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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TARVEY REGO,

Defendant and Appellant.

A130047

(Alameda County  
Super. Ct. No. H47496)

Defendant Tarvey Rego appeals from a first degree murder conviction (Pen. Code, § 187)<sup>1</sup> which the prosecution theorized was related to gang rivalry between the Norteños and Sureños street gangs. The prosecution presented evidence suggesting the victim was killed because he was wearing a blue shirt in Norteños territory. (Cf. *People v. Williams* (1997) 16 Cal.4th 153, 193-194.) Defendant raises claims on appeal relating to a request to bifurcate the gang evidence from the rest of the trial, as well as claimed instructional error and insufficiency of the evidence to support a first degree murder conviction. We reject his arguments and affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

On the night of October 6 and into the early morning hours of October 7, 2007, defendant and his girlfriend, Vanessa Hernandez, were winding up the evening at a friend's apartment in Hayward with a group of other people. Among the group were two

<sup>1</sup> Further statutory references, unless otherwise designated, are to the Penal Code.

brothers, Manuel and Gerald Salas, who were sons of defendant's cousin,<sup>2</sup> and their girlfriends. There was a party going on in the house next door.

As the night wore on the Salas brothers began to talk about robbing people who were at the party next door. Defendant was present during that conversation but expressed no intention to join in the robbery.

The Salas brothers left the apartment, followed by their girlfriends. Defendant and Hernandez also left, but sat down on the landing, where they could not see down to street level.

Soon after they left the house the Salas Brothers recruited at least one more man, Darwin Ponce, to join in their robbery scheme. Ponce had been at the party next door but was thrown out because he had become too drunk. As he was leaving the party, he met two men he did not know and agreed to help them commit a robbery. The Salas group then approached a car that pulled up to go to the party next door.

Ligia Tijerina was driving the car, with two passengers, Arturo Chivalan and Yesenia Benavides. Tijerina described being approached by at least three men, apparently just after she had parked the car and Chivalan had alighted. Chivalan's own car was parked just behind Tijerina's, and he went into it to grab a pack of cigarettes. Tijerina, Benavides, and Chivalan all heard someone in the Salas group ask where the newly arriving guests were from, and he then said words to the effect, "This is our turf" or "South Hayward territory."

A man, apparently Ponce, then began to open the driver's door and asked Tijerina for money. Tijerina was able to pull the door closed again before he got it fully open. She then restrained Benavides from leaving the car because a fight had broken out outside the car. Benavides locked her door as the men approached. She thought there were more than five of them.

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<sup>2</sup> The apartment belonged to Raquel Gomez, mother of the Salas brothers. The brothers' father was defendant's cousin.

Chivalan, too, thought there were about six men in the Salas group. Hearing the commotion near Tijerina's car, he began to return to it when someone, probably Ponce, punched him. Benavides heard the man first ask Chivalan for money. Chivalan fought back with the man and knocked him to the ground. Other men then jumped on him and dragged him into the middle of the street, saying "South Hayward" or "Southside Hayward."

Chivalan called out for help from a friend he saw nearby, Roberto Soto. When Soto and another man whom Chivalan knew, Manuel Camacho, came to intervene on Chivalan's behalf, the men let Chivalan go and began fighting with his would-be rescuers.<sup>3</sup> Chivalan jumped back into Tijerina's car, and Tijerina called 911 as she was driving to a nearby 7-Eleven store.

As the fighting erupted other people joined in, with estimates running from ten to forty people being involved. The Salas brothers' girlfriends yelled upstairs to defendant to come and help his cousins.<sup>4</sup> Defendant then ran back into the apartment to get a steak knife, saying he had to "back up his nephews." He emerged with a knife and ran downstairs. Hernandez told him not to go, but he went anyway.

Upon first approach he waved the knife in the air and shouted, "Back the fuck off!" The fighting continued. Gerald, according to Hernandez, was "getting his ass beat," while Manuel was getting the better of whomever he was fighting. Defendant was near Gerald when Gerald managed to free himself and grabbed Camacho. Camacho was about to jump into the fight with Gerald, or had already started fighting, but Gerald was able to pin both his arms behind his back. According to Hernandez, defendant then thrust

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<sup>3</sup> Sadly, Camacho had been a good friend of Ponce's since fourth grade.

<sup>4</sup> We refer to the Salas brothers as defendant's "cousins," as does defendant in his briefs. The Salas brothers referred to defendant as "Uncle Dirk", and the Attorney General refers to them as "nephews." The exact nature of the relationship is immaterial, and Hernandez seemed to use both terms interchangeably.

the knife twice into Camacho's chest, stabbing him in the heart and killing him.<sup>5</sup> Gerald exclaimed, "What the fuck are you doing?"

