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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. SOLOMON MILLER, Defendant and Appellant.	B286820 (Los Angeles County Super. Ct. No. MA064555)

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

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

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

In an information filed by the Los Angeles County District Attorney's Office, defendant and appellant Solomon Miller was charged with "malice aforethought" murder (Pen. Code, § 187, subd. (a); count 1)[1] and first degree burglary (§ 459; count 2). As to the murder charge, it was alleged that defendant personally used a deadly and dangerous weapon, a crowbar. (§ 12022, subd. (b)(1).) The special circumstance of murder while engaged in a burglary was also alleged. (§ 190.2, subd. (a)(17).) The jury found defendant guilty of both counts and found the enhancement and special circumstance true. Defendant was sentenced to life in state prison without the possibility of parole, plus one year for the weapon enhancement on count 1. The trial court imposed the upper term of six years for the burglary charge, which was stayed pursuant to section 654.

Defendant timely filed a notice of appeal. He argues that the trial court committed four instructional errors, compelling reversal of the judgment against him.

We affirm.

FACTUAL BACKGROUND

I. *Prosecution's Evidence*

A. The Crime

Nolasco Buenaventura Ramos (Ramos) lived in a one-bedroom, ground floor apartment in a senior complex in Palmdale. His sister-in-law, Irma Lopez (Lopez), helped care for him two to three times per week for about three years prior to his death. He had knee problems and used an electric wheelchair and electric bed. He also had high blood pressure.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Kelly Mills (Mills) lived with, and possibly dated, Ramos on and off for about three months in the summer of 2013. She was 33 at the time of trial in 2017. She had problems with drugs, including methamphetamine and heroin. Because she did not have a car, her mother, Lori Hall (Hall), often drove her places. Hall sometimes visited Mills at Ramos's apartment, and the three of them would go swimming. Lopez believed that Mills was on drugs and told Ramos that she would not go to the apartment when Mills was there.

Mills moved out at the end of the summer of 2013. According to Hall, it seemed sudden. Hall had left some clothes and a pair of slippers at the apartment.

At around the same time, Mills was dating defendant and had gotten pregnant by him. Hall sometimes drove Mills and defendant places. She had never seen defendant at Ramos's apartment or heard Mills talk about him to Ramos.

On the night of Saturday December 7, 2013, Ramos's upstairs neighbor, Hilaria Arredondo, heard noise coming from Ramos's apartment, which was not unusual. At around 10:00 p.m., she heard a "very strong noise," like a door slamming, which prompted her to get up and look out the window. She saw two people running away; a man ran to her right and a woman ran to her left. The man fell, and the woman returned to help him. They both continued to run to the left. She could not see their faces.

Earlier that day, defendant had called Mills to be picked up, and Mills asked Hall to give her a ride to pick him up. Hall drove Mills to a parking lot next to Ramos's apartment complex. Mills had Hall stop to wait for defendant. There was a small wall

that someone could easily jump to get from the apartment complex to the parking lot. Hall had picked up Mills there before.

Hall remembered it being early evening when they arrived. They parked for about 15 to 20 minutes. Mills got out and met defendant at the wall that separated the properties. The two spoke for a couple of minutes near the hood of Hall's car. Next, defendant then went over to some nearby trash bins and then returned to the car. Defendant got in the rear seat, and Mills got in the front passenger seat of the car. Hall did not remember if he was carrying anything. She did not see any blood on him. He was wearing blue jeans and Hall's slippers, which Hall found odd. Defendant said, "'Now I have some money for us, babe.'"

Mills asked Hall to drive them to a friend's house. When they arrived, Mills and defendant got out of the car, but they returned because no one was home. Mills then asked Hall to take them to a Burger King; defendant's mother picked him up there, and Mills returned to Hall's car. Defendant removed a bag about the size of a shopping bag from the trunk and took it with him. Hall did not hear either Mills or defendant make any telephone calls. Hall never saw defendant again.

