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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DERRICK PHILLIP WILSON et al., Defendants and Appellants.	B267501 (Los Angeles County Super. Ct. No. LA078365)

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

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Derrick Phillip Wilson.

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

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Derrick Phillip Wilson and Raheen Ahab Taylor were convicted by jury of one count of first degree murder (Pen. Code, § 187, subd. (a); count 1) and three counts of robbery (§ 211; counts 2-4). The jury also found true the special-circumstance that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)), and the special allegations that both defendants personally used firearms (§ 12022.53, subd. (b)), that defendant Taylor discharged a firearm (§ 12022.53, subd. (c)), and that defendant Taylor caused great bodily injury or death (§ 12022.53, subd. (d)). Defendants were sentenced to life without the possibility of parole (LWOP), in addition to consecutive terms for the robbery counts, which were stayed, and consecutive terms for the firearm enhancements.

On appeal, defendants contend the trial court erroneously failed to instruct the jury with the lesser included offenses of second degree murder, voluntary manslaughter, involuntary manslaughter, and theft. Additionally, defendants contend that insufficient evidence supports the special-circumstance allegation. Both defendants contend that the LWOP sentence for the felony-murder special circumstance constitutes cruel and unusual punishment, and defendant Wilson contends that his sentence is unconstitutional as applied to him, based on his mental disability and level of culpability as the nonshooter. Finding no merit in any of these contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Rosalinda Garcia and Nafees Bermudas began dating in 2013. Bermudas was a drug dealer, selling small quantities of

marijuana and cocaine, and both he and Garcia were drug users.[1] Bermudas began dealing in larger quantities of drugs in December 2013. Bermudas asked Garcia if she knew anyone who sold cocaine. Garcia learned from her half sister that defendant Taylor sold cocaine, and gave his telephone number to Bermudas. Bermudas made several drug transactions with defendant Taylor in late 2013 and early 2014.

On January 25, 2014, Bermudas and Garcia made plans to act as "middlemen" for a marijuana deal. Bermudas arranged to purchase a half-pound of marijuana from Filiberto Aguilar and Ricardo Zetino for $1,200. Aguilar and Bermudas were friends, had engaged in a number of prior deals together, and Aguilar trusted Bermudas. Bermudas did not tell Aguilar that he was purchasing the marijuana to sell to someone else. However, Bermudas intended to sell the marijuana to defendant Taylor for a profit.

Bermudas and Aguilar arranged to meet at 6:00 or 7:00 that evening at a North Hollywood park. Bermudas also arranged to meet Taylor at the park at the same time. After Bermudas and Garcia arrived at the park, defendants Taylor and Wilson drove up in a Lexus sedan. Taylor was driving, and Wilson was the passenger. However, Aguilar and Zetino never showed up at the park, so Bermudas decided to obtain marijuana from a dispensary to sell to defendant Taylor.

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[1] Garcia, Bermudas and Filiberto Aguilar all testified under a grant of immunity. Bermudas was uncooperative as a witness, but ultimately agreed to testify after being found in contempt. Nevertheless, the prosecutor was permitted to use leading questions because of his repeated nonresponsive answers.

Bermudas and Garcia were driving to the dispensary, with defendants following behind, when Bermudas experienced car trouble, and pulled into the parking lot at a community college. Aguilar then called Bermudas, and explained that he and Zetino had been delayed. Bermudas arranged for Aguilar and Zetino to meet him at the community college.

Bermudas and defendant Taylor parked their vehicles next to each other in the college parking lot, with a planter between their vehicles. Defendant Taylor's car was on the passenger side of Bermudas's car, facing the same direction. Aguilar and Zetino arrived approximately 30 minutes later in Zetino's pickup truck. Zetino was driving and Aguilar was in the passenger seat of the truck. Zetino parked next to Bermudas, on Bermudas's driver's side.

Aguilar walked to Bermudas's car, and got in the front passenger seat. Garcia had moved to the back seat. Aguilar handed Bermudas a bag of marijuana. Bermudas asked Aguilar if it was okay if he took the marijuana to defendant Taylor's car, and Aguilar gave him a small "sample" to take to the other car. Bermudas took the sample to defendants' car, and got in the back seat of the Lexus. Defendants inspected the marijuana, and agreed to buy it. However, they wanted Bermudas to bring the rest of the marijuana to them before they paid for it.

