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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BYRON KEITH STREET,

Defendant and Appellant.

B267285

(Los Angeles County
Super. Ct. No. SA086128)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark A. Young, Judge. Affirmed as modified and remanded for resentencing.

Donna L. Harris, 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Byron Keith Street fatally shot Patrick Odoi-Kyene. The two men were security guards assigned to a large apartment complex, but Street was off duty and was discovered by Odoi-Kyene and another guard taking their time records. Evidence existed that Street also vandalized several vehicles parked in a parking garage at the complex, scratching angry remarks aimed at Odoi-Kyene into them. A jury found Street guilty of first degree murder, and found true that the murder was felony murder in the commission of burglary, that a burglary special circumstance applied, and that during the murder, Street used a firearm. It also found Street guilty of burglary with intent to commit vandalism.

On appeal, Street contends the evidence was insufficient to support either his convictions for felony murder and burglary or the burglary special circumstance finding; the trial court erred in failing to instruct on imperfect self-defense; and there were several problems with his sentence. He also assumes that the jury did not convict him of first degree deliberate and premeditated murder.

We conclude the jury convicted Street of deliberate and premeditated murder, and the evidence was sufficient to show he killed Odoi-Kyene with deliberation and premeditation. We therefore affirm the first degree murder conviction. Further, his contentions regarding the sufficiency of the evidence for felony murder, burglary, and the burglary special circumstance finding turn on a single issue—when the vandalism took place. We conclude the evidence was sufficient to show Street vandalized the vehicles on the night of the shooting as part of a continuous transaction with the murder and therefore affirm the felony-

murder and burglary convictions and the burglary special circumstance finding.

Further, we reject Street's argument that the trial court erred in failing to instruct on imperfect self-defense. Regarding sentencing, we agree with Street that his sentence was unlawful in certain respects and will order it modified and remand for resentencing.

BACKGROUND

The events of this case transpired at an apartment complex in Marina Del Rey, consisting of about 500 units in five buildings, with several underground parking garages. The main entrance is accessed through a patio area fronted by a low-walled planter. To the rear of the patio area is an outdoor courtyard.

A private company provided security for the apartment complex using unarmed guards. Street and Odoi-Kyene were guards with the company, and Odoi-Kyene additionally served as a supervisor at the complex. When Street applied for employment, he used the name Curtis Boyd, presenting California state identification in that name.

While on duty during the overnight shift of December 28 to 29, 2013, Street and Odoi-Kyene were in a verbal confrontation in which Odoi-Kyene yelled loudly at Street and challenged him to fight. Bertin Gnabe, the owner of the security company, separated the two men.

The following night, Odoi-Kyene and security guard Kofi Bawa were working the overnight shift at the complex, but Street was not. About 2:00 a.m., Bawa saw Street in the patio area, where he appeared to be taking the security company's time records—two binders with sign-in sheets, time sheets, and activity reports for the guards working at the location—from the

low wall of the planter in the patio. Bawa and Odoi-Kyene ran to Street's location, and Odoi-Kyene approached and stood a few feet in front of Street. He asked Street what he was doing there. Without responding, Street took out a gun and fatally shot Odoi-Kyene three times.

Los Angeles Sheriff's Department deputies and detectives responded to the scene. They found Odoi-Kyene's body lying in a parking space near the building entrance.

In a second amended information, Street was charged with murder (Pen. Code, § 187).¹ The information alleged as a special circumstance that he committed the murder while engaged in the crime of burglary (§ 190.2, subd. (a)(17)), and alleged gun enhancements under section 12022.53, subdivisions (b), (c), and (d). He was also charged with false personation (§ 529, subd. (a)(3)), counterfeiting the seal of California (§ 472), first degree burglary (§ 459), and three counts of felony vandalism (§ 594, subd. (a)).

Trial was by jury. Gnabe testified that during the overnight shift of December 28 to 29, 2013, Odoi-Kyene called him and said Street had brought his girlfriend to the complex. When Gnabe arrived shortly after midnight, he went to the location where Street was on duty and found Street's girlfriend there, dressed in a security guard uniform. Gnabe requested that she leave the premises, which she did. As Gnabe and Street spoke, Odoi-Kyene and security guard Henry Castillo joined them. Odoi-Kyene complained about Street and then argued with him and challenged him to go outside to fight. Odoi-Kyene physically "tried to get to" Street, prompting Gnabe to step between and separate them. Gnabe testified he heard Street say

¹ Further statutory references are to the Penal Code.