A couple of days later, Hall saw in the news that Ramos had been killed. She spoke to Mills about it. At some point Hall told her friend Laurie Ann Sullivan that defendant had killed someone.

At around 8:30 a.m. on December 8, 2013, Los Angeles County Sheriff's deputies were called to Ramos's apartment because a door was open. They approached his fenced apartment patio, and the sliding glass door was ajar a few inches. One of the panes in the door was broken, and there was blood on the

vertical blinds. Inside, the apartment was covered in white powder, which was determined to be from a fire extinguisher.

Ramos was lying on his back on the bedroom floor at the foot of the bed. He suffered obvious massive head trauma and numerous bruises, lacerations, and fractures. Near his head was a flat metal crowbar.

The bedroom appeared to have been ransacked. Drawers were pulled out and items were dumped on the beds. There was a knife handle with the blade broken off. A broken knife blade that was likely from that handle was on the dresser; the tip of the blade was bent up as if it had been used to pry something open. A briefcase had marks where it appeared someone had attempted to pry it open. Also, the handle of an open closet door had keys inside the lock; there were blood smears on the door near the keys. Inside the closet, drawers were pulled out and papers were strewn on the floor.

In the kitchen, it appeared as if someone tried to wipe things down. There were two distinct shoe patterns, suggesting that two people had been inside. A fire extinguisher, with fresh powder on the nozzle, was on the patio.

On the concrete pathway between the back patio and front door was a glass jar with blood on it. A cash receipt with the word "Buena" (part of Ramos's name) was also found in that area.

Both defendant's and Ramos's DNA were found on a telephone receiver. Ramos's DNA was in blood found on the crowbar.

B. Law Enforcement Interviews Defendant

On April 9, 2014, Detective Richard Tomlin and Sergeant Louis Nunez interviewed defendant. Defendant said that Mills

was pregnant with his baby. He initially denied committing the murder or ever being at the complex.

After Detective Tomlin said that they were going to take his DNA, defendant said that Mills had showed him Ramos's house and wanted him to get her property out, but he never did. He said she got her own property. She told defendant that Ramos owed her $6,000 or $8,000, but defendant did not believe that that was possible. He then told the officers, "[A]fter we left each other that day, . . . I decided to go take it upon myself later on that Saturday night and I went to his house, uh, sprayed it with, his whole house with a fire extinguisher and I went into his house and I beat him to death pretty much and everything with my hands and then I, um, beat him with a crowbar."

Defendant said that he and Mills went to the apartment at around noon, and Mills went inside for about an hour while defendant waited outside. After they left, Mills asked defendant to beat Ramos up. Defendant refused. When asked why he returned to the apartment after leaving, defendant said, "[T]hose were my intentions." Detective Tomlin asked, "To try to get her money or her property?" Defendant replied, "Yeah."

Defendant went back to Ramos's apartment at around 9:00 or 9:30 p.m. He knocked, but Ramos did not let him in. Defendant left and returned at around midnight. He threw a hammer at the sliding glass door, breaking it. He knocked until Ramos opened the door. Ramos tried to shut it, but defendant sprayed him with the fire extinguisher. Defendant punched him a couple of times, and then hit him two times with the crowbar, which he had found on the porch. When asked why he did it, defendant said, "[h]onestly, I don't know." Detective Tomlin asked if he "just snapped," and defendant said, "Yeah."

After Ramos was dead, defendant called Mills from the apartment. He told her that he "just got done killing a man," and asked her to pick him up. She said that she was on her way. He also called his mother and told her what happened. Mills went with Hall to pick defendant up. Mills went into the apartment and put her hands on Ramos and then smeared blood everywhere. She was "wilding out." She said, "Oh, f***, why would you do this?" She then tried to light Ramos's shirt on fire and stab him.

