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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HECTOR DUARTE,

Defendant and Appellant.

B282474

(Los Angeles County
Super. Ct. No. GA089555)

APPEAL from judgment of the Superior Court of Los Angeles County, Stanley Blumenfeld, Judge. Affirmed.

Marilyn G. Burkhardt, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Christopher G. Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

The jury convicted defendant and appellant Hector Duarte of first degree murder (Pen. Code, § 187, subd. (a)).¹ The jury found true a personal use deadly and dangerous weapon allegation pursuant to section 12022, subdivision (b)(1). Defendant was sentenced to 26 years to life, comprised of 25 years to life for the first degree murder charge, plus one year under section 12022, subdivision (b)(1).

Defendant contends neither of the alternative first degree murder theories of liability—willful, deliberate, premeditated murder and felony murder—is supported by substantial evidence. We affirm the judgment.

FACTS

Family History

Defendant and the victim, Alfonso Castro,² had known each other since 1990 when defendant began dating Roxanne Serbantez, Alfonso's former stepdaughter. Serbantez and Alfonso did not get along. Defendant and Alfonso also had a strained relationship.

¹ All future statutory references are to the Penal Code unless otherwise specified.

² Because Alfonso Castro has the same last name as his daughter Yolanda, they will be referred to by their first names for ease of reference.

Alfonso lived with his daughter, Yolanda, in a two-bedroom house in Rosemead. Alfonso was a very strict “neat freak” who regularly washed the walls. Defendant and Serbantez seldom went to Alfonso’s home.

In 1997, defendant and Serbantez moved to Virginia but “came back for the fact that her mom had broken up with [Alfonso]” in 1998. The couple had “even less to do” with Alfonso at that time, and defendant did not enter the Rosemead home after 1998. Defendant and Serbantez separated in 2008.

Night of the Murder

On May 24, 2008, Yolanda left the Rosemead home to attend a baseball tournament in San Clemente. The next day at approximately 9:30 p.m., Alfonso called Yolanda to inform her that a man came to the house looking for her. Alfonso was angry because “nobody [was] allowed to come over to [his] house.” Alfonso was also not feeling well, so his sister Connie Parada was going to bring over soup, and Yolanda planned on taking him to the doctor when she returned to town the next day.

Parada talked to Alfonso around 11:20 p.m. to let him know she was leaving her home. Parada arrived at Alfonso’s home at 12:05 a.m. She entered the back of the house through the laundry room screen door, which was always unlocked. The screen door and laundry room were not visible to the street. Inside the laundry room, Parada

noticed that the door leading into the house was broken, unlocked, and “wide open.” Glass from the door window was scattered on the kitchen floor. Parada found Alfonso’s body in the hallway outside the kitchen. She tried to use the kitchen phone to call the police, but the phone cord had been removed so she used her cell phone.

At 12:00 a.m. on May 26, 2008, Alfonso’s upstairs neighbor woke up to the sound of fighting. He got dressed because he wanted to figure out why there was so much noise downstairs. Alfonso’s neighbor walked downstairs and saw Parada, who told him something was wrong. The neighbor walked into the kitchen and saw Alfonso’s body in the hallway.

The Investigation

The Los Angeles County Sheriff’s Department investigated the homicide. Sergeant Joseph Ramirez noticed that the kitchen phone cord was missing. After Sergeant Ramirez walked through the kitchen, he entered the hallway and noticed that a broken telescope and tripod were on the floor next to Alfonso’s body. The telescope looked out of place. Pieces of the telescope were scattered on the hallway floor. One piece was lying next to Alfonso’s hand. Yolanda later testified at trial that the telescope was always kept in the living room next to the fireplace in the front area of the home. The living room and kitchen are separated by a

curved hallway. The telescope was never placed in the hallway between her and Alfonso's bedrooms.

Alfonso's body was discovered with one sock on his foot. The other sock was lying under his shoulder. Alfonso's knife that he normally kept on his bed was found undisturbed. A fuse that controlled the downstairs lighting was not fully connected.

There were blood stains on the hallway walls near Alfonso's body. There was no blood on Alfonso's knife, the broken glass in the kitchen, or anywhere else in the house. Investigators collected a total of eight blood samples from the scene. One sample was taken from the hallway next to the bathroom. The small stain, which was at the height of the bathroom door handle, indicated a nearly perpendicular impact, and was of interest to the Sheriff's Department because Alfonso's body was approximately nine feet down the hallway. Yolanda lived in the house her entire life, and she never noticed the blood mark in the house prior to the homicide. Before leaving the day before the murder, Yolanda did not see a blood mark in the area of the bathroom.