“something like ‘Me, I don’t fight,’” and “some [of] the words came into his mouth ‘shoot’ or something like that.” He testified later that on the day of the shooting, he told detectives he heard Street say, “I do not fight, I shoot.” Gnabe then sent Odoi-Kyene upstairs, and Castillo left. Noting Street was not wearing shoes on both feet—he had a bandage on one and was wearing a sandal—and knowing Street had been off work recovering from a foot or leg injury about a week before, Gnabe told him not to return to work until he had healed. Gnabe believed that rather than leaving immediately, Street finished his shift that morning, but he was not certain.

Castillo testified that during the confrontation between Street and Odoi-Kyene, Odoi-Kyene became angry, moved toward Street, and loudly challenged Street to fight. He told Street that he would beat him up, and called him to go outside. At that point, Street smirked and said in a low-pitched voice, “Like before we fight, I’ll shoot you.” Gnabe separated them, pushing Odoi-Kyene back. Street and Odoi-Kyene did not fight or have physical contact during the confrontation.

Castillo testified that after the shooting, he told detectives he and Street left together after the confrontation, and Street showed him a loaded silver pistol similar to a gun shown in a photograph retrieved from Street’s cell phone and offered by the People at trial.

Bawa testified that about 2:00 a.m. the following night, he saw Street take the security company’s binders of time sheets from the wall of the planter in the patio area. He and Odoi-Kyene ran from the courtyard into the patio area, and Odoi-Kyene stood face-to-face with Street.

Street put his hands in the front pocket of his hooded sweatshirt. Odoi-Kyene said to him, “My friend, what are you doing here? Kofi, call the police.” Street took a “black, small gun” from his pocket. Without saying anything, he shot Odoi-Kyene three times as Odoi-Kyene turned away. Bawa ran back toward the building and saw neither of the men again that night.

The deputy medical examiner who performed an autopsy on Odoi-Kyene testified that he had been shot three times, with all three bullets entering his body “at the left back” all traveling “left to right, back to front and upwards through the body,” hitting the heart, key blood vessels, and other structures within the chest. All were fatal. He recovered a bullet from each wound.

A firearms examiner testified that one revolver shown in photographs recovered from Street’s cell phone was a potential candidate for having fired the bullets recovered from the autopsy.

During Bawa’s testimony, the prosecutor played a surveillance video that confirmed Bawa’s testimony.

The investigating detective, Francis Hardiman, conducted an operation in which he placed Street in a jail cell with undercover deputies and recorded their conversation. Hardiman testified to the content of that conversation, and excerpts of the recording were played at trial. Street told the deputies that his girlfriend drove him to the apartment complex on the night of the shooting. He said she knew what he was going to do at the complex—“she knows the business.” When one deputy asked him, “What made you tell her though that you was about to go check this nigga off?” he responded, “Dumb ass.”

While investigating, deputies discovered that several vehicles in one of the parking garages had been vandalized. These included Odoi-Kyene’s SUV and an Audi, parked next to it.

On the Audi's hood were the words "Fuck Patrick" (Odoi-Kyene's first name), a smiley face, and an arrow pointing toward Odoi-Kyene's SUV. The driver's side and trunk of the car had lines scratched into them. A BMW parked in the garage also had graffiti, including the words "Your time will come" on the hood. A Camry had the words "Patrick must go" scratched into the hood. Street was determined to be a possible source for DNA found on one of the vandalized vehicles. Evidence was presented that Odoi-Kyene parked his SUV when he arrived at work on the afternoon of December 29, 2013, and the other vehicles were not vandalized before they were parked.

Street testified in his defense. He denied he shot Odoi-Kyene, and said he was not at the scene of the shooting Bawa described and was not the person depicted in the surveillance video. He testified he was home sleeping on the night of the shooting. He admitted to arguing with Odoi-Kyene on the night of December 28 to 29, 2013, and admitted he said, "I don't fight" and "I will shoot you."

The jury found Street guilty on all counts and found true all special allegations.

The trial court sentenced Street to an indeterminate term on the murder count as follows: 25 years to life for first degree murder, 25 years to life imposed consecutively for a gun enhancement, and a sentence of life without the possibility of parole (LWOP) for the special circumstance of murder committed while Street was engaged in the commission of burglary. The court also sentenced Street to a total determinate term of seven years four months, to run concurrently to the indeterminate term, as follows: the four-year middle term for first degree burglary, and a total of three years four months for the other

determinate terms, i.e., eight months (one-third the middle term of 24 months) each for false personation, counterfeit seal, and three counts of felony vandalism.