Mills went through a lot of her things in the bathroom, closet, and dressers. Defendant asked what she was doing and said that they needed to hurry up and leave. He went out to Hall's car, which was in the next door parking lot, and waited. When he left, he did not stumble, and Mills did not go out with him. Mills came out an hour or two later. Defendant said that he saw Mills start to mess with the briefcase and believed that she probably got something out of it. Defendant initially said that he did not spray the fire extinguisher all over the apartment, but later admitted that he did. Defendant said that he did not take anything from the apartment, but Mills probably took money.

He was again asked why he decided to go back to the apartment and "do this." He said that he wanted to go back "on [his] own terms." He was not thinking about murdering Ramos, but was "thinking about like talking to him or talk him down . . . [¶] . . . about her, her belongings and like the stuff that she needs for her child." He thought killing Ramos would make him "feel good about himself."

Defendant, Mills, and Hall left in Hall's car. She dropped them off at a friend's house, where they stayed for about three

hours. Hall returned to pick them up and dropped them off at defendant's sibling's apartment. His mom met them there and got into an argument with Mills about the murder.

At the end of the interview, defendant was again asked why he went to Ramos's home. He said he "really went over there . . . to talk to him about her, [Mills's] belongings." "To get her stuff, you know?" Ramos refused defendant and told him to bring Mills. Defendant left and returned later. Detective Tomlin asked if he then got angry, and defendant replied, "Yeah."

C. Defendant's Recorded Call from Jail

The day after the interview, defendant called his mother from jail. The call was recorded. He told her that Mills had "snitched on" him. She was incredulous. He said that the homicide detectives were there and asked him about every detail of the incident. He said it was "f***ed up that she would do some s*** like that." His mother agreed "because she was the one that was over there." His mother said that he was at his sister's birthday party, "and we can all vouch for that." He falsely claimed that he had told the detectives that he was at his sister's birthday party. He told his mother that he did not tell the detectives anything and repeatedly asked for a lawyer.

II. *Defense Evidence*

Dr. Catherine Scarf met with and tested defendant; she diagnosed him with an intellectual disability, attention disorder, cannabis use disorder, unspecified disruptive impulse control, and conduct disorder.

DISCUSSION

Defendant contends that the trial court committed four instances of instructional error, compelling reversal. We reject each in turn.

I. *Circumstantial Evidence*

First, defendant claims that the trial court erred by instructing the jury with the general instruction on circumstantial evidence (CALJIC No. 2.01) instead of the more limited instruction that addresses circumstance evidence only with regard to intent (CALJIC No. 2.02).

A. Procedural background

After a jury instruction conference was held off the record, the trial court stated on the record that it "intend[ed] to give 2.01 versus 2.02. 2.01 is the broader instruction[]. Everything, all the principles in the 2.02 can certainly be argued under 2.01." Defense counsel affirmed that he objected to the trial court's decision and was requesting CALJIC No. 2.02. He explained: "[O]ur defense is that [defendant] did not have the specific intent to commit the burglary. And that's going to be I think the big issue. It's not any other fact." The trial court responded, "I think you are right. As an experienced trial lawyer, you hit the issue right on the head there. It revolves around intent. However, the People have to prove every element of the crime. And so I am going to give 2.01 over your objection."

Defense counsel then asked the trial court to give both instructions. The trial court refused, noting that it would get reversed if it gave both CALJIC Nos. 2.01 and 2.02.

CALJIC No. 2.01, as given by the trial court, provides: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.

"Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

"Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his] guilt.

"If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable."

B. The trial court rightly gave CALJIC No. 2.01 and not CALJIC No. 2.02

As part of its duty to instruct on general principles of law, "'[a] trial court has a sua sponte duty to give CALJIC No. 2.01 in criminal cases "where circumstantial evidence is substantially relied upon for proof of guilt . . . ."' [Citation.]" (*People v. Burch* (2007) 148 Cal.App.4th 862, 870 (*Burch*).) "'CALJIC 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC 2.02 is limited to just mental state and/or specific intent." (Use Note to CALJIC No. 2.02; see also *Burch*, *supra*, at p. 871, fn. 3.) "If the only circumstantial evidence relates to specific intent or mental state, CALJIC 2.02 should be given. [I]f the circumstantial evidence relates to other matters or relates to other matters as well as specific intent or

mental state, CALJIC 2.01 should be given and not CALJIC 2.02 . . . .'" (Use Note to CALJIC No. 2.02; see also *Burch*, *supra*, at p. 871, fn. 3.)