Defendant then ran back into his friend's apartment, as did the other members of his group. He changed his clothes and put his bloody clothes into a bag with some bleach and left them on the patio. With Hernandez's help he cleaned the blood off his shoes and rinsed off the knife. He admitted to his friends he had stabbed Camacho.

When he was first interviewed by the police several days later defendant claimed he was not involved in the fracas and said he never left his friend's apartment that night. He said he did not see Manuel Salas at all that night. He described the clothes he had been wearing very differently from the clothes Hernandez said he had been wearing.

After the stabbing and before his arrest, defendant threatened Hernandez that he would hurt her family (she had five children) if she told anyone about the killing. When the police threatened her with the possibility of being arrested and being separated from her children, however, she agreed to turn over to them the bloody clothes and the knife defendant had used. DNA from the blood on the clothes matched Camacho's DNA.

Defendant was not apprehended until more than three months after the offense, when he was arrested after the car he was driving was stopped for a traffic violation. Hernandez was with him at the time. He said to her, "I love you, baby. I'm going to get years, baby. They're going to give me years." The arresting officer heard him say, "I'm done. I'm going away for 20 years." He told the officer, "You better put me in the hole or I am going to start slashing people."

Camacho was wearing a blue shirt when he was stabbed. It was the prosecution's theory that the stabbing was gang-related in that defendant was a Norteño and blue is a

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<sup>5</sup> Camacho's friend took him to the same 7-Eleven where Chivalan's group had gone. He fell out of the car bleeding from his ribcage. Paramedics responded and took him away; he died a few hours later. The stipulation regarding his death suggests he was stabbed only once.

Sureño color. (Cf. *People v. Williams, supra*, 16 Cal.4th at pp. 193-194.) There was no evidence, however, that Camacho was a Sureño or that he belonged to any other gang.<sup>6</sup>

The gang evidence came from several sources. First there were, of course, the “South Hayward” and “turf” comments by the would-be robbers during the incident. This testimony came from Chivalan, Tijerina, and Benavides.

Hernandez, who was engaged to marry defendant at the time of the offense, testified defendant was a member of 38th Street Locos, a Norteño gang; she knew he was a gang member because he had gang tattoos “blasted all over his hands.” His nickname was “Dirt,” which is also gang slang for committing a violent crime (i.e., “doing dirt”). Hernandez had also been in a gang in the past, and she testified about the frequently violent animosity between Norteños and Sureños. She further testified that sometime after the stabbing defendant had called Camacho a “scrap,” which is a very derogatory term Norteños use to refer to a Sureño.

In addition, defendant told a police inspector he had been a member of the Nuestra Familia prison gang while previously incarcerated. He had two stars tattooed on his hand, which he said he had earned in that gang by stabbing two people in prison. Defendant claimed he had dropped out of the gang.

While the investigation was ongoing defendant asked the same inspector whether he had “thrown [defendant’s] name out on the street,” because defendant had heard the Border Brothers, another gang, were out to get him.<sup>7</sup> He told the officer he had started

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<sup>6</sup> Defendant goes to some length to argue that Camacho was not a Sureño, not only because the police could find no evidence of such gang affiliation, but because defendant’s group, which was aligned with the Norteños, had been invited to the party, and it is unlikely that Sureños and Norteños would have been socializing together at the same party. The key fact, however, is not whether Camacho was actually a Sureño, but whether defendant perceived him to be. (See *People v. Williams, supra*, 16 Cal.4th at p. 194.)

<sup>7</sup> The parties dispute whether the Border Brothers were Sureños or a gang of its own opposed to both Sureños and Norteños. We find resolution of that dispute unnecessary to our decision. To the extent, however, the Attorney General suggests

carrying a “bone-crusher”—i.e., a screwdriver sharpened to a point—with him for protection.

A gang expert testified that “Norteño” means “northerner.” There are separate Norteño gangs, but they all are “sort of a united group” because they are all subordinate to Nuestra Familia, a prison gang. Norteños claim the number 14, since N is the 14th letter of the alphabet, standing for “Nuestra Familia.” “Sureño” means “southerner”; that group identifies with the Mexican Mafia, a rival prison gang, and attaches significance to the number 13 for M, the 13th letter of the alphabet. Norteños and Sureños are enemies and often commit violent crimes against one another. Norteños claim red and Sureños claim blue. A Sureño found by himself in a Norteño neighborhood would likely be assaulted. “Southside Hayward” is an umbrella name for several local Norteño gangs.

