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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMAR LEVAL THOMAS,

Defendant and Appellant.

D058369

(Super. Ct. No. INF058881)

APPEAL from a judgment of the Superior Court of Riverside County, James S. Hawkins, Judge. Affirmed.

A jury convicted Jamar Leval Thomas of premeditated and deliberate murder (Pen. Code,¹ § 187, subd. (a), count 1); active participation in a criminal street gang (§ 186.22, subd. (a), count 2); and robbery (§ 211, count 3). It found true special circumstance allegations that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)), and other allegations that counts 1 and 3 were

¹ All statutory references are to the Penal Code.

committed for the benefit and direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)); during the commission of the offenses, Thomas inflicted great bodily injury (§ 12022.7, subd. (a)); Thomas committed the offenses while released from custody (§ 12022.1); and Thomas had suffered a prior strike conviction (§§ 667, subds. (c), (e)(1); 1170.12, subd. (c)(1)). The jury fixed the penalty under count 1 as life in prison without the possibility of parole. The trial court sentenced Thomas accordingly on that count, two years on count 2, and the upper term of five years on count 3, stayed under section 654.

Thomas's sole contention on appeal is that the People did not present sufficient evidence that he acted with reckless indifference to human life, requiring that this court reverse the robbery-murder special circumstance finding. We reject the contention and affirm the judgment.

FACTUAL BACKGROUND

We set forth only those facts relating to the count 1 and 3 murder and robbery.

On June 9, 2007, Wallace Brown was working the graveyard shift as a security guard at a construction site. His daughter worked for the same company, and at 2:12 a.m., Brown used his personal cell phone to speak with her for approximately 11 minutes. Brown usually carried a wallet with him.

At 2:11 a.m., a surveillance camera recorded Thomas and three other men, Jerrett Lewis, Akil Williams, and Darius Lee, arriving in a Ford Explorer at a Valero gas station at the intersection of Rosa Parks and North Indian Hill Canyon in Palm Springs. Lewis was driving and Thomas was in the rear passenger seat. The men entered the store and

left at about 2:16 a.m. At 2:18 a.m., they drove off, heading north on Frontage Road. Lewis weighed 296 pounds at the time. That night, he was wearing white low-top tennis shoes.

About 20 minutes later, Robert Hatten entered the Valero store to make a purchase. As he left, he observed Brown lying on the pavement next to a vehicle. He returned to the store and told the employees to call 911. One of the employees went to Brown's location and called 911. Brown was bleeding and attempting to get into the minivan. Brown asked the employee to call his wife, although she had died ten years earlier.

Palm Springs Police Department Officer Paola Ramos responded to a call in the area north of the gas station. She observed Brown on the ground bleeding, with a swollen mouth and significant injuries to the top of his head and left arm. Brown vomited and pieces of his teeth came out. He was unresponsive. The officer saw that the front passenger and driver's side windows of Brown's vehicle were completely smashed out and within the van she saw blood on the steering wheel and broken glass, as well as a rock. Another rock was found next to Brown.

A criminalist found human blood on the driver's side exterior and portions of the interior. There were bloodstains on the van's undercarriage, and also on the driver's side door sill, indicating the door was open when the blood was deposited.

Brown eventually died from his injuries. His wallet and cell phone were missing. An autopsy revealed he had a fractured nose; bruises on his forehead, chin, cheek and lip; and broken teeth. Brown had small lacerations on his hands. He had lacerations and

bruising to his ear, behind his ear, and on his scalp. Brown had suffered a subdural hematoma that compressed his brain and caused it to shift to the left. He died of closed head injury due to blunt force trauma.

The morning after the incident, Thomas and his father voluntarily went to the police station, where Palm Springs Police Department Detectives Frank Browning and Rhonda Long interviewed him. Thomas initially claimed he "[didn't] have anything to do" with the matter. He claimed he, Lee, Williams and another individual got drunk, went out to a club and then ran into Lewis, who was by himself. According to Thomas, they were just "chillin" and then he [Thomas] left and went to sleep. After further questioning, he admitted he was at the gas station, but denied being there the whole time or doing anything. Browning did not believe Thomas. At the end of the interview, Thomas was placed under arrest and put into an investigation room within the jail.