Here, there were elements in addition to intent that were proved by circumstantial evidence. For example, to support its felony murder theory, the prosecution had to prove that Ramos was killed "during the commission or attempted commission of burglary." Circumstantial evidence, such as the ransacked condition of the bedroom, the pry marks on the briefcase, the opened and ransacked closet, the jar and cash receipt outside the apartment, and defendant's possession of Hall's slippers and a bag after the murder, supported this element.

Also, defendant's identity as the burglar and killer had to be proved, and that was by circumstantial evidence as well. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1172 (*Samaniego*).) Circumstantial evidence, such as defendant's DNA on the telephone receiver and him leaving the apartment complex that night wearing Hall's slippers, showed his identity as the perpetrator.

Since "mental state was not the only element of the case resting on circumstantial evidence; . . . , the trial court did not err in reading the more inclusive instruction." (*People v. Marshall* (1996) 13 Cal.4th 799, 849.)

Defendant argues that the trial court recognized that intent was the only element that rested on circumstantial evidence. Defendant mischaracterizes the appellate record. As set forth above, the trial court agreed with defense counsel that the only contested issue was intent. But that is not the standard to determine whether to give CALJIC No. 2.01 or CALJIC No. 2.02. Since circumstantial evidence in this case related to

more than intent, the trial court correctly instructed the jury with CALJIC No. 2.01. (*Burch*, *supra*, 148 Cal.App.4th at p. 871, fn. 3.)

Moreover, we cannot ignore the extensive direct evidence of intent here. Defendant's interview with the detectives contained several admissions about his motive and intent. This substantial direct evidence from defendant's admission made any circumstantial evidence instruction as to intent unnecessary. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1171 [circumstantial evidence instructions "applicable only when the prosecution substantially relies on circumstantial evidence to establish any element of the case," but "should not be given where circumstantial evidence is incidental to and corroborative of direct evidence"].) The fact that defendant gave the detectives conflicting statements is of no moment. The jury was tasked with determining which of defendant's statements to detectives were true in conjunction with the rest of the evidence.

Accordingly, the balance of direct and circumstantial evidence was similar for all of the elements, including intent. It follows that the trial court's use of CALJIC No. 2.01 was proper. Defendant's constitutional rights were not violated.

C. Any possible error was harmless

The failure to give CALJIC No. 2.02 is assessed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), i.e., reversal is required only when the reviewing court finds, after an examination of the entire case, that it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error. (*Burch*, *supra*, 148 Cal.App.4th at pp. 872–873.) In light of defendant's admissions to detectives, it is not reasonably probable that defendant would

have obtained a more favorable result, under either *Watson* or *Chapman v. California* (1967) 386 U.S. 18, 24, had the trial court instructed the jury with CALJIC No. 2.02 instead of CALJIC No. 2.01. (See *Samaniego*, *supra*, 172 Cal.App.4th at p. 1172.)

Finally, as defendant acknowledges, where the trial court instructs with the "more inclusive" CALJIC No. 2.01, its refusal to additionally instruct with CALJIC No. 2.02 is not prejudicial error. (*Burch*, *supra*, 148 Cal.App.4th at pp. 872–873 [even where intent was the only element that relied on circumstantial evidence, there is no prejudice when the trial court instructs with CALJIC No. 2.01 instead of CALJIC No. 2.02]; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.)

II. *Claim of Right Instruction*

Second, defendant argues that the trial court prejudicially erred in failing to give a claim-of-right instruction to the burglary charge.