Bermudas returned to his car and asked Aguilar for the rest of the marijuana. Aguilar allowed him to have it, even though he had not been paid. Bermudas took the bag of marijuana to the Lexus, while Garcia and Aguilar waited in Bermudas's car. Both Aguilar and Garcia felt that the transaction was taking too long, and became concerned.

Once Bermudas entered the Lexus, both defendants drew guns on him. Defendant Taylor had a .38-caliber revolver and defendant Wilson had a .357. Bermudas struggled with the defendants over the guns, which were pointed at him, and defendant Taylor started driving away. During the struggle, Bermudas cut his hand on one of the guns. Bermudas was able to "smack" the guns out of defendants' hands. He struggled to open the car door, but was unable to. He rolled down the window and opened the door from the outside, then jumped from the moving vehicle. He ran back to his car.

As the Lexus drove away, Aguilar got out of Bermudas's car and yelled to Zetino that defendants were taking off with "the stuff." Zetino said that he could not "let them get away with it" and started to pursue the Lexus in his truck. Zetino cut off the Lexus, blocking the exit from the parking lot, and the Lexus struck the driver's side of Zetino's truck. Several gunshots rang out, and the Lexus reversed and drove away. Bermudas and Garcia fled the parking lot.

Aguilar ran to Zetino's truck. The passenger door was open, and Zetino lay on the ground, covered in blood. Zetino appeared to be choking on blood, so Aguilar tried to prop him up. Aguilar then tried to put Zetino in the truck so that he could drive him to the hospital, but was unable to. Aguilar called 911, and police arrived several minutes later. Zetino ultimately died from a bullet that entered his chest cavity.

Aguilar initially told responding officers that he had arrived at the school by bus, recognized Zetino's pickup truck as belonging to a friend, and went to see what was going on. He later told police what really happened.

Later that night, Bermudas and Garcia went to the police station to report the shooting.

The next day, Los Angeles County sheriff's deputies arrested defendant Taylor outside of an apartment in San Jacinto, as he retrieved something from the Lexus. Deputies then conducted a protective sweep of the apartment, and found defendant Wilson on the couch. Deputies recovered .38- and .357-caliber revolvers in the couch cushions. There was one live bullet in the .38, and five live bullets in the .357. Deputies also recovered a bag containing half a pound of marijuana.

Criminalists from the sheriff's department examined the Lexus, and determined that there were two bullet holes in the windshield, resulting from someone discharging a weapon from inside the vehicle. There was also a bullet impact in the windshield that did not pierce the windshield, resulting from a bullet traveling through the car's dashboard from the interior of the vehicle. The Lexus's passenger window was also shattered, consistent with a bullet having been fired through the window. Deputies found ammunition and plastic baggies in the trunk, and an expended shell casing on the floorboard of the front passenger seat.

Zetino's truck was also examined. There was a bullet hole in the driver's side door, and an expended bullet lodged in the door. The driver's side window was also shattered.

The bullets recovered from Zetino's truck and during his autopsy were determined to have been fired from the .38-caliber revolver, as was the expelled shell casing recovered from the Lexus.

Defendant Taylor's DNA matched DNA found on the .38-caliber revolver, and defendant Wilson's DNA matched DNA

found on the .357. Blood on the center console of the Lexus matched Wilson's DNA, and blood on the front passenger seat headrest matched Bermudas's DNA.

The defense presented evidence that a single particle of gunshot residue was found on Bermudas's hands. The presence of gunshot residue could show that the person touched or fired a gun, was in close proximity to someone who fired a gun, or touched a surface containing gunshot residue.

DISCUSSION

1. Lesser Included Offenses

Defendants contend the trial court erroneously failed to instruct the jury on a number of lesser included offenses of murder and robbery. A trial court has a duty to instruct on a lesser included offense when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Shockley* (2013) 58 Cal.4th 400, 403-404.) This duty exists whether or not the defense requests instructions on a lesser included offense, and even over a defense objection. (*People v. Breverman* (1998) 19 Cal.4th 142, 153 (*Breverman*); *People v. Barton* (1995) 12 Cal.4th 186, 195.) Substantial evidence means evidence from which a reasonable jury could conclude that the defendant committed the lesser, but not the greater, offense. (*People v. Ochoa* (1998) 19 Cal.4th 353, 422.) The trial court need not instruct on a lesser offense if there is no evidence that the offense committed was less than that charged. (*Breverman*, at pp. 154-155; see also *Barton*, at p. 196, fn. 5.) The trial court's failure to instruct on a lesser included offense is reviewed de novo. (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

a. Second degree murder, voluntary manslaughter, and involuntary manslaughter

The jury was instructed solely with the elements of felony murder (CALCRIM Nos. 540A & 540B) and with the felony-murder special-circumstance instruction (CALCRIM No. 730), notwithstanding defendants' requests for instructions on second degree murder, voluntary manslaughter, and involuntary manslaughter, after the trial court concluded that substantial evidence did not support these lesser crimes.