During Thomas's second interview, he admitted being at the scene and began to implicate Lewis, telling the detectives that after they left the store, Lewis spotted Brown, circled around his car and said, "I need to get the money" or "I need some money." According to Thomas, Lewis parked and left the car first and threw the rocks through the window of Brown's vehicle, and then the rest of the men exited Lewis's car. Thomas went over "just to make sure he would, [*sic*] he didn't need any help with the guy." Thomas denied putting his hands on Brown, telling detectives that Lewis "snatched [Brown] out the car, and he started to kick him: Bam, bam, bam, bam" The

transcript indicates Thomas imitated Lewis kicking.² Thomas claimed he grabbed Lewis and said, "Hey, what are you doing man? Come on, watch out," and Lewis responded by saying he didn't know what he was doing and didn't know his own strength. Thomas said he told Lewis to go wash his shoes off. Thomas told detectives he "thought [Brown] was dead, that's why everybody ran."

After Detective Browning exited the room, Thomas told Detective Long that all four men walked up to Brown's car together, Lee threw a rock through the driver's window and Lewis threw the other rock. Thomas admitted that he opened the car door, tugged at Brown and tried to pull him out of the car. Lewis then pushed Thomas out of the way, got Brown out of the car and started kicking Brown in the head. As Thomas described it a few moments later, "[I]t was dark, I didn't see any blood, but like once [Lewis] started to kick him, like you could see like it was like . . . [¶] . . . [¶] . . . all over the place and then And the, so, like he started kicking him, like, he kicked him like ten times, and I ran over there like 'Hey, what you doing?' I mean 'Stop.' . . . 'It's too far.' So he's like, you know what I'm saying? Everybody looks at his shoes, his shoes

² Thomas also told the detectives that Lewis hit Brown and was thumping his head to the ground: "He snatched him, the dude was like, you could see him like on the steering wheel, he (**Making thumping sounds**) hit him, hit him, and like he, he just pulled him out of the car, so that's when we all ran down there and by the, he just, was just, he just, just, he was just thumping his head to the ground just bam, bam, bam. . . ." Thomas said, "[H]e kicked, then it was just, and all you could see was the guys [*sic*] head just bounce off the wall and we were like 'What are you doing?' You know what I mean? So we tried to break it up, but at the same time nobody, nobody wants to get involved, you know what I mean? Cause the dude, I just seen him like, you could see his body just (**Imitating signs of Victim**), then I was like 'Man, I'm out of here. You're stupid.' And I left."

were like covered in blood." According to Thomas, Lewis took off his shoes and carried them back to his car. Lewis opened Brown's wallet, which was empty, and also had Brown's cell phone. They ran back to Lewis's car parked down the street, and Lewis took them home.

Detectives also interviewed Lewis, who eventually told them both he and Thomas threw rocks into Brown's car, then Thomas grabbed Brown with one hand, hit him a couple times with the other, and tried unsuccessfully to remove him from the car. Lewis said he helped Thomas drag Brown out of the car and claimed to have hit Brown twice in the back and ribs, as Brown groaned in pain.

Later, detectives put Thomas and Lee into the same room on a pretext and monitored their conversation. Thomas and Lee accused Lewis of being a snitch. At one point in the conversation, Thomas said that Lewis "know what he did . . . [¶] . . . [¶] Cause he kicked that nigga so many times, man just Poom, poom, poom Cuz." The transcript indicates Thomas imitated beating sounds, and the sounds the victim was making. Thomas still denied hitting or touching Brown. He told Lee he did not have blood on his clothes or shoes, commenting, ". . . that nigga when he came my house, that nigga's shoes just red. You know them white shoes he had on, they were red—red nigga. He must've kicked that nigga so many times."

On June 12, 2007, a police officer patrolling in the area of the Valero gas station found Brown's social security card, his AARP card, the top half of a cell phone, a bank card with Brown's name on it, and half of another credit card. The items were approximately 100 yards from the station.

Later that month, Lee and Thomas made a phone call to Thomas's father from jail. Thomas repeatedly told him, "When you dig up the lemon tree don't throw it away," and to "keep it and then call my lawyer." He said, "As soon as you dig, as soon as you dig up the lemon tree call him and give it to him." In March 2010, police recovered a pair of white Nike size 13 shoes from Thomas's backyard with possible human hairs or fibers embedded in their velcro straps. The shoes screened positive for blood, but DNA analysis was unsuccessful due to the blood's deterioration. The criminalist was unable to perform DNA analysis on the hairs.