A. Procedural background

Defense counsel requested that the jury be instructed with CALJIC No. 9.44 regarding the claim-of-right defense to burglary. That instruction provides: "An essential element of the crime of [burglary], where the entry is alleged to have been committed with the intent to commit theft[,]] is a specific intent permanently to deprive the alleged victim of his or her property. That specific intent does not exist if the alleged perpetrator had a good faith claim of right to title or ownership of the specific property taken from the alleged victim. In other words, if a perpetrator seeks to regain possession of property in which [he] honestly believes [he] has a good faith claim of ownership or title, then [he] does not have the required criminal intent.

"However, the required criminal intent exists if, rather than seeking to recover specific property, the perpetrator is attempting to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated, and specifically intends permanently to deprive the alleged victim of his or her property in furtherance thereof.

"If, after a consideration of all the evidence, you have a reasonable doubt that [defendant] possessed the required specific intent, you must find [him] not guilty of the crime of burglary, [where it is alleged the entry was to commit theft]." (CALJIC No. 9.44)

The trial court asked the prosecutor whether he intended to proceed on both the theory that defendant and Mills intended to recover property and to collect a debt. The prosecutor replied that his theory was that they intended to collect money, not property. He explained, "She said she is owed $8,000. I don't think anybody says anything about property in the sense of like my purse is in there." The trial court responded, "I had inferred that and thrown it out there in the sense that the mother (Hall) claimed that there was some of her property there. The defendant goes in and comes out with the mother's slippers. That was floating around."

The trial court denied defendant's request for this instruction on two grounds. First, it asserted that the claim-of-right theory applies to the person whose belongings were recovered, but nothing belonged to defendant. Since the defense opposed the aiding and abetting theory, defendant could not claim that he was attempting to recover his coprincipal's property. Second, the trial court stated that even if aiding and abetting instructions were given, it would deny this instruction

because "of the bracketed portion dealing with debt. That is, sought to be satisfied. [¶] [The prosecutor] has made it clear that his theory he is proceeding on is they entered with the intent to recover money, not the property."

B. Relevant law

"An essential element of any theft crime is the specific intent to permanently deprive the owner of his or her property." (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1526 (*Williams*).) The claim of right defense negates that element. (*Id*. at pp. 1526–1528.) "The claim-of-right defense is based on the sound concept that a person who acts under a good faith belief that he is repossessing his own property lacks the felonious intent to deprive another of his or her property." (*Id*. at p. 1528.)

This reasoning extends to a defendant who aids and abets a principal to recover the principal's property. (*Williams*, *supra*, 176 Cal.App.4th at p. 1529.)

However, there is no "claim-of-right defense when force is used to collect on a debt." (*Williams*, *supra*, 176 Cal.App.4th at p. 1527.) "'*The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy*.'" (*People v. Tufunga* (1999) 21 Cal.4th 935, 956.)

"'[A] trial court is not required to instruct on a claim-of-right defense unless there is evidence to support an inference that [the defendant] acted with a subjective belief he or she had a lawful claim on the property.'" (*People v. Tufunga*, *supra*, 21 Cal.4th at p. 944.) Moreover, the defense "does not apply where, 'although defendant may have "believed" he acted lawfully, he was aware of contrary facts which rendered such a belief wholly unreasonable, and hence in bad faith.' [Citation.]" (*People v.*

Wooten (1996) 44 Cal.App.4th 1834, 1849.) Whether the defendant concealed his activities or did not conceal them is relevant to whether he had a good faith belief. (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 644.)

C. Analysis

Applying these legal principles, we conclude that the trial court did not err in refusing to give a claim of right instruction to the jury. There was no evidence here of a specific personal property that defendant intended or attempted to recover. (*People v. Tufunga*, *supra*, 21 Cal.4th at p. 956.) Defendant's vague references in his police interview that he intended to talk to Ramos about Mills's belongings did not support a finding that he intended to forcefully retrieve those unidentified belongings when he broke in.

