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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SAUL GASTELUM MORENO,

Defendant and Appellant.

B235376

(Los Angeles County  
Super. Ct. No. VA110647)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Michael A. Cowell, Judge. Affirmed as modified.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M.  
Roadarmel Jr. and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Saul Gastelum Moreno appeals his multiple murder convictions and sentences. Moreno asserts his trial counsel was ineffective for failing to request a pinpoint instruction, namely CALJIC No. 8.73, on the issue of provocation as it relates to premeditation and deliberation. He also claims that the court erred in sentencing him to a separate life without possibility of parole sentence on each murder count. As we shall explain, Moreno has not affirmatively demonstrated that he suffered prejudice as a result of the failure to instruct the jury with CALJIC No. 8.73. Nonetheless, the claim with respect to his sentence has merit. Accordingly, the judgment as modified is affirmed.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

#### **Circumstances Leading up to the Murders.**

The Bohnhoff family operated the Bohnhoff Lumber Company in Vernon for more than 100 years. At the time the murders occurred in 2009, one of the victims Alan Bohnhoff (“Alan”)<sup>1</sup> owned the business. His adult children Christa Bohnhoff (“Christa”) and Charles Michael Bohnhoff (“Michael”) also worked at the company. According to people who worked there, the lumber company had a family atmosphere, and the Bohnhoffs treated the employees like friends and family. The second victim, Jaime Sanchez, and appellant Moreno also worked at the lumber company.

Moreno was hired in 2005. He was a lumberman with about 30 years of experience in the field. However, Moreno had a difficult personality and customers and his colleagues complained about his attitude. Moreno was known to hit and kick customers during his employment. He did not get along with his colleagues at work. He had a “short fuse” – when he got angry, he would curse and throw things. He also had a difficult time taking orders from others. When Moreno became upset at work, he would leave, and not return for several days to a week. One of the managers of the company estimated that in the year preceding the murders Moreno had missed about 50 days of

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<sup>1</sup> To avoid confusion the individuals involved in this case that have the same surname will be referred to by his or her first name.

work. Notwithstanding his behavior, Moreno was formally disciplined only once, in March of 2009.

Jaime Sanchez was about 20 years younger than Moreno and had considerably less experience in the lumber business. However, Sanchez was dependable and able to get along with customers and the other employees at the lumber company. Ultimately Sanchez was promoted to yard foreman. Moreno was very upset about Sanchez' promotion. Moreno believed he rather than Sanchez should have received the promotion because Moreno had better qualifications and more experience in the lumber business. Nonetheless, Moreno was passed over for the promotion because of his difficult personality and his frequent absences from the workplace.

Moreno did not get along with Sanchez. Other employees also had difficulties in dealing with Sanchez because he could be demanding as the foreman. In addition, sometimes because of his inexperience, Sanchez would "get in over his head" and get frustrated and "take it out" on other people.

Moreno complained about Sanchez to his co-workers on an almost weekly basis. Over the years Moreno became increasingly resentful and repeatedly told others he should have been promoted. Moreno was angry on those occasions when he was asked to fill lumber orders that he perceived to be Sanchez' responsibility, even though it was not uncommon at the company for all employees to work as a team to complete orders.

Once, a couple of months before the May 2009 murders, Moreno became angry about filling an order and told a co-worker, that "Alan and Michael need to be shot in the head." When Moreno said this he made hand gestures like he was holding a gun and shooting someone in the head. According to the co-worker, Moreno also said "when you kill somebody you go to jail. You plead insanity and they get you out right away."

### **The Murders.**

On Friday, May 15, 2009, Moreno again became upset about his having to fill a lumber order that he thought Sanchez should fill.

On Monday, May 18, 2009, Moreno came to work earlier than usual. At about 6:45 a.m. that morning, a co-worker saw Moreno inside the company management office

rummaging through the desk drawers, including Alan's desk. The co-worker had never seen Moreno do this before. Moreno appeared a little nervous. The employees thought that the Bohnhoffs had a gun somewhere on the premises.

Later that morning, Moreno approached one of his co-workers and said “things are going to change today.” Moreno then walked away, turned and repeated, “things are changing today.”

Another employee, Tom Field, gave Moreno an order to fill that morning; it was an order for teak wood that normally would have been filled by Sanchez. Moreno became very upset and asked “why the hell” he had to fill an order that normally would be filled by Sanchez. Moreno was angry, but turned “cold” and said in a matter of fact manner, “things are going to change. I’m not the same man today.” Moreno then walked toward the office. Field saw Moreno in the office waving his arms around in front of Alan’s desk.