DISCUSSION

I. First Degree Murder

Street contends the evidence was insufficient to support his conviction for first degree murder on a felony-murder theory. But Street was also tried on the alternative theory of first degree deliberate and premeditated murder. (*People v. Johnson* (1993) 6 Cal.4th 1, 42, abrogated on other grounds by *People v. Rogers* (2006) 39 Cal.4th 826 [if one theory of criminal liability is unsupported by the evidence, the judgment of conviction may rest on any legally sufficient theory unaffected by the error, unless record affirmatively shows the jury relied on the unsupported theory].)

On appeal, Street asserts “the jury specifically convicted appellant under the felony murder theory,” implying the jury did not convict him on the theory of first degree murder with deliberation and premeditation. The record is to the contrary. The jury was instructed on alternative theories of first degree murder: felony murder and first degree murder with deliberation and premeditation. In closing argument, the prosecutor explained that the jury could convict on either theory, and discussed evidence that Street intended to kill Odoi-Kyene, and that the murder was willful, deliberate, and premeditated.

After the prosecutor’s argument, the trial court stated, “I think I might need to add something as to [the murder count] as to two theories to get to first degree.” The verdict form reflects that, as it set forth the theories as two separate findings for the

jury's consideration, with the finding on the burglary special circumstance between them:

“We further find the murder to be Felony Murder (TRUE) or (NOT TRUE)

“We further find the special circumstance that the above offense was committed by the said defendant . . . while the defendant was engaged in the crime of BURGLARY IN THE FIRST OR SECOND DEGREE . . . within the meaning of Penal Code, Section 190.2(a)(17) (TRUE) or (NOT TRUE)

“We further find the murder to be MURDER IN THE FIRST DEGREE (TRUE) or (NOT TRUE).”

The jury found both true. Reading the verdict form in light of the jury instructions and the prosecutor's argument as to both theories, we conclude the jury found true both that the murder was felony murder and that it was first degree murder on the alternative theory of deliberation and premeditation. (See *People v. Jackson* (2014) 58 Cal.4th 724, 750-751 [technical defect in verdict form may be disregarded where jury's intent to convict of a specific offense is clear].)

The first degree murder conviction may rest on the alternative theory as long as sufficient evidence supported it. We conclude it did.

First degree murder includes any “willful, deliberate, and premeditated killing.” (§ 189.) “‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance.” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) ““The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .”” (*Ibid.*)

Evidence of planning, motive, and manner of killing is relevant to determine the sufficiency of the evidence of premeditation and deliberation. (*People v. Young* (2005) 34 Cal.4th 1149, 1182-1183.)

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.] “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

The night before the shooting, Odoi-Kyene argued with Street and challenged him to a fight. Street said, “I don’t fight, I shoot,” or “before we fight, I’ll shoot you.” Street scratched angry messages on vehicles: “Fuck Patrick,” “Your time will come,” and “Patrick must go.” The jury could infer that those messages

evinced both motive and planning. There was also evidence Street had told his girlfriend “the business,” including that he was going to “check this nigga off,” also allowing an inference of planning. Moreover, Street carried a loaded gun to the apartment complex the night of the shooting. When Odoi-Kyene faced him, Street pulled the gun out and shot him three times in his chest, a vital area of his body, as Odoi-Kyene turned away. That evidence shows a manner of killing from which a preconceived plan could be inferred. We thus conclude the evidence was sufficient that the killing was intentional, deliberate, and premeditated.

II. Evidence of When the Vandalism Occurred

Street concedes the evidence was sufficient that he vandalized the vehicles, but argues the evidence did not show *when* he did so, or specifically that he entered the garage intending to commit vandalism. He contends there was a window of more than 24 hours within which he may have vandalized the vehicles, and that window includes the time when he was on shift in the early morning hours of December 29—a period when he was on the premises for work. Thus, Street contends, “it is reasonable to infer that [he] was either completing his rounds or preparing to leave when he entered the parking garage and acted impulsively when he happened to spot [Odoi-Kyene’s] car parked in the garage.” Based on that contention, Street asserts that his convictions for felony murder and burglary, and the true finding on the burglary special circumstance allegation, must be reversed because there was insufficient evidence that he committed burglary, or if he did, that he did so as part of a continuous transaction with the murder.