At trial, the People presented evidence that calls were made from Brown's cell phone at 2:44 a.m. and 2:56 a.m. on June 9, 2007, to a phone number that Thomas had called several times while in Indio County Jail awaiting trial, and also to Wells Fargo Bank. Four other calls were made from Brown's phone to Williams's phone on June 9, 2007, between 9:25 a.m. and 11:06 a.m.

Lewis testified at trial that on the night in question, he was drinking and used PCP and marijuana, and had blacked out after he threw a rock at Brown's car and pulled him out of the vehicle. He denied that he wanted to rob Brown, but admitted he ended up with Brown's cell phone and wallet. Lewis claimed he dropped off his bloody shoes and Brown's cell phone at Thomas's house.

DISCUSSION

I. *Standard of Review*

"We review a challenge to the sufficiency of the evidence to support a special circumstance finding as we review the sufficiency of the evidence to support a

conviction." (*People v. Cole* (2004) 33 Cal.4th 1158, 1229; *People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) That standard is settled: " 'In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, 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 standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. " '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. Story* (2009) 45 Cal.4th 1282, 1296.)

II. *The Robbery-Murder Special Circumstance*

Felony-murder special circumstances are enumerated in section 190.2, and include in subdivision (a)(17) a special circumstance for murder during the course of a robbery: "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 of the following special circumstances has been found . . . to be true: [¶] . . . [¶] (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the

commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] (A) Robbery in violation of Section 211 or 212.5."

Section 190.2, subdivision (c), provides: "Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true"

Subdivision (d) of section 190.2 states: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true"

Under the foregoing provisions, "[a] felony-murder special circumstance is applicable to a defendant who is not the actual killer if the defendant, either with the 'intent to kill' (§ 190.2, subd. (c)), or '*with reckless indifference to human life* and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [one of the eleven enumerated felonies].' (§ 190.2, subd. (d), italics

added. . . .)" (*People v. Estrada* (1995) 11 Cal.4th 568, 572; see also *People v. Proby* (1998) 60 Cal.App.4th 922, 927.) The phrase "reckless indifference to human life" does not have a technical meaning peculiar to the law. (*Estrada*, at p. 578.) According to the California Supreme Court, "[T]he culpable mental state of "reckless indifference to life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death"" [Citation.] This mental state thus requires the defendant be 'subjectively aware that his or her participation in the felony involved a grave risk of death.' " (*People v. Mil* (2012) 53 Cal.4th 400, 417, quoting and citing *Estrada*, at p. 577;³ see *People v. Hodgson* (2003) 111 Cal.App.4th 566, 579-580; *Proby*, at p. 928 ["The term 'reckless indifference to human life' means 'subjective awareness of the grave risk to human life created by his or her participation in the underlying felony' "].)

Courts have found substantial evidence of reckless indifference to life under circumstances where a defendant has continued to assist with a violent robbery and/or flee rather than come to the injured victim's aid. (See *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1115-1118; *People v. Smith* (2005) 135 Cal.App.4th 914, 927-928, overruled on other grounds as stated in *People v. Garcia* (2008) 168 Cal.App.4th 261,

³ In *People v. Mil*, *supra*, 53 Cal.4th 400, the California Supreme Court considered a claim of instructional error in failing to instruct the jury with all elements of the felony-murder special circumstance (for both robbery-murder and burglary-murder) by a defendant who was not the actual killer. (*Id.* at p. 416.) Finding error and proceeding to a prejudice analysis, it assessed the evidence of the defendant's reckless indifference to human life in the light most favorable to the *defendant*, to decide in keeping with instructional error analysis whether a rational factfinder could come to the conclusion that he did *not* act with such indifference to human life. (*Id.* at p. 416.) Here, of course, we assess the evidence in the light most favorable to the jury's verdict, under the "less demanding" sufficiency of the evidence standard. (*Id.* at p. 417.)