Defendant was charged with first degree murder (§ 187), including personal weapon use (§ 12022, subd. (b)(1)) and a gang enhancement (§ 186.22, subd. (b)(1)).<sup>8</sup> The case went to jury trial. Defendant claimed at trial, as on appeal, that he was only trying to help his cousins escape from their predicament and had no intent to assist in the attempted robbery. The jury was instructed on actual and imperfect defense of others but not on heat of passion manslaughter. It was instructed on first degree felony murder based on robbery and attempted robbery and was also instructed on premeditated, deliberate first degree murder. The verdict was first degree murder, with true findings on the weapon use and gang enhancements. Defendant was sentenced to 25 years to life in prison, plus one year for the weapon use.

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defendant was expecting an attack by the Border Brothers at the time of the offense, we agree with defendant that the evidence is not reasonably open to that interpretation.

<sup>8</sup> He was also charged with possession of a dirk or dagger (§ 12020, subd. (a)(4)) at the time of his arrest and driving on a suspended license (Veh. Code, § 14601.1). He entered a no contest plea to the weapon offense, and the Vehicle Code violation was dismissed on the court’s own motion in the interests of justice (§ 1385) before trial on the murder charge. An alleged prison prior (§ 667.5) was struck on the court’s own motion after the jury returned its verdict. The charge of illegal weapon possession was also dismissed after the murder verdict.

## DISCUSSION

Defendant raises four alleged errors on appeal: (1) failure to bifurcate the gang enhancement allegation; (2) failure to instruct on heat-of-passion voluntary manslaughter and on provocation as reducing first degree murder to second degree; (3) insufficient evidence that defendant aided and abetted an attempted robbery to support a felony murder theory of first degree murder; and (4) insufficient evidence of premeditation and deliberation to support a first degree murder conviction on that theory.

### I. Bifurcation of gang enhancement

Defendant moved in limine to bifurcate the trial of the gang enhancement, as well as to exclude individual items of evidence relating to gangs. The motions were denied.

The courts are authorized to bifurcate trial of gang evidence in appropriate cases. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049-1050 (*Hernandez*)). We review the trial court's decision on that issue for abuse of discretion only. (*Id.* at pp. 1048, 1050-1051.), and find no abuse of discretion here.

Since there was a gang enhancement alleged, the trial court's discretion to deny bifurcation was broader than its discretion to admit gang evidence when a gang enhancement is not charged. (*Hernandez, supra*, 33 Cal.4th at p. 1050.) Moreover, the reason for allowing gang testimony in this case was in part to prove the motive for the vicious stabbing. Bifurcating the trial would have deprived the People of the opportunity to prove that motive. Defendant points out that the prosecution was not required to prove motive. That is beside the point. By proving motive the prosecution also strengthened its case on intent, which it contended, at least under one theory, was the premeditated intent to kill due to gang rivalry. In such circumstances it was not an abuse of discretion to hold a unified trial on both the murder charge and the gang enhancement.

The cases relied upon by defendant are unpersuasive. Defendant admits “ ‘[g]ang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang-related.’ ” (*People v. Memory* (2010) 182 Cal.App.4th 835, 858.) That is the case here. Defendant's cited authorities are plainly distinguishable in that they involved no gang enhancement or other gang allegation. (*Id.* at pp. 858-859

[evidence that defendant was in a motorcycle gang held more prejudicial than probative where no gang enhancement alleged]; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 343 [gang evidence admissible to show defense witness’s bias even where other evidence of friendship with defendant was available, but relevance of gang testimony about gang behavior was “minimal, if not nonexistent”].) Both cases discussed admissibility of gang evidence in non-gang offenses. As noted above, the court has broader discretion in the bifurcation context.

In *People v. Albarran* (2007) 149 Cal.App.4th 214—not incidentally, an appeal following a new trial motion, not a bifurcation case—a gang enhancement was charged, but the trial court on the new trial motion ruled the evidence was insufficient to support the enhancement. (*Id.* at p. 222.) The new trial motion was granted as to the enhancement, and that allegation was dismissed without prejudice, but the motion was denied on the substantive offense. (*Ibid.*) The Court of Appeal reversed, noting there was no evidence of “any known or relevant gang rivalries” (*id.* at p. 227) and concluding, “the prosecution did not prove that this gang evidence had a bearing on the issues of intent and motive. We thus discern ‘no permissible inferences’ that could be drawn by the jury from this evidence.” (*Id.* at p. 230.) There was “nothing inherent in the facts of the shooting to suggest any specific gang motive.” (*Id.* at p. 227.)