A. Additional Background

According to stipulations presented to the jury, none of the vehicles were damaged when the owners parked them in the garage, and Odoi-Kyene parked his SUV there when he arrived at work on December 29, 2013.

The security company's time records for the apartment complex included sign-in sheets that showed Odoi-Kyene usually worked overnight shifts beginning at 2:00 p.m., and he recorded his time for the December 28-29 shift as from 2:00 p.m. to 7:00 a.m.

B. Applicable Legal Principles

A murder committed in the perpetration of burglary is murder of the first degree. (§ 189.) This felony-murder rule is based on public policy considerations: "Once a person has embarked upon a course of conduct for one of the enumerated felonious purposes, he comes directly within a clear legislative warning—if a death results from his commission of that felony it will be first degree murder, regardless of the circumstances." (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.)

"The crime of burglary consists of an act—unlawful entry—accompanied by the 'intent to commit grand or petit larceny or any felony.'" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041, quoting § 459.) Burglary is of the first degree if it is of an inhabited part of a building. (§ 460, subd. (a).) For an entry to constitute burglary, the intent to commit a felony must exist at the time of entry. (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) "However, the existence of the requisite intent is rarely shown by direct proof but may be inferred from facts and circumstances." (*Id.* at p. 541.) "Any variety of circumstances

may be sufficient to establish the necessary felonious intent.”

(*People v. Smith* (1978) 78 Cal.App.3d 698, 704.)

When a person has been found guilty of first degree murder, section 190.2 provides for a penalty of death or imprisonment for life without the possibility of parole (LWOP) if certain special circumstances are present, including if the “murder was committed while the defendant was engaged in . . . the commission of . . . or the immediate flight after committing” enumerated felonies, including burglary. (§ 190.2, subd. (a).)

“Under the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction.” (*People v. Young* (2005) 34 Cal.4th 1149, 1175.) The “reach of the felony-murder special circumstance is equally broad.” (*People v. Hayes* (1990) 52 Cal.3d 577, 631-632.)

We review “the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (2015) 60 Cal.4th 966, 988.) This standard applies to review of largely circumstantial evidence and of special circumstance findings. (*Ibid.*)

C. Analysis

Street contends, first, that the evidence allows an inference that he entered the garage while on duty for a reason other than to vandalize the vehicles, not with the intent to commit vandalism. Under that reading of the evidence, neither his conviction for felony murder nor for burglary could stand. Second, he contends that even if the evidence showed he intended

to commit vandalism when he entered the garage, the evidence was insufficient that the vandalism was committed on the night of the shooting, in which case the conviction for felony murder and the finding of a burglary special circumstance must be reversed.

Street misapprehends the standard of review. It is immaterial that the jury could have reasonably drawn an inference in favor of the defense, unless that was the *only* reasonable inference. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 357 [“A reversal for insufficient evidence ‘is unwarranted unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict”].)

We conclude the evidence allowed a reasonable inference that Street vandalized the vehicles after he had finished work, and in fact that the more reasonable inference was that he committed the vandalism soon before he was discovered near the security guards’ time records later that night. The evidence allowed an inference Odoi-Kyene was absent from the premises from 7:00 a.m. on December 29 to the start of his next shift that afternoon at 2:00, when he parked in the garage. The jury could infer Odoi-Kyene would have noticed any vandalism to his own vehicle, or the extensive vandalism to the Audi parked next to it, and would have mentioned it to his coworkers or Gnabe before or during his shift that night. From that, the jury could reasonably infer Street entered the garage and vandalized the vehicles the night of the shooting, shortly before he was discovered with the security guards’ time records.

Once having inferred the vehicles were vandalized on the night of December 29 to 30, the jury could easily infer that when Street entered the garage, he intended to commit the vandalism.

He was not on duty, so he had no business that might have taken him into the garage for another reason. It was reasonable to infer Street was angry at Odoi-Kyene at the time he entered the garage, and the words etched into the vehicles are strong evidence Street intended to send an angry message when he entered. Further, the extent of the vandalism allows an inference that Street entered with the intent to accomplish it.

Because the evidence was sufficient that Street entered the garage with the intent to commit vandalism, we reject his contention that the burglary conviction should be reversed.² This conclusion also disposes of Street's argument that the felony murder conviction must be reversed on the ground that the evidence was insufficient that he committed burglary.