Seven out of the eight blood samples were consistent with Alfonso's DNA. The sample taken next to the bathroom door was consistent with an unknown male. A forensic identification specialist was unable to obtain any fingerprints from the Rosemead home.

The coroner identified a total of 80 separate stab wounds on Alfonso's body. Alfonso suffered cuts and stab

wounds to his face, neck, chest, abdomen, legs, back, arms, and hands. Eighteen of the wounds were independently lethal. One of the wounds to Alfonso's neck cut through the jugular and carotid arteries and was "rapidly fatal." Twelve wounds penetrated the chest cavity. Alfonso's heart was still beating while the stab wounds were inflicted. Defensive wounds to Alfonso's arms, hands, and fingers indicated that he was alive and trying to protect himself when each wound was inflicted. The coroner concluded that a single-edged, kitchen-style knife inflicted the wounds.

The day after the murder, defendant went to Serbantez's home. Serbantez told defendant that Alfonso had been murdered, and he "didn't respond at all." Defendant did not look like "the same person." His demeanor was "[j]ust emptiness."

The case remained unsolved until 2012 when a hit from a national DNA database prompted further investigation into defendant. The Sheriff's Department analyzed defendant's DNA against the unknown male blood sample collected at the scene. Defendant's profile matched the sample. In a subsequent interview, defendant could not explain how his blood was at the scene of the murder. At trial, defendant's son testified that sometime after the homicide in 2008, defendant told him, "There's a lot of things you don't know about me." Defendant then placed his hand over his heart and stated, "your aunt's dad," in reference to Alfonso.

DISCUSSION

Standard of Review

Defendant contends there is insufficient evidence to support both first degree murder theories presented to the jury—willful, deliberate, premeditated murder and felony murder. We conclude substantial evidence supports both theories of liability and affirm the judgment.

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Avila* (2009) 46 Cal.4th 680, 701.) “We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]” (*People v. Medina* (2009) 46 Cal.4th 913, 919.) “The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

“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. [Citation.]” (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 (*Zamudio*)). “Substantial evidence includes circumstantial

evidence and the reasonable inferences flowing therefrom.” (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) “We ‘must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]’ [Citation].” (*Zamudio, supra*, at p. 357.) “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.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054.)

Murder is defined as the “unlawful killing of a human being . . . with malice aforethought. (§ 187, subd. (a).) First degree murder includes “any . . . kind of willful, deliberate, and premeditated killing” (§ 189.) Murder committed in the perpetration of burglary also constitutes murder in the first degree. (*Ibid.*)

“[I]n a prosecution for first degree murder it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by statute.’ (*People v. Milan* (1973) 9 Cal.3d 185, 195.)” (*People v. Guerra* (1985) 40 Cal.3d 377, 386; accord, *People v. Moore* (2011) 51 Cal.4th 386, 413; *People v. Millwee* (1998) 18 Cal.4th 96, 160.)

Here, the trial court instructed the jury that it could find defendant guilty of first degree murder on either of two theories: (1) willful, deliberate, premeditated murder; or (2) felony murder based on the predicate felony of burglary. The court instructed the jury that it need not be unanimous as to which theory supported conviction. We review the sufficiency of the evidence as to both theories in turn.

Willful, Deliberate, Premeditated Murder

Defendant contends there is insufficient evidence to prove premeditated murder under *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*). The California Supreme Court in *Anderson* identified three factors that may support a finding of premeditation and deliberation in certain combinations—planning, motive, and the nature of the killing. “Regarding these categories, *Anderson* stated: ‘Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of [planning activity] or evidence of [motive] in conjunction with either [planning activity] or [manner of killing].’ ([*Anderson, supra*, 70 Cal.2d at p. 27.])” (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).)