The fact that defendant was wearing Hall's slippers does not compel a different conclusion. There was no evidence suggesting that defendant intended to recover the slippers on Hall's behalf when he broke into the apartment. (*Williams*, *supra*, 176 Cal.App.4th at pp. 1528–1529.) Indeed, Hall found it odd that defendant appeared at her car wearing her slippers. Even if Hall could somehow be deemed a coprincipal, which we doubt, her reaction supports the inference that defendant had not retrieved the slippers on her behalf. The more likely explanation is that defendant put on the slippers to escape after either stepping in blood or fire extinguisher residue, which left his shoe prints in the apartment.

Moreover, any belief defendant may have had in the lawfulness of retrieving property was unreasonable and therefore in bad faith. (*People v. Wooten*, *supra*, 44 Cal.App.4th at p. 1849.) Defendant did not believe that Ramos owed Mills money, let

alone $6,000 or $8,000. During his conversation with detectives, defendant never mentioned any specific property belonging to Mills that he believed Ramos had. The items defendant took—Hall's slippers, a jar, and a cash receipt in Ramos's name—did not support a good faith belief in the claim of right to those or any other items. In short, no evidence suggested that defendant had a good faith belief that Mills was entitled to any of the property taken (or attempted to be taken) from Ramos's apartment.

Furthermore, defendant's attempt to conceal his crimes refutes any claim of right defense. (*People v. Fenderson*, *supra*, 188 Cal.App.4th at p. 644.) Defendant killed Ramos, which prevented him from speaking about any theft. Defendant sprayed the entire apartment with a fire extinguisher in an apparent attempt to remove or diminish forensic evidence of his crimes. After leaving footprints in the kitchen, defendant changed his shoes and fled the scene. He initially lied to the police about his involvement in the crimes. And, there was evidence that he concocted an alibi story with his family. This overwhelming evidence of concealment proves that defendant did not have a good faith belief in the right to reclaim any property. It follows that no claim of right instruction was required. (*Ibid.*)

D. Any presumed error was harmless

Even if the trial court had erred in refusing to give a claim of right instruction, which it did not, the error would have been harmless under any standard. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Other instructions given to the jury permitted it to acquit if it determined that defendant intended to reclaim Mills's property rather than steal from Ramos. For example, the jury was instructed that burglary is a specific intent crime, and that

defendant had to have had the specific intent to steal Ramos's property. The jury was told that if that specific intent did not exist, "the crime[] . . . [was] not committed." Had the evidence supported the theory that defendant intended only to retrieve Mills's property and return it to her, he would not have had the intent to "deprive [Ramos] permanently" of his property, and an acquittal would have been appropriate.

But the evidence did not support this defense. In fact, defense counsel did not even make this argument below; rather, he argued that defendant entered Ramos's apartment on an impulse to harm or kill him, not with the intent to steal or retrieve Mills's property.

Furthermore, the prosecution never suggested that defendant's retrieval of Mills's property could support a conviction. Rather, the prosecutor expressly noted that a conviction was appropriate exclusively based on defendant's intent to steal from Ramos.

Under these circumstances, any alleged error was harmless.

III. *Lesser-included Instructions*

Third, defendant argues that the trial court erred when it failed to instruct sua sponte on the lesser included offense of second degree murder.

A. Procedural background

Before the instructions were read, defense counsel said that he understood that the prosecution was proceeding on a felony murder theory, but he requested instructions on first and second degree malice murder, as well as voluntary and involuntary manslaughter. Counsel asserted that there was evidence that defendant committed first degree murder (premeditated malice

murder) rather than felony murder. He stated that he would argue that defendant committed "second degree murder in that he picked up a crowbar and did an act that is inherently dangerous to human life." Counsel suggested that manslaughter instructions were supported by defendant's statement that he "snapped."

The trial court denied defendant's request because the prosecution chose to proceed solely on a theory of felony murder. In so ruling, the trial court stated that it was "clear those lesser[s] don't apply."