Street further argues the murder and burglary were not part of a continuous transaction because the evidence did not

² Street also passingly contends there was insufficient evidence that his entry was trespassory, claiming that to constitute burglary, "the entry must invade a possessory right in the building by one who has no right to be in the building." He argues the evidence allows a reasonable inference he vandalized the vehicles while he had a right to be on the property. However, "it is settled that the entry need not constitute a trespass' to support a burglary conviction." (*People v. Pendleton* (1979) 25 Cal.3d 371, 382.) One who enters a structure with intent to commit a felony is "guilty of burglary except when he or she (1) has an unconditional possessory right to enter as the occupant of that structure or (2) is invited in by the occupant who knows of and endorses the entrant's felonious intent." (*People v. Salemm* (1992) 2 Cal.App.4th 775, 778.) No evidence was presented from which to infer Street had either an unconditional right to enter or had been invited by an occupant who knew of his intent to vandalize vehicles in the parking garage.

show the burglary was committed the same night as the murder. We also reject that argument because the evidence allowed a reasonable inference that Street vandalized the vehicles on the night of the shooting.

III. Evidence of Continuous Transaction

Street makes a final, brief argument that the shooting was not part of one continuous transaction with the burglary. He contends the murder occurred after Bawa saw him taking the binders with the guards' time records. In other words, Street was not "fleeing to escape after committing vandalism" but "instead was fleeing after he was caught removing the binders from the building." Street appears to argue that the action of taking the time records terminated the burglary, so that the killing could not be part of the same continuous transaction.

We disagree. Under the continuous transaction doctrine, the felony continues for purposes of felony-murder liability until the perpetrator reaches a place of temporary safety. (*People v. Wilkins* (2013) 56 Cal.4th 333, 341.) This "“escape rule serves the legitimate public policy considerations of deterrence and culpability” by extending felony-murder liability beyond the technical completion of the crime.” (*Id.* at p. 346.)

There need not be immediate pursuit from the scene for the escape rule to apply. (*People v. Russell* (2010) 187 Cal.App.4th 981, 990-991.) A defendant's "subjective feeling of security, i.e., his inability to appreciate the risk of staying at the scene of the crime, is irrelevant." (*People v. Ramirez* (1995) 39 Cal.App.4th 1369, 1374.) And, although a perpetrator may form the additional intent to complete another crime after having entered with burglarious intent, a killing after the burglary commences is still part of a continuous transaction with the burglary, unless,

for example, the perpetrator “discard[s] or abandon[s]” the original felonious intent, or there is some other “arguably significant interruption of events between the entry and the homicide.” (*People v. Sakarias* (2000) 22 Cal.4th 596, 625-626.) The “ultimate question of whether the defendant has reached a place of temporary safety is an objective one to be determined by the trier of fact.” (*People v. Russell, supra*, 187 Cal.App.4th at p. 991.)

Here, there was sufficient evidence for the jury to determine Street had not reached a place of temporary safety. Street was still on the premises at the time of the shooting. He had been told not to return to work and was not authorized to be there, thus risking discovery for the vandalism if he was seen. When he was confronted, Odoi-Kyene told Bawa to call the police, increasing the risk of remaining on the premises. Nothing suggests Street abandoned his intent to commit vandalism—he had completed the act—and his stopping to take or interfere with time records does not represent a significant interruption in events between his entry and the shooting. Indeed, the jury could have inferred Street was engaged in a continuous course of conduct in which he intended to vent his anger at Odoi-Kyene both through vandalism directed at him and through interfering with the records, and while engaged in that course of action, he was confronted by Odoi-Kyene.³

³ This conclusion is not undermined by our prior conclusion that there was sufficient evidence to support the first-degree murder conviction on the theory of deliberation and premeditation. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1141 [“concurrent intent to kill and to commit the target felony or felonies does not undermine the basis for a felony-murder conviction”]; *People v. Abilez* (2007) 41 Cal.4th 472, 511 [“a

Accordingly, we hold there was sufficient evidence supporting the conviction for felony murder and the burglary special circumstance.

IV. Jury Instruction on Imperfect Self-Defense

Street argues the trial court failed to instruct the jury sua sponte on imperfect self-defense despite the existence of substantial evidence that Odoi-Kyene threatened and tried to attack him on the prior evening and Street felt threatened by him at the time of the shooting.