291-292; *People v. Hodgson, supra*, 111 Cal.App.4th at pp. 579-580 [defendant helped his codefendant, who planned to rob the victim, by holding a garage door open and after hearing a shot, continued to assist by trying to keep the garage gate from closing until the codefendant could escape with the loot; the "appellant's role was more 'notable and conspicuous'—and also more essential—than if the shooter had been assisted by a coterie of confederates"]; *People v. Proby, supra*, 60 Cal.App.4th at p. 929 [defendant knew of codefendant's willingness to do violence and provided him with a gun, and continued to rob a restaurant, took money and left after the codefendant shot the victim in the back of the head]; *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [defendant helped plan a night-time armed invasion, gave his accomplice a rifle, and personally carried the loot, leaving one victim to die and threatening another; appellate court held that even if the jury believed the defendant did not intend the victim to be killed, he was aware of the "risk of resistance to such an armed invasion of the home and the extreme likelihood death could result"]; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754 [sufficient evidence for special circumstance found where defendant was involved in planning the robbery, knew another codefendant had a knife, went into the restroom and struggled with the victim who was stabbed, and "fled together with his accomplices and the robbery loot, leaving the victim to die"].)

In *Smith*, 135 Cal.App.4th 914, the Court of Appeal found substantial evidence to support a robbery-murder special circumstance where the defendant acted as a lookout outside a room while his codefendant beat and stabbed the victim in the room, and did not seek help when the codefendant left. (*Id.* at pp. 927-928.) The appellate court held

the jury could have found the defendant "gained a 'subjective awareness of a grave risk to human life' during the many tumultuous minutes it would have taken for [the victim] to be stabbed and slashed 27 times, beaten repeatedly in the face with a steam iron, and had her head slammed *through* the wall" and observed that when the codefendant emerged from the room covered in blood leaving a trail, the defendant "chose to flee rather than going to [the victim's] aid or summoning help." (*Ibid.*)

In *People v. Lopez*, the defendant, knowing that her codefendant planned a robbery and had a gun (*Lopez*, 198 Cal.App.4th at pp. 1110, 1116), lured the victim into an alley and failed to help the victim or call 911 after she heard a gunshot. (*Id.* at pp. 1110, 1113, 1117.) The Court of Appeal held that the fact the defendant knew about the gun showed she acted with reckless indifference to the life of the man she had lured into the alley. (*Id.* at p. 1116.) It further held, however, that her knowledge of the gun was not necessary to uphold the jury's special circumstance finding: "[Defendant's] act of luring the victim into the secluded alley was critical to the robbery's success. After hearing what she knew was a gunshot, she failed to help the victim or call 911. Instead she went to [the codefendant's] house and stayed with defendant and Crawford for the rest of the night and, on the evidence, engaged in sexual intercourse with [the codefendant]. Her actions reflect utter indifference to the victim's life." (*Id.* at p. 1117.) The court rejected the defendant's claim that the secluded location lessened the chance of violence, reasoning that a "person trapped in a secluded location, with no help in the offing, might resist an attempted robbery, or the robber might be emboldened to act

violently, with reduced fear of capture" (*Id.* at p. 1118.)

III. *Substantial Evidence Supports the Felony-Murder Special Circumstance*

Conceding the evidence shows he was a major participant in Brown's robbery, Thomas contends the record does not support a finding that he acted with reckless indifference to human life for purposes of the robbery-murder special circumstance; that the evidence only shows, and the prosecutor only argued, his intent was to rob Brown, not kill him. According to Thomas, the reckless indifference standard is "elusive," and his case exhibits none of the "key factors" relied upon by the cases finding sufficient evidence: he did not participate in an armed robbery with advance knowledge of the presence of weapons, neither he nor any of the other accomplices brought a weapon, and there was no long-range planning for the robbery. Relying on nonbinding out-of-state authorities (see *Episcopal Church Cases* (2009) 45 Cal.4th 467, 490), Thomas argues the fact he did not summon aid for Brown is not enough to uphold the special circumstance finding. Thomas characterizes the circumstances as a tragic but unanticipated death in the commission of a robbery, which he tried to stop once Lewis began kicking and hitting Brown in the head.