Our case is clearly different. One of the prosecution’s chief theories was that defendant stabbed Camacho because he was wearing a blue shirt in Norteños territory, a not unheard of circumstance. (See *People v. Williams, supra*, 16 Cal.4th at pp. 193-194.) As the Attorney General notes “the probative effect of the [gang] evidence was weighty, persuasive and, as to the motivation of the slaying, indispensable.”

Indeed, the trial court opined it would be “just plain foolish to separate the two” trials. We agree. Despite defendant’s protestations to the contrary, a unified proceeding did result in significant trial efficiencies. Had the issues been bifurcated, presumably the gang expert would not have testified at the murder trial. The other witnesses about gang involvement, however, i.e., Hernandez, Chivalan, Tijerina, Benavides, and the police inspector, would have testified on the murder charge. It would have been wasteful of

judicial resources, as well as witnesses' and jurors' time, to bifurcate the trial. (Cf. *People v. Williams* (2009) 170 Cal.App.4th 587, 611 [“state has a strong interest in prompt and efficient trials,” including consideration of “burden on jurors and the court itself”].)

## **II. Instructional issues**

### **A. *Heat of Passion Voluntary Manslaughter***

The defense pursued at trial was defense of others or honest but unreasonable belief in the need to defend others. Trial counsel argued at length that defendant was only trying to help his cousins from being beaten when he entered the fray, and that the robbery attempt had already ended. The court instructed the jury on defense of others as a complete defense, as well as on imperfect defense of others as reducing the crime from murder to manslaughter.

Defendant claims the court erred in failing to also instruct sua sponte on voluntary manslaughter under heat of passion. (§ 192, subd. (a).) We review de novo whether the instruction was required. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.)

A trial court is required to instruct the jury sua sponte “on general principles of law that are ‘closely and openly connected to the facts before the court and that are necessary for the jury’s understanding of the case.’ [Citation.]” (*People v. Moye* (2009) 47 Cal.4th 537, 554 (*Moye*)). This includes the duty to instruct sua sponte on any lesser included offenses, such as voluntary manslaughter, supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*); *People v. Barton* (1995) 12 Cal.4th 186, 194-195.) The converse of this rule is that the court is not required to instruct on theories the jury could not reasonably find to be true. (*Breverman, supra*, 19 Cal.4th at p. 154; *People v. Wickersham* (1982) 32 Cal.3d 307, 324-325, overruled on other grounds in *People v. Barton, supra*, 12 Cal.4th at p. 201.)

Substantial evidence is defined as “ ‘ ‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’ ” that the lesser offense, but not the greater, was committed.” (*Breverman, supra*, 19 Cal.4th at p. 162.) It is evidence of

“ ‘ ‘ponderable legal significance . . . reasonable in nature, credible, and of solid value.’ ’ ” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408.) “The trial court need not give instructions based solely on conjecture and speculation.” (*People v. Young* (2005) 34 Cal.4th 1149, 1200.) The Supreme Court has repeatedly emphasized that the requirement of substantial evidence is not met by the existence of “ ‘ ‘any evidence, no matter how weak’ ’ ” of circumstances that might lead to an impassioned response. (*Moye, supra*, 47 Cal.4th at p. 553; *People v. Barton, supra*, 12 Cal.4th at p. 195, fn. 4.) Likewise, a heat of passion instruction is properly refused where the testimony shows the defendant responded to a perceived threat in a rational defensive manner, not in a passion-inflamed fury. (*Moye, supra*, 47 Cal.4th at pp. 546, 553-554.)

We begin by noting that the court considered and rejected the possibility of instructing on this theory. Defense counsel at trial agreed such an instruction was not supported by the evidence.

The factor that distinguishes the heat of passion form of voluntary manslaughter from murder is provocation by the victim. (*Moye, supra*, 47 Cal.4th at p. 549.) The underlying theory is that the defendant was so overwhelmed by the victim’s provocation that his reason was temporarily obscured. (*Id.* at p. 550; *Breverman, supra*, 19 Cal.4th at pp. 163-164.) The killing therefore is not treated as the product of his voluntary choice, but rather is reduced to voluntary manslaughter.