A. Additional Background

Street said that there was tension between Odoi-Kyene and himself because they talked badly about each other to the other guards, and what one said would get back to the other. He said Odoi-Kyene was angry at him on the night of December 28 to 29 because Street told Gnabe that Odoi-Kyene had skeleton keys to the apartment complex units and leasing office, where he would hide and sleep. During that confrontation, Odoi-Kyene yelled very loud, and Street “couldn’t even understand him, he was so mad.” Castillo testified that Odoi-Kyene went on “the offense with like a verbal confrontation,” and yelled “really, really loud,” noting that “it was really extreme” because sounds echoed in the parking area.

During the recorded conversation between Street and undercover deputies, the following exchange occurred:

“Deputy O: Did you have any reason to do that or was it something you just thought of?”

“Street: What—no, no, no. Motherfucker was—when I get threatened.”

‘concurrent intent to kill and to commit [burglary] will support a felony-murder special circumstance’].)

“Deputy O: So you planned that shit?

“Street: I didn’t plan it I just did it.”

B. Applicable Legal Principles

Imperfect self-defense negates malice, reducing an intentional killing from murder to voluntary manslaughter, and is a lesser included offense of murder. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

The doctrine of imperfect self-defense “is narrow.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) It requires that the defendant must have “actually believed that [he] was in imminent danger of being killed or suffering great bodily injury,” and “that the immediate use of deadly force was necessary to defend against the danger,” but that at least one of those beliefs was unreasonable. (CALCRIM No. 571; see *People v. Por Ye Her* (2009) 181 Cal.App.4th 349, 352-353.)

As part of the duty to instruct on general principles of law, the trial court has a duty to instruct on lesser included offenses even in the absence of a request, as is the case here. (*People v. Breverman, supra*, 19 Cal.4th at p. 154.) The “existence of ‘any evidence, no manner how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury.” (*Id.* at p. 162.) “Substantial evidence is . . . evidence that a reasonable jury could find persuasive.” (*People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 8.)

The trial court thus has a duty to instruct on imperfect self-defense “whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the

unreasonable but good faith belief in having to act in self-defense.” (*People v. Barton*, *supra*, 12 Cal.4th at p. 201.)

C. Analysis

Foremost, the doctrine of imperfect self-defense does not apply to felony murder. An “honest but unreasonable belief in self-defense negates malice aforethought. [Citation.] In felony murder, on the other hand, malice aforethought is not required.” (*People v. Lousaunau* (1986) 181 Cal.App.3d 163, 170.) Thus, imperfect-self-defense voluntary manslaughter is not a lesser included offense of felony murder, and there was no error in not instructing on it with respect to the felony murder theory.

Even if the murder conviction were supported by sufficient evidence only on the theory of premeditated murder, there was no error under this set of facts. Street points to evidence that there was a history of animosity between himself and Odoi-Kyene; Odoi-Kyene was angry at him the night of their confrontation because Street had reported to Gnabe about Odoi-Kyene having skeleton keys and sleeping on the job; and during the confrontation, Odoi-Kyene threatened to beat up Street, challenged him to fight, and physically tried to “get to” him until Gnabe separated them. Street also says he told undercover deputies that when Odoi-Kyene ran up to him, he “felt threatened and ‘just did it,’ referring to shooting” Odoi-Kyene. He asserts the jury could have concluded Street actually but unreasonably believed he was in imminent danger due to Odoi-Kyene’s prior threats.

We disagree. Evidence that the men had a contentious relationship or that Street felt threatened the prior night is not substantial evidence to support imperfect self-defense—the perceived danger must be imminent. (*In re Christian S.*, *supra*, 7

Cal.4th at p. 783.) Nor was there substantial evidence allowing a reasonable jury to find that at the time of the shooting, Street actually believed the immediate use of deadly force was necessary to defend against an imminent danger of death or great bodily injury. Odoi-Kyene ran up to Street and then stopped, making no physical threat. He called Street “my friend.” He told Bawa to call the police, showing an intention to let police handle the situation rather than taking action himself. When Street pulled out the gun, Odoi-Kyene began to turn away. Street shot him in the left side of his back, three times. That evidence leaves no room for a belief—even an unreasonable one—that Street had to defend himself from death or great bodily injury, or that deadly force was necessary to do so.