When Moreno entered the company office that morning, Alan sat behind his desk. Michael was also in the room at his desk, as was the company receptionist, Magali Fabian. Another employee, Walter Maas was also in the office sitting at a desk about 10 feet from Alan.

Moreno began speaking to Alan, complaining about having to fill the order that he thought Sanchez should complete. Alan remained seated and did not get angry; he did not yell at Moreno. Alan was calm and firm with Moreno but not disrespectful. Alan told Moreno he could fill the order as requested or clock out and go home. Moreno appeared angry and agitated; he walked back and forth in front of Alan’s desk. Moreno told him he was not going to “pull the order” and said that “everything was going to change,” at least three times. When Moreno continued to argue, Michael told Moreno, “you heard what he said.” Moreno was again told to fill the order or go home. Moreno started to walk away but stopped. He turned and said, “you know, I’m not going to do either of those.” He walked back to Alan, pulled out a gun and shot him five times at close range. Alan died of the wounds. The entire incident, which took place over about a 3-5 minute time span, was recorded by video surveillance cameras in the office.

Thereafter, Moreno chased Michael out of the office. Maas saw the shooting and also fled the office. Ms. Fabian remained behind and called 9-1-1.

Outside the office Moreno pointed the gun at Michael. Michael pled with Moreno not to shoot him, but Moreno put the gun in Michael's face. However the gun did not fire, and Michael escaped back into the office and locked the door.

Moreno then walked past other co-workers in the lumber yard and went into the warehouse where Sanchez was operating a forklift. Moreno shot Sanchez a number times, causing him to fall off the forklift onto the ground. Moreno shot Sanchez again as he lay on the ground; Sanchez died from his wounds. Moreno's attack on Sanchez was also captured on surveillance video.

After Moreno shot Sanchez, Moreno ran to his car. Police had just arrived as Moreno was getting in his vehicle. Moreno sped off in his car and police pursued him. The subsequent police chase involved multiple police cars and lasted several minutes. The pursuit ended when Moreno crashed his car.

The gun used in the killings, registered to Moreno, was found in his car when he was arrested. Police also found an empty magazine clip for the gun in Moreno's pocket and a loaded magazine clip was found as Moreno was being removed from the vehicle. At the time, Moreno was apprehended he wore five different shirts and 11 pairs of long, thermal underwear.

### **Moreno's Arrest and Trial.**

Moreno was arrested and charged in counts 1 and 2 with murder of Jaime Sanchez and Alan Bohnoff in violation of Penal Code section 187, subdivision (a). In count 3 he was charged with attempted murder of Michael Bohnoff,<sup>2</sup> and in count 4 of evasion of a police officer. The information also further alleged that Moreno committed multiple murders in violation of Penal Code section 190.2, subdivision (a)(3) and various weapons enhancements.

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<sup>2</sup> The court granted Moreno's motion to dismiss count 3 pursuant to Penal Code section 1118.1 during the trial.

During the trial, the prosecution presented evidence which included the testimony of the eyewitnesses to the crimes and video surveillance footage of the shootings.

Moreno did not testify on his own behalf at trial. He presented evidence that two days before the shootings, he went to a Kaiser Permanente medical center. He complained to the medical personnel at Kaiser that he was under a lot of stress at work, that he had not been able to sleep well, and that he experienced head pain. He wanted Motrin and sleep medication.

The jury found Moreno guilty of first-degree murder in counts 1 and 2, and guilty of count 4. They found the special circumstance and firearm allegations true. Thereafter, the court sentenced Moreno to a total prison term of life without the possibility of parole plus 25 years to life for count 1 and an identical concurrent term of life without the possibility of parole plus 25 years to life for count 2. The court also imposed a concurrent term of 16 months for count 4.

Moreno filed a timely notice of appeal.

## ***DISCUSSION***

### ***I. Ineffective Assistance of Counsel.***

Before this court, Moreno contends that his trial counsel rendered ineffective assistance in failing to request that the jury be instructed with CALJIC No. 8.73, which relates evidence of provocation to the issue of premeditation and deliberation.

#### ***Background***

During his opening statement Moreno's counsel told the jury Moreno felt he was being pushed around at work by Sanchez, and that he suffered stress because he was being required to do work that Sanchez should have performed. He argued that Moreno went to speak with Alan on the morning of the murders to get Alan to understand he was being asked to fill an order that should have been given to Sanchez, and that when Alan told Moreno to either fill the order or go home, "Moreno lost it. In the heat of passion, Mr. Moreno shot and killed Alan Bohnoff." He further argued that when Moreno later pointed the gun at Michael, he made a conscious decision not to fire. Counsel further

emphasized that “the evidence will show that Mr. Moreno acted rashly and without deliberation and reflection, and from passion rather than judgment.”