A heat of passion theory includes both objective and subjective elements. To satisfy the objective or “reasonable person” element of this form of voluntary manslaughter, the victim’s conduct must have been “ ‘ ‘sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection.’ ’ ” (*Moye, supra*, 47 Cal.4th at p. 550.) The subjective element requires the defendant “to have killed while under ‘the actual influence of a strong passion’ induced by such provocation,” without an opportunity to regain control of his emotions. (*Ibid.*)

Stripped of its details, the killing here was the stabbing of an unarmed man while his arms were restrained behind him. And although Camacho’s friend told police he had

been actively throwing punches before he was restrained, no witness testified to seeing with whom he might have been fighting. Hernandez testified that Camacho was merely getting ready to jump into the fight with Gerald when Gerald grabbed him and pinned his arms behind him. Even if Camacho were preparing to jump into or had jumped into the fight involving Manuel Salas, Gerald apparently disabled him before he could inflict any injury.<sup>9</sup>

Indeed, defendant does not appear to claim that Camacho himself provoked the attack. Rather, his argument is that the brawl that ensued after the Salas group unsuccessfully demanded money from the victims was such a provocative occurrence that it triggered an emotional reaction of fear or anger on defendant's part, which he suggests was consistent with that of a reasonable person in like circumstances. Or at least he claims the evidence is open to such an interpretation and that sua sponte instruction was required.

We disagree. First, there was no substantial evidence to suggest that Camacho himself engaged in any kind of provocative behavior that would reduce murder to manslaughter. *People v. Lee* (1999) 20 Cal.4th 47, 59, reiterates that “[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.]”

Even if Camacho were involved in the brawl and in fact exchanged punches with Gerald or someone else, that simply does not rise to the level of provocation that would override the judgment of a reasonable person in defendant's position. Even evidence of a provocative initial attack by the decedent does not alone justify a heat of passion instruction. Nothing in the case law “suggests an instruction on heat of passion is required in every case in which the *only* evidence of unreasonable self-defense is the

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<sup>9</sup> Hernandez may have initially told the inspector that Camacho was about to jump into the fight with Manuel , but she testified at trial he was about to jump into the fight with Gerald.

circumstance that a defendant is attacked and consequently fears for his life.” (*Moye, supra*, 47 Cal.4th at p. 555.) And here defendant himself was not attacked at all.

By all accounts, the original aggressors were the Salas brothers or those associated with them. There is no evidence that Camacho did anything beyond trying to foil the robbery attempt or that Chivalan did anything further than necessary to try to escape from the robbers. There was no evidence that the crowd was surging toward defendant, or even that Gerald or Manuel was presently in trouble when defendant intervened. Manuel was winning his fight and Gerald had extricated himself from the fight with one man and had then pinned Camacho’s hands behind his back. Exactly who else joined the fracas on whose side is unclear. This is not evidence of provocation to which a reasonable person would respond with uncontrolled passion.

Moreover, and as noted, at the time defendant stabbed Camacho, Gerald had restrained him with his hands behind his back. Thus rendered helpless, Camacho was not engaging in any sort of provocative behavior when defendant stabbed him to death. Even in a case of mutual combat, a killer may not take “undue advantage” of his opponent and still have his crime reduced to manslaughter. (*People v. Lee, supra*, 20 Cal.4th at p. 60, fn. 6.) Here there was unquestionably undue advantage.

Defendant compares his case to *Breverman, supra*, 19 Cal.4th at pp. 163-164, where the Supreme Court held the jury should have been instructed on voluntary manslaughter because a group of angry men converged on defendant’s home, vandalized his car in the driveway, and were surging toward his home. The man Breverman killed was part of the assaulting crowd. (*Id.* at p. 148.) As the Attorney General points out, the case involved trespass upon Breverman’s property, whereas the fighting in this case occurred on a public street.

It is equally important that the mob in *Breverman* appeared to be acting in concert and of one mind in targeting the defendant; here the evidence suggests only a wild free-for-all without any backing for Camacho in particular and without any clear target. Nor did the crowd appear to be closing in on the Salas brothers or defendant himself, perhaps in part because he was waving a knife and, as far as the evidence discloses, was

the only armed man on the scene. Defendant cannot use the chaotic scene in general to claim he was provoked to violence. The lack of imminent threat is reflected in Gerald's remark after the stabbing: "What the fuck are you doing?"

Defendant's other cases are equally unpersuasive. He cites *People v. Ramirez* (2010) 189 Cal.App.4th 1483, which involved a gang-related confrontation. In that case, however, there was evidence that the killer himself was punched during a heated confrontation about gang territory. (*Id.* at p. 1486.) And while it is true that the court held there should have been a sua sponte voluntary manslaughter instruction, the portion of the opinion discussing the need for such instruction was not published. (*Id.* at p. 1487.) Moreover, the fact that the defendant himself was attacked, as well as the fact that the homicide victim was his assailant, distinguishes that case from ours.