Furthermore, Street did not tell the undercover deputies, as he asserts, that he felt threatened and “just did it.” He began to say something about what happens when he feels threatened, and then was interrupted by a deputy asking if he planned the murder, and responded that he did not plan it, he “just did it.” That is too thin a reed to support an instruction on imperfect self-defense. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162 [“the existence of ‘any evidence, no matter how weak,’ will not justify instructions on a lesser included offense”].)

Assuming for argument that the trial court erred by failing to instruct on imperfect self-defense, the error was harmless under either the *Watson* or *Chapman* test. (*People v. Watson* (1956) 46 Cal.2d 818; *Chapman v. California* (1967) 386 U.S. 18.) Given the paucity of evidence that Street believed that he was in imminent danger of being killed or suffering great bodily injury, or that the immediate use of force was necessary, it is beyond reasonable doubt that Street would not have obtained a more

favorable outcome had the jury been instructed on that theory of voluntary manslaughter. Moreover, any error would be harmless because sufficient evidence supported the conviction under the felony murder theory, to which imperfect self-defense does not apply.

V. Sentencing Issues

Street contends the court erred in sentencing him to 25 years to life for murder in addition to life without the possibility of parole for the same offense. He also argues the sentences for the three vandalism counts and the burglary count should be reversed and stayed because they violated section 654 and double jeopardy protections. Additionally, we address an error in the sentence for gun enhancements under section 12022.53.

A. Additional Background

At the sentencing hearing, there was brief discussion of the parties' positions as to whether the sentences for vandalism should be stayed pursuant to section 654. However, the court sentenced Street without stating its position regarding the applicability of section 654, and did not stay any terms of imprisonment.

The trial court sentenced Street for murder as follows: 25 years to life for first degree murder (§ 187, subd. (a)), 25 years to life imposed consecutively for a gun enhancement (§ 12022.53, subd. (d)), and a sentence of LWOP for the special circumstance of murder committed while Street was engaged in the commission of burglary (§ 190.2, subd. (a)(17)). The trial court also sentenced Street to four years for first degree burglary, and a consecutive eight months each for the other offenses, including for the three counts of vandalism, a total determinate term of

seven years four months, to be served concurrent to the indeterminate term.

B. Unauthorized Sentence for Murder

Street argues the 25-year-to-life term imposed for first degree murder in addition to the LWOP sentence was unauthorized by law and must be stricken. The Attorney General agrees.

A sentence that “could not lawfully be imposed under any circumstance in the particular case” is unauthorized, and may be reviewed regardless of whether the defendant objected to the sentence at the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Subdivision (a) of section 190 sets forth the punishment for first degree murder: “Every person guilty of murder in the first degree shall be punished by death, imprisonment in state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.” Section 190.2, subdivision (a) states, “The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more . . . special circumstances has been found . . . true”

Under this sentencing scheme, a person found guilty of first degree murder is punished by either death, LWOP, or 25 years to life, but not more than one of those terms. Further, the scheme mandates that if a special circumstance under section 190.2 is found true, the penalty is death or LWOP rather than 25 years to life. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 865,

disapproved on other grounds by *People v. Riccardi* (2012) 54 Cal.4th 758.)

Thus, the trial court erred in imposing a term of 25 years to life for first degree murder in addition to a term of LWOP for that same murder conviction. The judgment must be modified to strike the former term.

C. Prohibition on Multiple Punishment

1. Applicable Legal Principles

Section 654, subdivision (a) provides in relevant part, “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The purpose of this statute “is to insure that a defendant’s punishment will be commensurate with his culpability.” (*People v. Perez* (1979) 23 Cal.3d 545, 551.) Section 654 “prohibits multiple sentences where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct engaged in with a single intent and objective.” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196.) But where a defendant acts with “multiple criminal objectives that [are] independent of and not merely incidental to each other, then he may be punished for the independent violations committed in pursuit of each objective even though the violations were parts of an otherwise indivisible course of conduct.” (*Ibid.*)

“Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support

them. [Citations.] We review the trial court’s determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

2. Burglary Sentence

By imposing and not staying sentence for burglary, the trial court implicitly found Street had separate intents and objectives in committing the burglary and the murder. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

The Attorney General asserts that because there was evidence to support a finding of murder based on premeditation, the trial court properly imposed additional punishment for burglary. He asserts that *People v. Osband* (1996) 13 Cal.4th 622, 730-731 (*Osband*), permits separate punishment where alternative theories are supported by substantial evidence. We disagree that *Osband* reached that conclusion. Instead, in a case involving two separate underlying felonies for felony murder—rape and robbery—the Court found substantial evidence that the rape and robbery had more than a single objective. The Court declined to decide whether the fact that the defendant may have been found guilty of felony murder required the sentences for the two underlying felonies to be stayed. (*Id.* at pp. 730-731.)