But these factors in certain combination are not the only means for establishing premeditation and deliberation. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127; *Perez, supra*, 2 Cal.4th at p. 1125 [“The *Anderson* factors, while helpful for

purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive”]; *People v. Thomas* (1992) 2 Cal.4th 489, 517 (*Thomas*) “[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate”].) The court’s ultimate duty is to assess “whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.” [Citation.]” (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) “[T]he requisite reflection need not span a specific or extended period of time. Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly. [Citations.]” (*People v. Nelson* (2011) 51 Cal.4th 198, 213.) “The test is not time, but reflection.” (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.) We follow these guiding principles here.

We conclude there was sufficient evidence from which the jury could find that defendant premeditated Alfonso’s death. The jury was presented with significant circumstantial evidence from the crime scene to support a strong inference of planning. Based on their past relationship, defendant was familiar with the layout of Alfonso’s home and was also aware that he was unwelcome there. The evidence of the break-in supports an inference that defendant intended to enter the house undetected—he entered the house around midnight, from the back, and at a place not visible from the street. Defendant took steps to surprise Alfonso, breaking in by shattering the glass on the

back door to gain entry. Although the glass in the back door was shattered and scattered all over the kitchen floor, there was no trace of defendant's blood on the door or inside the kitchen, which suggests that he either used some implement to break into the house or took some other precaution to avoid being cut. Coming through the back entry led defendant into the kitchen, where Parada and investigators later discovered that the kitchen phone had been rendered inoperable. Defendant's argument that the absence of blood on the phone "strongly suggested [he] did not touch the phone after the stabbing" lends further support to the inference that defendant planned the murder by disconnecting the phone before the attack.

The testimony of the forensic expert established that Alfonso was stabbed with a kitchen knife, supporting the inference that defendant either brought a knife with him or obtained one while he was in Alfonso's home. In either circumstance, the jury could reasonably find defendant's use of a knife to support a finding of premeditation. Evidence that a defendant carried knife into the victim's home makes it "reasonable to infer that he considered the possibility of homicide from the outset." (See *People v. Steele* (2002) 27 Cal.4th 1230, 1250; see also *People v. Elliot* (2005) 37 Cal.4th 453, 471.) Alternatively, the jury could infer that defendant took a kitchen knife after breaking in, but before he attacked Alfonso. Given the absence of any evidence of a struggle or blood in the kitchen and the location of Alfonso's body at the far end of the hallway away from the kitchen, defendant's

carrying a knife from the kitchen into another room to attack Alfonso equally supports premeditation and deliberation. (See *Perez, supra*, 2 Cal.4th at p. 1127 [going into kitchen in search of a knife after first knife broke supports an inference of premeditation].) The layout of the home and the physical evidence militates against the theory that defendant grabbed a knife instinctively while in the throes of a fight.

The nature of the killing also supports the finding of premeditation and deliberation. “A violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation.” (*People v. Pride* (1992) 3 Cal.4th 195, 247.) “[N]umerous blows to the neck and vital organs . . . including a blow that penetrated [one victim’s] eye, supports the reasonable inference . . . that the blows were intended to kill rather than merely wound. (See [*People v. Lewis* (2009) 46 Cal.4th 1255, 1293] [the “additional act of slashing her throat ‘is indicative of a reasoned decision to kill’”].) [Citation.]” (*People v. Williams* (2018) 23 Cal.App.5th 396, 411; accord, *People v. Harris* (2008) 43 Cal.4th 1269, 1287 [“defendant . . . stabbed Rodriguez without provocation directly in the heart with enough force to penetrate part of a rib and pierce entirely through the heart”]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [jury could construe “three potentially lethal knife wounds, not to mention almost eighty other stab and slash wounds to [the] body” as “intimating a preconceived design to kill”]; *People v. San Nicolas* (2004) 34 Cal.4th 614, 658–659 [“The jury also fairly could have concluded that

defendant was intent upon killing [the victim] due to the sheer number of wounds on [her] body, many of which individually would have been fatal”].) Defendant stabbed Alfonso 80 times in vital areas such as the neck, heart, and lungs. The force used in 18 stab wounds alone, 12 of which were deep enough to enter Alfonso’s chest cavity and one of which cut his neck through the left jugular and carotid arteries, created independent and “rapidly fatal” wounds, further supporting a finding of deliberation.

