuming Miles showed the prosecutor's final argument misstated the law, we find she has failed to establish prejudice. The test for prejudice on appeal on a claim of prosecutorial error is the "traditional application of this state's harmless error rule . . . ." (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Accordingly, prosecutorial error justifies reversal only when it is "'reasonably probable that a result more favorable to the defendant would have occurred'" in the absence of the improper conduct. (*People v. Haskett* (1982) 30 Cal.3d 841, 866; and see also *People v. Watson* (1956) 46 Cal.2d 818, 836.)

We find for a number of reasons no probability that the result of Miles's trial would have been different had the prosecutor not give the challenged element of her final argument. First, the trial court instructed the jury on the burden of proof, and that the jurors were required to "rely" on the court's recitation of the applicable law. (*People v. Montiel* (1993) 5 Cal.4th 877, 937-938 [due to instructions, there was no reasonable probability that any remarks during argument misled jury to defendant's prejudice].) Second, the case against Miles was overwhelming, thus diminishing any possible prejudice from the prosecutor's final argument, assuming it was erroneous. (*People v. Hardy* (1992) 2 Cal.4th 86, 172-173; *People v. Hines* (1997) 15 Cal.4th 997, 1037-1038.) Though fully presented, the jury rejected Miles claim that she acted under duress. Once that defense was rejected, there was no dispute that Miles met and conspired with Borney before they went to the victim's apartment, no dispute that she was at the victim's apartment, and no dispute that she stole the victim's pants which had the money in the pocket while Woods was being beaten. As such, the evidence showed Miles was a major participant in a planned burglary and robbery during which Woods was killed. Those proven facts encompass all of the elements of the charges and special allegations.

II. The Instructional Error Claim

Miles contends her special circumstances murder conviction must be reversed because the trial court erred in denying her request for instructions on "malice murder,"

including the lesser included offense of "[second degree] implied malice murder." We are not persuaded.

The Applicable Legal Principles

A trial court has a duty to instruct on lesser included offenses, "when the evidence raises a question as to whether all of the elements of the charged offense were present . . . , but not when there is no evidence that the offense was less than that charged." (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) To support instruction as to a lesser included offense, there must be substantial evidence from which the jury could find that the defendant was guilty of the lesser included offense, but not the charged offense. (*People v. Barton* (1995) 12 Cal.4th 186, 201.) Under these rules, a defendant "has no general right to have the jury presented with a shopping list of alternatives to the crimes charged by the prosecution." (*People v. Geiger* (1984) 35 Cal.3d 510, 514, overruled on other grounds in *People v. Birks* (1998) 19 Cal.4th 108, 112-113.)

"'Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 667-668; see *People v. Martinez* (2012) 208 Cal.App.4th 197, 199.)

On appeal, a defendant's claim that the trial court failed to instruct on a lesser included offense is subject to de novo review. (*Booker, supra,* 51 Cal.4th at p. 181; *People v. Licas* (2007) 41 Cal.4th 362, 366.)

Analysis

Miles' argument that lesser included instructions on second degree implied malice murder should have been given is defeated by *People v. Huynh* (2012) 212 Cal.App.4th 285 (*Huynh*). In *Huynh*, the Court of Appeal noted that the defendant there had cited no authority to support the proposition that second degree implied malice murder is a lesser included offense in a first degree felony-murder prosecution. (*Id*. at pp. 314-315.) The *Huynh* court recognized that our Supreme Court "has left open the question [citations]," but went on to explain why lesser instructions on second degree implied malice murder are not workable in the context of a first degree felony-murder prosecution.

In reaching its decision, the *Huynh* court quoted from *People v. Mendoza* (2000) 23 Cal.4th 896 (*Mendoza*). We do likewise: "'Where the evidence points indisputably to a killing committed in the perpetration of one of the felonies section 189 lists, the *only* guilty verdict a jury may return is first degree murder. [Citations.] Under these circumstances, a trial court 'is justified in withdrawing' the question of degree 'from the jury' and instructing it that the defendant is either not guilty, or is guilty of first degree murder. [Citation.] The trial court also need not instruct the jury on offenses other than first degree felony murder or on the differences between the degrees of murder. [Citations.] Nor need it give CALJIC No. 8.70, which provides: 'Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree. [Citation.] Because the evidence establishes as a matter of law that the murder is of the first

degree, these procedures violate neither the right under section 1126 to have a jury determine questions of fact [citation], nor the constitutional right to have a jury determine every material issue the evidence presents. [Citation].'" (*Mendoza, supra*, 23 Cal.4th at pp. 908-909.)

We agree with this analysis. Miles was either guilty of first degree felony-murder as a willing participant in a robbery and burglary, crimes that are listed in section 189, and that resulted in Woods' murder, or she was not guilty because she participated in the robbery and burglary under duress. Because the crime for which Miles stands convicted was a first degree murder as a matter of law based on the underlying listed section 189 felonies, the trial court was not required to instruct on a lesser degree of murder.

Beyond this, Miles' argument for instructions on the lesser included offense of second degree implied malice murder does not apply given the facts established at her trial. Under CALCRIM No. 520, the standard implied malice murder instruction, the jury would have been instructed on second degree implied malice murder with language which included elements along the following lines:

> "To prove the defendant is guilty of murder on the theory of malice, the following must be proven:
>
> " . . .
>
> "2. When the defendant acted, *she had a state of mind called malice aforethought* . . .
>
> " . . .
>
> "[Malice aforethought includes] implied malice.
>
> "The defendant acted with implied malice if:
>
> "1. She intentionally committed an act; and

"2. The *natural and probable consequences of the act were dangerous to human life*; and

"3. At the time she acted, *she knew her act was dangerous to human life*; and

"4. She *deliberately acted with conscious disregard for human life*. . . ." (Italics added.)