Courts have often found section 654 precluded separate sentences for felony murder and the underlying felony. In *People v. Hensley* (2014) 59 Cal.4th 788, 828, the Supreme Court held that where a robbery “formed the basis for the first degree felony-murder convictions and findings on the robbery-murder special-circumstance allegations,” the sentence for the underlying robbery and related firearm use allegations should be stayed. In

People v. Mulqueen (1970) 9 Cal.App.3d 532, 544-545, as in this case, the jury was instructed on alternative theories of murder—felony murder and premeditated murder—and the Court of Appeal found ample evidence under which to sustain the verdict under either theory. The Court of Appeal concluded that the “sentence resulted in double punishment for one act for the reason that the act of robbery is the same act which made the homicide first degree murder.” (*Id.* at p. 547; see *People v. Boyd* (1990) 222 Cal.App.3d 541, 576 [when robbery is a predicate for felony murder, robbery sentence must be stayed].)

We find the reasoning of these decisions persuasive. As noted above, sections 190 and 190.2 mandate that where a felony special circumstance under section 190.2, subdivision (a)(17) is found true, the sentence is death or LWOP rather than 25 years to life. That means the sentence is based on the underlying felony. Moreover, in reaching its verdict on the murder charge, the jury found the burglary and murder were part of one continuous transaction, showing it believed the acts did not have independent objectives. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1103 [noting a special circumstance finding established that a murder and the underlying felony “were committed during an indivisible transaction to which section 654 applies”].)

Accordingly, we conclude that imposing enhanced punishment for the burglary while simultaneously punishing Street for the burglary itself represents multiple punishment prohibited by section 654, and the trial court’s decision to sentence Street separately for those offenses was unsupported by substantial evidence. We will order the sentence for burglary stayed, the stay to become permanent on completion of the sentence for murder.

3. Vandalism Sentences

Street also contends the three sentences for vandalism should be stayed because they were part of the same indivisible transaction as the burglary.

“When a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes.” (*People v. Islas, supra*, 210 Cal.App.4th at p. 130.)

Here, the evidence showed Street entered the garage to vandalize vehicles inside it, and the burglary was therefore only a means to accomplish the vandalism. Thus, Street cannot be punished for both the burglary and the vandalism. However, the vandalism sentences need not be stayed, because we have concluded that the burglary sentence must be. (See *People v. Osband, supra*, 13 Cal.4th at p. 731 [when burglary sentence is stayed, sentence on predicate felony need not be].)⁴

D. Gun Enhancement Sentencing

We will order corrected an error in the sentencing for gun enhancements under section 12022.53. The jury found true the allegation under subdivision (d) that Street “personally and intentionally discharged a firearm, a handgun, which caused great bodily injury and death.” It also found true the allegation under subdivision (c) that Street “personally and intentionally discharged a firearm, a handgun,” and the allegation under

⁴ Because the sentence for burglary will be stayed under section 654, we also need not separately address Street’s argument that imposing punishment for both burglary and felony murder, or both vandalism and burglary, violates his right against double jeopardy. (See *People v. Holt* (1997) 15 Cal.4th 619, 692-693; *People v. Wader* (1993) 5 Cal.4th 610, 670.)

subdivision (b) that Street “personally used a firearm, a handgun.”

The trial court imposed a sentence of 25 years to life for the subdivision (d) enhancement, but no sentence for the enhancements under subdivisions (c) and (b). Sentence must be imposed for all section 12022.53 enhancements that have been found true, and then all but the longest sentence should be stayed. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.) Accordingly, we will order that the trial court impose and stay execution of sentence on the gun enhancements under section 12022.53, subdivisions (b) and (c).

DISPOSITION

The judgment is modified by striking the sentence of 25 years to life for murder and staying the sentence for burglary pending service of the murder sentence. The matter is remanded for resentencing. On remand, the trial court shall resentence Street to a determinate term based on the remaining counts of conviction. The court also shall impose sentence for all section 12022.53 gun enhancements found true by the jury, but stay execution of all but the longest of those sentences. In all other respects, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.