Although there was no clear evidence of motive presented by the prosecution, the record does indicate that there was longstanding ill will between defendant and Alfonso. Defendant and Serbantez had a strained relationship with Alfonso even before he separated from Serbantez’s mother, and afterwards they had almost no contact with him and never went to his house. Nevertheless, Alfonso’s familiarity with defendant supports a secondary motive—that whatever the reason for entering the home, “once confronted by [Alfonso], who knew him and could identify him, he determined to kill [him] to avoid identification.” (*Perez, supra*, 2 Cal.4th at p. 1126 [“regardless of what inspired the initial entry and attack, it is reasonable to infer that defendant determined it was necessary to kill [the victim] to prevent [him] from identifying [him]” given their acquaintance from high school]; *Thomas, supra*, 2 Cal.4th at p. 518 [“The jury could also have found a “plausible motive” for [the] murder in defendant’s need to eliminate a witness to his crimes.”].)

Finally, there was no evidence that Alfonso did anything to provoke an impulsive violent response from defendant during the encounter, which lends support to the jury's finding that the killing was deliberate and premeditated. (See *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102 [lack of provocation is a strong factor supporting jury's conclusion that defendant's attack was deliberate and premeditated].)

Sufficiency of the Evidence of Felony Murder

Defendant contends there was insufficient evidence to support the jury's verdict on a felony murder theory of liability. We disagree.

Felony murder does not require an intent to kill, but only an intent to commit the underlying felony. (*People v. Gonzalez* (2012) 54 Cal.4th 643, 654.) “[T]he killing need not occur in the midst of the commission of the felony, so long as that felony is not merely incidental to, or an afterthought to, the killing.” (*People v. Proctor* (1992) 4 Cal.4th 499, 532 (*Proctor*).) In this case, the prosecution proceeded on the theory that defendant killed Alfonso in the commission of a burglary. Any person who enters a house with the intent to commit grand or petit larceny at the time of entry is guilty of burglary. (§ 459; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) “One may be liable for burglary upon entry with the requisite intent, regardless of whether the felony or theft actually committed is different from that originally

contemplated, or whether any felony or theft actually is committed.” (*In re Matthew A.*, *supra*, 165 Cal.App.4th at p. 540.)

Circumstantial evidence may support a felony murder conviction, including establishing the defendant’s intent. (*People v. Prince* (2007) 40 Cal.4th 1179, 1259–1260.) When the underlying felony is burglary, “such intent usually must be inferred from all the facts and circumstances revealed by the evidence, because only rarely can it be proved directly.” (*Proctor*, *supra*, at p. 533.)

Defendant first argues there was no evidence to support the finding that he entered Alfonso’s home with intent to steal because “[t]here was no evidence that [defendant] said or did anything” to suggest an intent to steal. To the contrary, defendant’s manner and timing of entry—through the back door at midnight—reflects an intent to covertly enter the home for some nefarious purpose. The evidence that the telescope was moved within a short time of defendant’s entry of the home supports the inference that he intended to commit burglary when he entered. (See *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1246 [“temporal or spatial proximity between the entry and the target or predicate crime are factors that may reasonably be considered by the jury when determining whether the requisite intent existed at the moment of entry”].) That no direct evidence established defendant personally moved the telescope is of no moment, as the jury could reasonably infer

he did so based upon the telescope's movement from its ordinary location.

Defendant's assertion that burglary requires that the perpetrator take something from the house is incorrect. Burglary does not require that the intended larceny be committed or even attempted. (*People v. Davis* (1998) 18 Cal.4th 712, 718.) We also reject defendant's argument that the telescope was not valuable, did not appear valuable, and was not "an attractive object to steal." "Under current California law, the item of property need only have some intrinsic value, however slight." (*People v. Martinez* (2002) 95 Cal.App.4th 581, 586–587 [ration stamps, empty cigarette carton, and use of soap, shampoo and hot water have slight intrinsic value to constitute larceny].) The telescope at issue meets this low threshold of having slight intrinsic value. Ultimately, both of defendant's contentions seek to reweigh the evidence in his favor. That is not our role.

DISPOSITION

The judgment is affirmed.

MOOR, J.

I concur:

KIM, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

BAKER, Acting P.J., Concurring

There was no substantial evidence at trial that would support a felony murder theory of first degree murder. I concur in the result reached by the majority, however, because presentation of the felony murder theory to the jury was harmless. (*Griffin v. United States* (1991) 502 U.S. 46, 58-59; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129; see also *People v. Hovarter* (2008) 44 Cal.4th 983, 1019-1020.)

BAKER, Acting P.J.