On the subjective element of heat of passion manslaughter *Moye* had this to say: "In *Breverman* there was affirmative evidence that the defendant panicked in the face of an attack on his car and home by a mob of angry men and had come out shooting, and continued shooting, even after the group had turned and ran. 'At one point in his police statement, defendant suggested that he acted in one continuous, *chaotic response* to the riotous events outside his door.' [Citation.]" (*Moye, supra*, 47 Cal.4th at p. 555.) Without similar evidence, a heat of passion instruction was properly denied in *Moye*. (*Id.* at pp. 555-558.) *Moye's* own description of his reaction showed it was rational and defensive, not a panic-inspired attack.

Similarly, the fact that defendant retrieved a weapon before entering the fracas strongly suggests he was not acting in heat of passion. (*People v. Butler* (2005) 127 Cal.App.4th 49 [defendant who retrieved gun before confronting group at bus stop was not entitled to voluntary manslaughter instruction].) There was also the fact that Hernandez urged him not to get involved, which predictably would have triggered an examination by him of the reasonableness of his response and would have snapped him out of any sort of panic reaction he might otherwise have been experiencing. And defendant himself said he was going to "back up" the Salas brothers, which suggests reasoning, not panic or a mental state in which reason has been obscured.

The evidence shows defendant remained in control during his initial entry to the fighting, waving the knife and ordering the crowd to “back off.” His homicidal rage was evidently fueled by seeing Camacho wearing blue, the color of his sworn enemies, the Sureños. That, however, is not something that would provoke a reasonable person to uncontrollable passion. Yet the jury’s true finding on the gang allegation suggests it believed this was the motive for the attack.

Nor was there any evidence that defendant was or appeared to be in a panic state when he delivered the fatal wounds. Hernandez saw him simply “go up to [Camacho] and stab him.” This was a well-aimed lethal stabbing of an unresisting victim, not a wild panic-driven slashing.

For the foregoing reasons, neither the objective nor subjective aspects of heat of passion manslaughter were supported by the evidence.

***B. Provocation as Reducing First Degree Murder to Second Degree Murder***

Defendant also claims the court erred in failing to give CALCRIM No. 522, which would have instructed the jury, “Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]”

The Attorney General points out, however, that the Supreme Court has specifically held this instruction is a “pinpoint” instruction, as to which no sua sponte duty exists. (*People v. Rogers* (2006) 39 Cal.4th 826, 877-878; accord, *People v. Middleton* (1997) 52 Cal.App.4th 19, 31-33, overruled on another ground in *People v. Gonzalez* (2003) 31 Cal.4th 745, 752-753, fn. 3.) Defendant’s appellate counsel admits he overlooked this authority in preparing the opening brief. This forecloses any argument that the court erred in failing to instruct sua sponte. In any event, for the reasons indicated above, a theory of provocation was not reasonably raised by the evidence.

**C. *Ineffective Assistance of Counsel***

Defendant's fallback position, of course, is that defense counsel was ineffective in failing to request CALCRIM No. 522. We cannot conclude based on the record before us that defense counsel's performance fell below an objective standard of reasonableness. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.) It is possible the attorney had tactical reasons for wanting to stake his bets on a voluntary manslaughter conviction by imperfect defense of others, arguing defendant was only trying to help protect his cousins when he entered into the fighting. That is essentially his same argument on appeal, but now he tries to call it heat of passion.

It is also entirely possible the attorney simply did not believe there was substantial evidence of provocation or heat of passion. As discussed above, we share that view.

**D. *Prejudice***

But even if the court erred in failing to give a heat of passion manslaughter instruction, there is no reasonable probability the result would have been more advantageous to defendant. (*Breverman, supra*, 19 Cal.4th at p. 165.) The first degree murder finding alone might not rebut any suggestion of prejudice, but that finding combined with the gang enhancement and the rejection of imperfect defense of others makes it most improbable that the jury would have convicted defendant of voluntary manslaughter on a heat of passion theory, even if it had been instructed on that theory.

**III. Sufficiency of Evidence of Attempted-Robbery Felony Murder**

The prosecution's theory was, in part, that defendant was guilty of first degree murder because the killing occurred in the course of a robbery or attempted robbery. Defendant claims, however, there was no actual robbery because no property was taken, and the failed robbery attempt was completed before defendant became involved. Therefore, he suggests, there was insufficient evidence to convict him of felony murder. He further argues that the instructions given on robbery and attempted robbery, combined with the prosecutor's argument, may have so confused the jury that some members may have convicted him of first degree murder on the faulty theory that he was guilty of

attempted robbery when they really believed he was only trying to help his cousins escape after their failed robbery attempt ended.

The Attorney General argues the instructions were correct and any misstatement by the prosecutor was waived by the failure to object at trial. She basically agrees with defendant that, in order to be found guilty of felony murder, he would have had to join in the attempted robbery before it ended. Whether the attempt had already failed when defendant entered the fracas or was continuing was a factual question for the jury. The evidence was not insufficient to support a felony-murder verdict based on attempted robbery.