Second degree murder, voluntary manslaughter, and involuntary manslaughter are lesser included offenses of first degree murder.[2] (*People v. Campbell* (2015) 233 Cal.App.4th 148, 160.) As is relevant here, second degree murder is unpremeditated murder committed with express or implied malice. Express malice exists when the defendant intends to kill, and malice will be implied when a killing results from an act involving a high probability of death with a wanton disregard for human life. (See *People v. Soto* (2016) 248 Cal.App.4th 884, 895.)

Defendants contend there was substantial evidence supporting the lesser charge of second degree murder, based on a

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[2] We need not consider whether a trial court has a duty to instruct on other theories of homicide as lesser included offenses of felony murder, where, as here, the prosecution proceeded solely on a theory of felony murder rather than first degree malice murder. The accusatory pleading alleged first degree malice murder, and was never amended to allege only felony murder. Therefore, under the accusatory pleading test for determining whether a crime is a lesser included offense, the trial court was required to instruct on other theories of homicide if they were supported by substantial evidence. (See *People v. Anderson* (2006) 141 Cal.App.4th 430, 442-446.)

theory that the shooting occurred in reaction to Zetino's act of chasing the Lexus and cutting it off, and not in the course of a robbery. We are not persuaded. "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. . . . 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." (*People v. Mendoza* (2000) 23 Cal.4th 896, 908-909, citations omitted; see also *Breverman*, *supra*, 19 Cal.4th at pp. 154-155.)

There was absolutely no evidence to support a reasonable doubt as to whether the killing was committed in the course of a robbery. Bermudas testified that defendants refused to pay until Bermudas brought them the bag of marijuana. Both defendants then simultaneously pulled guns on Bermudas as soon as he returned to the car with the half pound of marijuana. As Bermudas struggled with defendants, defendant Taylor began to drive away, shot at Zetino when he tried to stop them, and then abruptly departed the parking lot with the drugs without ever paying. These facts point "indisputably to a killing committed in the perpetration of" a robbery. (*People v. Mendoza*, *supra*, 23 Cal.4th at pp. 908-909.)

Defendants also contend that the car chase and collision support a voluntary manslaughter instruction under heat of passion and self-defense theories, and that an involuntary manslaughter instruction was warranted because defendant Wilson's act of displaying a firearm could be considered a mere brandishing offense, or that the killing occurred during the false imprisonment of Bermudas.

A killing resulting from a sudden quarrel or in the heat of passion, or while acting in actual, but unreasonable, self-defense may be found to be voluntary manslaughter rather than murder. (*People v. Montes* (2003) 112 Cal.App.4th 1543, 1548; *Breverman*, *supra,* 19 Cal.4th at p. 157.)

Involuntary manslaughter is the killing of another "in the commission of an unlawful act, not amounting to a felony[,] or [during] the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192, subd. (b); *People v. Guillen* (2014) 227 Cal.App.4th 934, 1027.)

There was absolutely no evidence that defendants acted in the heat of passion, in imperfect self-defense, or that the killing occurred in the course of a mere brandishing or false imprisonment offense. There was no evidence concerning Taylor's subjective mental state when he shot at Zetino. (See, e.g., *People v. Cole* (2004) 33 Cal.4th 1158, 1215 [the defendant must subjectively act in the heat of passion]; *People v. McCoy* (2001) 25 Cal.4th 1111, 1116 [imperfect self-defense requires an actual belief that defendant was in imminent danger of death or great bodily injury].) There was no evidence that he was enraged, or that he believed he needed to defend himself or Wilson. Moreover, the circumstances do not support a finding that Taylor was moved by heat of passion. The mere act of blocking defendants' exit from the parking lot was insufficient to cause a reasonable person to react with a deadly rage. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086 [The provocation must be such that a "reasonable person in defendant's position would have reacted with homicidal rage."].) Lastly, there was no evidence that a brandishing offense or false imprisonment

occurred, when the evidence indisputably indicated that a robbery was taking place. (*Breverman*, *supra*, 19 Cal.4th at pp. 154-155.)