B. Relevant law

There are two distinct "tests for whether a crime is a lesser included offense of a greater offense," both of which require a trial court to instruct on lesser included offenses: "the elements test and the accusatory pleading test." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 197 (*Gonzalez*).) "Under the elements test, one offense is another's 'lesser included' counterpart if all the elements of the lesser offense are *also* elements of the greater offense. [Citation.] Under the accusatory pleading test, a crime is another's 'lesser included' offense if all of the elements of the lesser offense are also found in the *facts alleged* to support the greater offense in the accusatory pleading." (*Gonzalez*, at p. 197.)

Defendant relies on the accusatory pleading test to assert that the trial court was required to instruct on malice murder and its lesser included offenses because the information charged murder "with malice aforethought." In so arguing, defendant disregards the purpose of the accusatory pleading test—to ensure that defendants have notice of the charges leveled against them and any applicable lesser included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.) Here, defendant was given notice

that the prosecution was not proceeding on a theory of malice murder and was only proceeding on a theory of felony murder. The trial court so noted at the pretrial hearing ["at this point the People are proceeding on a felony murder theory only"]; the parties so noted in their discussion of expert testimony at the pretrial hearing; and the prosecutor's opening statement set out facts that supported felony murder. Under these circumstances, we reject defendant's argument, as our Supreme Court has done "on many occasions." (*People v. Abel* (2012) 53 Cal.4th 891, 937.)

"In addition, "'generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing.'"" (*People v. Abel*, *supra*, 53 Cal.4th at pp. 937–938.) Here, the prosecutor at the preliminary hearing "established probable cause that the murder occurred during the commission of a [burglary], and the case was tried on the theory that the murder was committed during the course of a [burglary]." (*Id.* at p. 938.) It follows that defendant had ample notice that the prosecution was proceeding solely on a theory of felony murder. (See also *People v. Huynh* (2012) 212 Cal.App.4th 285, 313.)

Defendant's reliance upon *People v. Banks* (2014) 59 Cal.4th 1113 (*Banks*), overruled in part in *People v. Scott* (2015) 61 Cal.4th 363, 391, footnote 3, is misplaced. In that case, our Supreme Court found that the trial court should have instructed on second degree murder because the accusatory pleading "alleged not merely that defendant killed in the course of a robbery but that he did so willfully and maliciously." (*Banks, supra,* at p. 1160.) The prosecutor in that case did not inform the trial court or defense counsel until they were discussing jury instructions that it intended to proceed only on a felony murder

theory. (*Id*. at p. 1157.) In contrast, the prosecutor here made clear from before trial began that felony murder would be its sole theory of guilt.

C. No substantial evidence of second degree murder

Even if the trial court had a duty to instruct on second degree murder, there was insufficient evidence to require giving such instructions here. A trial court has a duty to instruct on lesser included offenses only where there is substantial evidence that the defendant is guilty of the lesser offense but not the greater. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

Defendant contends that substantial evidence supports a second degree murder verdict because the jury could have found defendant harbored an intent to kill when he entered Ramos's apartment, rather than an intent to commit burglary. But, even if defendant entered the apartment with an intent to kill (and not steal), he would still be guilty of first degree murder because he necessarily also premeditated and deliberated the homicide.

Second degree murder is a lesser included offense of first degree malice murder. (*People v. Taylor* (2010) 48 Cal.4th 574, 623.) Second degree murder is an unlawful killing with malice aforethought, but without premeditation or deliberation. (*People v. Seaton* (2001) 26 Cal.4th 598, 672.) "'"[P]remeditated' means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." [Citation.]' [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 636.) While evidence of planning, motive, and manner of killing is pertinent to the determination of premeditation and deliberation, they are not exclusive or determinative. (*People v. Silva* (2001) 25 Cal.4th 345, 368.) The method of killing alone

can support a finding of premeditated, deliberate murder. (*People v. Memro* (1995) 11 Cal.4th 786, 863–864; *People v. Hawkins* (1995) 10 Cal.4th 920, 956–957.)