**A. *Instructions on Robbery and Attempted Robbery***

At the close of evidence, defense counsel made a motion under section 1118.1, arguing there was insufficient evidence to place the attempted robbery felony-murder theory before the jury. The prosecutor disagreed and noted that Manuel and Gerald became involved in a fight immediately after they came downstairs to commit the robbery. “[K]nowing full well that *the robbery was ongoing*—and certainly, legally, the robbery had not come to a close and that the *force was still ongoing* as far as the attempted robbery was concerned—the defendant armed himself, went down the stairs and ended up stabbing somebody.” Defense counsel disagreed, but acknowledged that “[i]f it were shown that the defendant was aware that that fight was connected to the robbery attempt, I think that would make it a lot stronger.”

The court ruled in favor of the prosecution, finding that “almost immediately” after the Salas brothers went downstairs “there’s some kind of a fracas, and . . . the defendant goes down to join them.” The court concluded there was evidence the robbery was “still ongoing.”

The court instructed the jury on the elements of both robbery and attempted robbery for purposes of the felony-murder rule.<sup>10</sup> The instructions included the rule that

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<sup>10</sup> Even though there was no evidence that the Salas brothers actually obtained any of their victims’ property, the court noted that it needed to instruct on the elements of robbery because the allegation was that the murder occurred during the course of an

“[t]o be guilty of robbery as an aider and abettor, the defendant must have formed the intent to aid and abet the commission of the robbery before or while a perpetrator carried away the property to a place of temporary safety.” The instructions on attempted robbery were separate from the instructions on robbery and contained a requirement that “defendant intended to commit robbery,” with no mention of asportation.

The court also instructed the jury on the “one continuous transaction” rule, limiting the instruction to robbery, not attempted robbery. Defendant complains that the instruction told the jury it could consider “whether the fatal act occurred while the perpetrators were fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime . . . .” He contends the instruction “implied” that the “fleeing the scene” factor applied to attempted robbery, but in fact the instruction was specifically limited to robbery.

We perceive no error in the instructions. Indeed, in his reply brief defendant acknowledges he “does not contend the instructions were incorrect.” We take him at his word.

Nor do we think the instructions were so ambiguous as to have misled the jury. Defendant admits in his reply brief that he does not claim the instructions were legally erroneous, but that they were not justified by the evidence. He claims, in fact, that “the court should not have instructed as to robbery, attempted robbery, aiding and abetting, or felony murder at all, because those instructions misled the jury to believe that it could find appellant guilty of first degree murder on a felony-murder theory.”

This argument is unavailing. Certainly there was sufficient evidence of an ongoing felony for defendant to be tried on a felony-murder theory. The instructions required defendant himself to have harbored the intent to commit a robbery before he could be found guilty of attempted robbery felony murder. The evidence of the robbery attempt and the ensuing brawl left open the question whether the Salas brothers were

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attempted robbery. We believe the jury could be trusted to reject a theory of a completed robbery, and no prejudice ensued. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126, 1130.)

continuing to try to get money from whomever they could overpower. Defendant's theory of the evidence—that he was simply trying to help his cousins escape after a failed robbery attempt—was implicitly rejected by the jury under the instructions as given. There was no evidence to support a finding that he intended to commit some other robbery if the Salas brothers' attempted robbery was over when he entered the fracas.

Defendant argues a robbery instruction was superfluous, but *People v. Guiton*, *supra*, 4 Cal.4th at p. 1126 held if in fact there was insufficient evidence of one factual theory of the crime but sufficient evidence of another, the jury could be trusted to have so determined. No reversible error could accrue on the purported misinstruction. (*Id.* at pp. 1124-1129.) There was sufficient evidence to support the attempted robbery theory submitted to the jury and to support the verdict.

***B. Prosecutor's Argument on Attempted Robbery***

We do find problematic some of the prosecutor's remarks during his summation. For instance, he said, "But the robbery is ongoing, essentially, until the robbers *or attempted robbers* reach a place of safety." In his closing argument he referred to CALCRIM No. 1603 and said, "That instruction specifically addresses a completed robbery. 'Carried the property to a place of temporary safety.' 'A perpetrator has reached a place of temporary safety with the property if he or she has successfully escaped from the scene.' [¶] How does that relate to what we have here, an attempted robbery? The same language applies. The attempted robbery continues until the person attempting the robbery has reached a place of safety. Successfully escaped from the scene."