While we do not find the court erred in instructing only on first degree murder, we find that any error in not instructing on a lesser offense was necessarily harmless. The jury returned verdicts on the robbery counts for each defendant in addition to the murder and special-circumstance allegations. Therefore, the jury necessarily would have found defendants guilty of first degree felony murder, regardless of whether instructions were given on lesser theories of homicide. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1328.) Further, the evidence that the crime committed was felony murder was overwhelming, compared to the purely speculative evidence supporting any lesser degree of homicide. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621.)

b. Theft

Defendants also contend that the trial court erroneously refused counsels' request for an instruction on theft as a lesser included offense of robbery, reasoning that defendants never demanded that Bermudas give the marijuana to them.

Theft is a lesser included offense of robbery, with the greater offense including the additional element of force or fear. (*People v. Williams* (2013) 57 Cal.4th 776, 786-787; *People v. Whalen* (2013) 56 Cal.4th 1, 69.) "To support a robbery conviction, the evidence must show that the requisite intent to steal arose either before or during the commission of the act of force." (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) If the intent to steal arose after the use of force against the victim is completed, the pre-force taking constitutes only a theft. (*Ibid.*) A robbery begins at the time of the original taking and continues

until the robber reaches a place of relative safety. (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.) Thus, a simple theft becomes robbery if force or fear is used while the property is being carried away, even though the original taking is accomplished without force or fear. (*Ibid.*)

As discussed *ante*, there was absolutely no evidence that the crime committed was anything less than robbery. There was plainly both force and fear used, as both defendant Taylor and defendant Wilson drew guns on Bermudas when he returned to the car with the marijuana, and defendant Taylor attempted to drive off with Bermudas in the car after he resisted their assault.

2. Sufficiency of the Evidence for the Special Circumstance

Defendant Wilson contends that insufficient evidence supports the felony-murder special circumstance, reasoning there was insufficient evidence that he was a major participant in the crime who acted with reckless indifference to human life. He argues that it was defendant Taylor who discharged his gun multiple times and shot Zetino, that defendant Taylor arranged to purchase the marijuana from Bermudas, and that it was Taylor who started to drive away with the marijuana without paying.

The penalty for first degree murder is life in prison without the possibility of parole if any of the "special circumstances" listed in Penal Code section 190.2 is found true. Section 190.2, subdivision (a)(17)(A), identifies as a special circumstance the commission of a murder while the defendant was "engaged in, or was an accomplice in, the commission of, attempted commission

of, or the immediate flight after committing, or attempting to commit" a robbery.

The special-circumstance statute applies to aiders and abettors of first degree murder. (*People v. Banks* (2015) 61 Cal.4th 788, 797-798 (*Banks*).) Concerning felony murder, Penal Code section 190.2, subdivision (d) provides that: ". . . [E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, . . . or assists in the commission of [an enumerated] felony . . . 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." Section 190.2, subdivision (d) "imposes both a special actus reus requirement, major participation in the crime, and a specific mens rea requirement, reckless indifference to human life." (*Banks*, *supra*, at p. 798.)

"In [the context of Penal Code section 190.2, subdivision (d)], . . . the phrase 'major participant' is commonly understood and is not used in a technical sense peculiar to the law. The common meaning of 'major' includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.' [Citation.]" (*People v. Proby* (1998) 60 Cal.App.4th 922, 933-934.)

"[T]he culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' [citation]. . . ." (*People v. Estrada* (1995) 11 Cal.4th 568, 577; *People v. Mil* (2012) 53 Cal.4th 400, 417.) Knowing participation in an armed robbery

is not, by itself, sufficient to establish the reckless indifference to human life element of Penal Code section 190.2, subdivision (d). (*Banks, supra*, 61 Cal.4th at p. 808.) "Awareness of no more than the foreseeable risk of death inherent in any armed crime is insufficient; only knowingly creating a 'grave risk of death' satisfies the constitutional minimum. [Citation.]" (*Ibid.*) Rather, "[r]eckless indifference to human life 'requires the defendant be "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' [Citation.]" (*Id. at* p. 807.)