Thomas takes too narrow a view of the authorities. It is not necessary, for example, that Thomas gain awareness of the grave risk to human life *before* the crime; such knowledge can be gained during the course of the robbery. (See *People v. Smith*, *supra*, 135 Cal.App.4th at pp. 927-928 [defendant gained a subjective awareness of grave risk to human life during the time his accomplice beat and stabbed the victim].) And the People were not required to prove Thomas had the intent to kill Brown, only that he acted

with reckless indifference to human life in the commission of the robbery. Here, Thomas heard Lewis express an intent to rob Brown—saying he needed some money—after he spotted Brown sitting in his car. Thomas eventually admitted all of the men exited the car together with Lewis, and Thomas, who went over to make sure Lewis "didn't need any help with the guy," tried to pull Brown out of the vehicle. Thomas watched while the almost 300-pound Lewis kicked Brown in the head repeatedly—as Thomas put it to detectives, "like ten times," "Bam, bam, bam, bam"—with such force to cover Lewis's shoes in blood and cause Brown's blood to spurt onto the undercarriage of his vehicle. Thomas did not render assistance to Brown while he was lying on the ground bleeding, instead, believing he was dead, he fled the scene with Lewis and the others, leaving Brown to die. The jury was not required to believe Thomas's testimony that he tried to grab Lewis and get him to stop, but that testimony does not counter evidence that Thomas nevertheless left without giving Brown any assistance or seeking help for him.

In *People v. Hodgson, supra*, 111 Cal.App.4th 566, the defendant "held open the electric gate of an underground parking garage of an apartment complex to facilitate the escape of his fellow gang member who had robbed and shot to death a woman just after she opened the gate with her key card." (*Id.* at p. 568.) The court in *Hodgson* found substantial evidence the defendant was a major participant, even though he did not supply the gun, was not armed and did not personally take property. It also found substantial evidence the defendant acted with reckless indifference to human life, noting he must have been aware the use of a gun during a robbery presents a grave risk of death and,

after the victim was shot, the defendant did not aid the victim but instead helped his companion escape. (*Id.* at p. 580.)

Though in this case Lewis did not use a gun, he used his size and strength as a weapon. His multiple forceful kicks to Brown's head presented a grave risk to human life, and the jury reasonably found that Thomas was fully aware of that risk by his statements to detectives and to Lee on the tape recordings. Indeed, as stated, Thomas believed Brown was dead after witnessing Lewis's vicious assault on him. We conclude the evidence, and the inferences reasonably derived from the evidence, amply support the robbery-murder special circumstance.

Neither of the two out-of-state cases relied upon by Thomas convinces us to change our conclusion. In *State v. Lacy* (Ariz. 1996) 187 Ariz. 340, a burglary and double murder case, the defendant denied any involvement in the restraining or harming of the victims. In later recounting and distinguishing its decision in *Lacy*, the Arizona Supreme Court stated that "without the defendant's testimony, there was 'an almost complete void as to what occurred that night.' [Citation.] Because the record contained almost no evidence indicating what the defendant saw, knew, or did, except for his statement that he was not present when one of the victims was bound and gagged, we found the evidence insufficient to support the conclusion that the defendant was recklessly indifferent." (*State v. Bearup* (Ariz. 2009) 211 P.3d 684, 692, citing *State v. Lacy*, at pp. 352-353.) In *Jackson v. State* (Fla. 1991) 575 So.2d 181, the Florida Supreme Court found insufficient evidence of felony murder in a defendant's participation in a store robbery in which the accomplice killed the store owner by a

"single gunshot [that] was a reflexive reaction to the victim's resistance." (*Id.* at p. 193.)

The court found "no evidence that [the defendant] carried a weapon or intended to harm anybody when he walked into the store, or that he expected violence to erupt during the robbery. There was no real opportunity for [the defendant] to prevent the murder, since the crime took only seconds to occur, and the sudden, single gunshot was a reflexive reaction to the victim's resistance. No other innocent lives were jeopardized. [¶] . . . To give [the defendant] the death penalty for felony murder on these facts would qualify every defendant convicted of felony murder for the ultimate penalty." (*Id.* at p. 193.)

These cases are inapposite given evidence that Thomas witnessed Lewis's prolonged and ruthless attack on Brown. Even if they somehow had similarities to this case, we in any event decline to apply Arizona or Florida case law. (Accord, *People v. Proby, supra*, 60 Cal.App.4th at p. 930.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.