As we read the Attorney General's brief, she contends this was a correct statement of the law of felony murder, but not of aiding and abetting.<sup>11</sup> We tend to agree with

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<sup>11</sup> The Attorney General argues that the duration of an attempted robbery "for purposes of *felony murder* is broader than for *aiding and abetting liability*." She cites *People v. Cooper* (1991) 53 Cal.3d 1158, 1161. While her statement may be true it is somewhat beside the point. The Attorney General also admits "if appellant was not liable for attempted robbery, he could not be liable for felony murder." Thus, defendant would be correct that if the evidence were insufficient to support a finding that he aided or

defendant that the prosecutor's comments could have been interpreted to misstate the law, but any claim of misconduct was forfeited by failure to object at trial. (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Moreover, considering the comments in context, we think it unlikely that the jury was misled.

Defense counsel argued at length that the attempted robbery had already ended before defendant entered upon the scene: "And to argue that what [defendant] did down there was for the purpose of assisting Manuel and Gerald escape of [*sic*] the robbery assumes that whatever they were then involved in when [defendant] went down there had to do with the robber. [¶] . . . [¶] . . . And the evidence does not support that from the testimony—the evidence doesn't support that [defendant] went on down there to get involved in this robbery."

The prosecutor, on the other hand, argued, "It's a completely unreasonable argument that Gerald and Manuel are involved in this fight, not for the robbery, because the robbery is ongoing." His position was that the fighting with Chivalan and others was part of the force element of the robbery attempt.

Thus, the arguments of counsel, considered as a whole, focused the jury on the proper inquiry (i.e., whether the *mêlée* occurred as part of the robbery attempt, or whether the attempt had already ended by the time defendant joined in). Moreover, the jury was instructed that the actual instructions given by the court must be followed to the extent the arguments of the attorneys were inconsistent. We presume the jurors followed those instructions. (*People v. Williams, supra*, 170 Cal.App.4th at p. 613.) Any possible misinterpretation was forfeited by failure to object.

### ***C. Sufficiency of Evidence of Attempted Robbery***

Defendant claims he "came upon the scene well after the [robbery] attempt had failed, the intended robbery victims had left the scene, and a fight was going on between

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abetted the attempted robbery it would also be insufficient to support a felony-murder finding.

the would-be robbers and persons who were not involved in the attempt.” But the evidence was not nearly so clear or so one-sided.

Though the Salas brothers initially targeted Tijerina and Benavides, they also appear to have been after Chivalan’s money when they physically assaulted him. Chivalan testified that he was attacked by one of the would-be robbers as he was returning to Tijerina’s car. Benavides testified the men demanded money from Chivalan before the attack. Thus, at least the initial fisticuffs erupted as part of the robbery attempt, not a wholly separate incident. Whether the attempt was ongoing at the time defendant joined in was a question of fact for the jury.

Defendant argues repeatedly that the robbery attempt had already ended because the targeted victims had left the scene in Tijerina’s car before defendant emerged with the knife. This argument is faulty because the exact chronology of events is not clear from the testimony. This was an ambiguous area left to the jury’s determination.

Moreover, when defendant grabbed the knife and headed downstairs he said he was going to “back up” his cousins, not that he was going to rescue them from an attack. It was for the jury to decide whether the Salas brothers and their allies had abandoned the robbery attempt before defendant joined in on their behalf. The verdict necessarily incorporated a finding that defendant intended to commit a robbery. This shows the jury believed the robbery attempt was ongoing when defendant descended the stairs to assist his cousins. That verdict was supported by substantial evidence.

#### **IV. Sufficiency of Evidence of Premeditation and Deliberation**

Defendant’s final argument is that there was insufficient evidence of premeditation and deliberation, so that he was improperly convicted of first degree murder. He further argues that because both theories of first degree murder were supported by insufficient evidence, double jeopardy bars his retrial on both first degree murder theories. We must, he suggests, not only reverse the conviction, but order a new trial limited to second degree murder or manslaughter.

These arguments fail. Defendant’s forethought in returning to the kitchen to grab a knife suggests premeditation about what he might intend or be willing to do with such a

weapon. That Hernandez urged him not to go downstairs supports a finding of deliberation. Her warning—and defendant’s rejection of it—shows he must have considered what he might be getting himself into and went forward nonetheless. That he waited for his cousin to disable what he perceived to be a “scrap” before using his weapon further suggests forethought. Even the brief time which he had to deliberate was sufficient under the law. (CALCRIM No. 521.) The intentional delivery of wounds to the vital area of the heart suggests willful intent to kill. We find no reversible error.<sup>12</sup>

**DISPOSITION**

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Lambden, J.

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<sup>12</sup> We deny by separate order defendant’s first amended petition for writ of habeas corpus in case No. A133929.