Defendant Wilson knew that he and Taylor were going to engage in an armed robbery of a drug dealer, and that the crime involved a grave risk to human life. Both defendants were armed with guns, and simultaneously pulled them on Bermudas when he reentered the Lexus with the marijuana. When Bermudas resisted, both Wilson and Taylor fought to maintain control of their guns. Wilson never attempted to prevent Taylor from driving away, with Bermudas still in the car. And, after Taylor fired his gun, both Taylor and Wilson fled without any concern for Zetino's well-being. Wilson was found the following day in an apartment with Taylor, with both guns within Wilson's reach. The two defendants clearly operated together, with full knowledge of the risks involved. There was substantial evidence from which a rational trier of fact could conclude defendant Wilson was a major participant in the crime who acted with reckless indifference to human life.

3. Constitutionality of LWOP Sentence

a. General constitutionality

Defendants contend that Penal Code section 190.2, the special-circumstances statute imposing an LWOP sentence,

constitutes cruel and unusual punishment. Defendants concede, as they must, that this claim has been rejected by our Supreme Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946.) Therefore, we find no merit in this contention. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

b. As applied challenge

Defendant Wilson contends the sentence is unconstitutional under the California Constitution as applied to him, given his mental disability and level of culpability in the crime. Defendant raised this issue in his motion for a new trial, supporting his claim with a report from Dr. Nancy Kaser-Boyd. Dr. Boyd's report stated that defendant was exposed to drugs in utero, that his mother was rarely present in his life and was a drug user, and that he was very immature for his age and susceptible to the influence of others. Defendant Wilson had been friends with defendant Taylor for six months before the killing, and defendant Wilson looked up to Taylor, who was very controlling. Wilson was also mildly mentally retarded, with an IQ of 64. People with such an IQ are easily manipulated and exercise poor judgment.

In his interviews with Dr. Boyd, defendant Wilson asserted that he only drew his gun because defendant Taylor did, and that he did not know what was going on. He admitted to participating in numerous previous drug deals with defendant Taylor, and that he knew Taylor carried a gun. Dr. Boyd's report and probation report noted that Wilson had an extensive criminal history, including convictions for possession of controlled substances and carrying a loaded firearm.

After hearing argument from counsel, the court declined to strike the special circumstance as cruel and unusual, finding the

expert's report was not compelling, and that Wilson's account of the crime was self-serving.

To succeed on a challenge under the cruel or unusual punishment provision of the California Constitution, the defendant must show that the punishment is so disproportionate that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.) A reviewing court must examine the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society; compare the challenged punishment to punishments for more serious crimes in the same jurisdiction; and compare the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having a similar constitutional provision. (*Id.* at pp. 425-427.)

Defendant relies on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), in which the Supreme Court reduced a judgment from first degree to second degree murder after finding that the punishment for first degree murder was cruel or unusual. (*Id.* at p. 489.) The shooting in *Dillon* occurred when the 17-year-old defendant and two schoolmates went to a marijuana farm in the Santa Cruz Mountains to steal some marijuana. A guard at the farm threatened the boys with a shotgun and ordered them to leave. Several weeks later, the defendant returned to the farm with his brother. They fled after hearing a shotgun blast. Later, the defendant and several companions returned to the farm to steal marijuana. Some were armed with shotguns and the defendant carried a .22-caliber semi-automatic rifle. One of the boys accidentally fired his shotgun twice as the guard circled behind the defendant. The defendant testified at trial that when he heard the shotgun blast he believed that one of his friends had

been shot by the guard. The defendant heard the guard coming, saw that he was armed, and believed the guard was about to shoot him. He rapidly fired his rifle and fatally shot the guard. (*Id*. at pp. 451-452, 482-483.)

The *Dillon* court found the punishment for first degree murder was cruel or unusual in that case, noting that the defendant believed that one of his friends had been shot when he heard the shotgun discharged and that the guard was preparing to shoot him. (*Dillon*, *supra*, 34 Cal.3d at pp. 482-483.) The court also based its finding on the testimony of a clinical psychologist concerning the defendant's extreme immaturity and poor judgment. (*Id*. at p. 483.) Moreover, the defendant was a minor, and had no criminal history. (*Id*. at pp. 487-488.)

This case is nothing like *Dillon*. Here, defendant was an adult in his mid-20's, and there was no evidence mitigating his culpability, such as fear for his life or fear for his friend. Moreover, defendant Wilson, unlike the defendant in *Dillon*, has an extensive criminal history, and admitted to engaging in numerous drug transactions with Taylor before the killing, and that he knew Taylor carried a gun. We conclude that defendant's punishment does not violate the prohibitions against cruel and unusual punishment.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. RUBIN, J.