Here, there was no evidence that would have supported a finding by the jury that Miles herself did any act whose natural and probable consequences "was dangerous to human life." Either Miles acted under duress in going to Woods' apartment, in which event she would not be guilty, or she participated in a burglary and robbery of her own free will, in which event she would be guilty for any murder that resulted, necessarily first degree felony-murder as a matter of law.

Miles' argument that there is room for a path to second degree implied malice murder is not persuasive. Miles argues that her act of leaving Woods' apartment with his pants, and not telling Borney that she had the pants, all while she "knew Borney was dangerous," could have been found by the jury to be an act whose natural and probable consequences was dangerous to human life. Miles seems to assert that Borney was a ticking time bomb, waiting to explode in Woods' apartment, and that she lit the bomb's fuse by leaving the apartment without telling Borney that she had taken Woods' pants.

We simply do not accept Miles' proposition that her act of leaving an apartment where a robbery was occurring, with the victim's property in her possession, constituted an act that was naturally and probably dangerous to human life. Leaving the scene of a robbery, regardless of the circumstances, is not an act

whose natural and probable consequences are dangerous to human life. The act creating a danger to human life was Miles' participation in a robbery in the first instance, which as a matter of law made the first degree felony-murder rule applicable. Miles' argument fails to persuade us that her act of leaving the scene of the robbery reasonably could have been found by the jury to be some form of severable act that was dangerous to human life, thus giving a factual basis for a jury verdict for the lesser included offense of second degree implied malice murder, while simultaneously severing and insulating her from criminal liability for first degree felony murder.

Finally, we reject Miles' argument that the trial court failed in abiding its "obligation to instruct on [the] lesser included offense[] of malice murder in the context of the charging document." Miles is correct that the amended information filed against Miles, Borney and Jackson in October 2014 alleged murder in count 1 using the statutory language of section 187, subdivision (a), to wit: "On or about December 23, 2012, . . . the crime of MURDER, in violation of . . . Section 187(a), . . . was committed by [defendants], who did unlawfully, and *with malice aforethought* murder JOHN WOODS, a human being." (Italics added.) However, what is unmistakable from the record, including repeated statements from the prosecutor and the trial court, and the prosecution's evidence and argument, is that Miles case was, from beginning to end, prosecuted only on a theory of first degree felony-murder based upon the underlying crimes of robbery and burglary. Miles' argument that jury instructions on the lesser offense of second degree implied malice murder were required in her case given the language of the "charging document" is based on *People v. Smith* (2013) 57 Cal.4th 232

(*Smith*). We do not read *Smith* to support a finding of error in Miles' case.

In *Smith*, the information charged the defendant with a violation of section 69, which expressly punishes either of two alternative acts: (1) an attempt, by means of any threat or violence, to deter or prevent an executive officer from performing a duty imposed by law; *or* (2) a knowing resistance, by the use of force or violence, of an executive officer in the performance of his duty. The Supreme Court in *Smith* concluded that a violation of section 148, subdivision (a)(1), was not necessarily a lesser included offense of section 69 under a statutory elements analysis because the statutory elements of section 148, subdivision (a)(1), were embraced only in the conduct prohibited under the second part, but not the first part, of section 69. But *Smith* still found a problem as to instructions on a lesser included offense because, although section 69 separates the two potentially punishable acts with the disjunctive "or," the information in *Smith* had used the conjunction "and" to charge the defendant. *Smith* thus concluded that because the "accusatory pleading allege[d] both ways of violating section 69," the trial court erred in failing to instruct on section 148, subdivision (a)(1), even though the first act identified in section 69 could be committed without committing the lesser offense. (*Smith, supra*, 57 Cal.4th at pp. 244-245.)

The Supreme Court in *Smith* reasoned: "When the prosecution chooses to allege *multiple ways of committing a greater offense in the accusatory pleading*, the defendant may be convicted of the greater offense on any theory alleged [citation], including a theory that necessarily subsumes a lesser offense. . . . But so long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes

a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense." (*Smith, supra*, 57 Cal.4th at p. 244, italics added.)

In our view, the prosecution in Miles' case did not allege multiple ways of committing murder within the contemplation of *Smith*. "[A]n accusatory pleading charging malice murder supports conviction of first degree murder on a felony-murder theory. Malice murder and felony murder are two forms of the single statutory offense of murder." (*People v. Contreras* (2013) 58 Cal.4th 123, 147.) Further, "the felony-murder rule 'acts as a substitute' for conscious-disregard-for-life malice. [Citation.] It simply describes a different form of malice under section 188." (*People v. Chun* (2009) 45 Cal.4th 1172, 1184.) Where, as in Miles' case, a murder prosecution proceeds at all times on a theory of first degree felony-murder, we find that *Smith*'s accusatory pleading analysis is not applicable.

Harmless Error

Assuming that the trial court erred in denying Miles' request for jury instructions on second degree implied malice murder, we would find the error harmless. An error in failing to instruct on a lesser included offense does not warrant reversal unless a defendant establishes, based on an examination of the entire case, including the evidence, that "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (See *People v. Breverman, supra,* 19 Cal.4th at p. 178, citing Cal. Const., art. VI, § 13 and *People v. Watson, supra,* 46 Cal.2d at p. 836.) Here, once the issue of duress was decided adversely to Miles, the evidence

pointed overwhelmingly to her guilt for first degree felony murder. We perceive no probability that the result of Miles' case would have been different had the jury been instructed on second degree implied malice murder. Once the jury concluded that Miles was engaged in the commission of the crimes of robbery and burglary when the murder of Woods' was committed without duress, there would have been no reasonable basis for the jury not to have applied the first degree felony-murder instructions.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.