Here, substantial evidence shows that if defendant intended to kill Ramos from the time he entered his apartment, he did so with premeditation and deliberation. According to defendant, he visited the apartment alone twice that night. He first visited at around 9:00 p.m. and spoke to Ramos about Mills's belongings. When Ramos rejected his requests and would not let him in, he left. Defendant returned about three hours later and threw a hammer at the glass door, breaking it. He admitted that he was "pissed off" and wanted to return "on [his] own terms." The lapse of three hours between defendant's two visits, as well as the manner of those visits, demonstrates the time and basis for premeditation and deliberation. (*People v. Stevens* (2007) 41 Cal.4th 182, 203.)

Moreover, defendant obtained and used multiple tools throughout his attack. He first used a hammer to try to break in. He then got a fire extinguisher, which he used to spray Ramos in the face and force his way in. Finally, he retrieved a crowbar and hit Ramos multiple times, killing him. Each of these separate acts required thought and decision-making, demonstrating defendant's premeditation and deliberation.

D. Any presumed error was harmless

A failure to instruct on lesser included offenses when felony murder is the sole prosecution theory is assessed under *Watson*, *supra*, 46 Cal.2d at page 836. Our Supreme Court recently determined that a jury's true finding on a felony murder special circumstance renders such error harmless. (*Gonzalez*, *supra*, 5 Cal.5th at p. 200.) Here, the jury found the felony murder special

circumstance true. It follows that defendant could not have committed a crime lesser than felony murder. (*Gonzalez*, *supra*, at p. 201 ["In light of these additional findings and the presumption that juries understand and follow instructions, the special circumstance finding prevents [defendant] from establishing a reasonable probability that the jury would have reached a different result absent the trial court's failure to instruct on lesser included offenses of . . . murder with malice aforethought"].)

IV. *Elements of Murder*

As an "alternative" to his third argument, defendant claims that the trial court failed to instruct the jury on all elements of malice murder, namely malice aforethought. However, defendant was prosecuted solely on a theory of felony murder, which is an alternative to malice murder, and the jury was instructed on all elements of felony murder.

Defendant's argument may be based upon the information's reference to section 187, as opposed to section 189. However, "[a] pleading referring only to Penal Code section 187, subdivision (a) provides adequate notice that the defendant might be convicted of first degree murder on a felony-murder theory." (*People v. Abel*, *supra*, 53 Cal.4th at p. 937.) And when the prosecution also alleges a felony murder special circumstance, that "provides more than adequate notice that the prosecution will be pursuing a felony-murder theory of first degree murder." (*Ibid.*)

To the extent defendant suggests that the trial court erred in failing to instruct on malice, we are not convinced. As defendant concedes, felony murder does not contain malice as an element. (*People v. Bryant* (2013) 56 Cal.4th 959, 965.) Because

defendant was prosecuted solely on a felony murder theory, the jury did not have to be instructed on malice.

Defendant contends that the jury should have been given the option to convict him based on either killing with malice or killing in the commission of a burglary. But, the prosecution was entitled to pursue only a felony murder theory. (*People v. Abel*, *supra*, 53 Cal.4th at p. 937; *People v. Huynh*, *supra*, 212 Cal.App.4th at p. 313.)

Regardless, any alleged error would have been harmless under any standard. As set forth above, defendant was necessarily guilty of first degree murder, whether under a theory of felony murder or premeditated malice murder. Moreover, the jury found the special circumstance true, demonstrating that it specifically found that the murder was committed in the commission of a burglary. Thus, even if the jury had been given the additional theory of malice murder, it still would have convicted defendant of first degree murder with special circumstances. He was not prejudiced by any presumed error. (*Gonzalez*, *supra*, 5 Cal.5th at pp. 201–202.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