Thereafter before the case was sent to the jury, the court and the parties discussed the jury instructions. Moreno’s counsel requested that the court instruct the jury with instructions relating to provocation that could reduce the crime from murder to voluntary manslaughter. The court rejected Moreno’s counsel’s request, finding that there was no evidence of a legally adequate provocation. The court observed:

[Moreno] was asked to do an assignment. That’s part of his job. He didn’t want to do it. He resented it . . . the tape shows clearly there is no quarrel. There’s agitation by Mr. Moreno. There’s no quarrel. It takes two sides to quarrel. There was no quarrel by Mr. Bohnoff. . . . He was very calm. He was—said to him basically this is what you have to do. Do it or punch out and go home. But there was no quarrel. Nothing that a reasonable jury could view as being a quarrel or confrontation that might understandably arouse passion. Yes, his emotions were aroused. Yes, he was anxious.

The court further expressed its confidence that based on the evidence the jury would find Moreno had the required intent for the murders:

What conceivable provocation could be or heat of passion could be adduced with respect to the [killing of Sanchez]? [Moreno] runs out through the warehouse, approaches the man on the forklift and kills him. That’s all the earmarks of premeditation, deliberation, and indeed so does the killing of Mr. Bohnoff.

With respect to the elements of premeditation, the trial court thereafter instructed the jury with CALJIC No. 8.20, which provides in part, as follows:

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree. [¶] The

law does not undertake to ensure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances. The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is not deliberation and premeditation to fix an unlawful killing as murder of the first degree.”

The court also instructed the jury with CALJIC No. 8.30 which informed the jury that: “Murder of the second degree is also the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation.”

In closing argument, Moreno’s counsel argued that the killings of Alan and Sanchez were “unconsidered and rash impulse,” and that therefore Moreno was guilty of second-degree murder. Counsel asserted that Moreno’s conduct that day was not consistent with someone who had premeditated the murders; he maintained that when he was told to fill the order or leave work, Moreno was “filled with rage”; that Moreno had the intent to kill, but did not weigh or consider the decision. Counsel told the jury that Moreno “just lost it. He’d been under stress for many, many years, and this was the straw that broke the camel’s back. He just lost it. The killings were not deliberate and premeditated . . . both killings were unconsidered and rash impulses.”

### ***Analysis***

Appellant contends that the trial court should have instructed the jury with CALJIC No. 8.73, which provides: “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.”

CALJIC No. 8.73 is a “pinpoint” instruction that need not be given *sua sponte*, but must be requested by trial counsel. (*People v. Wright* (1988) 45 Cal.3d 1126, 1137

[defense “pinpoint” instruction pinpoints theory of defendant’s case]; *People v. Rogers* (2006) 39 Cal.4th 826, 878-879; *People v. Cole* (2004) 33 Cal.4th 1158, 1211.) Because his trial counsel did not request CALJIC No. 8.73, Moreno contends that his counsel provided ineffective assistance.

“Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes both of the following: (1) that counsel’s representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.]” (*People v. Foster* (2003) 111 Cal.App.4th 379, 383; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Waidla* (2000) 22 Cal.4th 690, 718.) “[P]rejudice must be affirmatively proved. [Citations.] ‘It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. . . . The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster, supra*, 111 Cal.App.4th at p. 383.)

A court should proceed directly to the issue of prejudice if it is easier to dispose of an ineffectiveness claim on that basis. (*Strickland, supra*, 466 U.S. at p. 697; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241; *People v. Holt* (1997) 15 Cal.4th 619, 703; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

In this case, Moreno’s claim fails because he has failed to affirmatively demonstrate prejudice.

To justify a second-degree murder instruction, there must be evidence of not just any kind of provocation, but of “evidence from which the jury could find that the defendant’s decision to kill was a *direct and immediate response* to the provocation such that the defendant acted without premeditation and deliberation.” (*People v. Fenenbock*

(1996) 46 Cal.App.4th 1688, 1705; *People v. Wickersham* (1982) 32 Cal.3d 307, 329 [“Thus, where the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately, the trial court is required to give instructions on second degree murder under this theory. The fact that heated words were exchanged or a physical struggle took place between the victim and the accused before the fatality may be sufficient to raise a reasonable doubt in the minds of the jurors regarding whether the accused planned the killing in advance”] overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 201.) While the “test of whether provocation or heat of passion can negate malice so as to mitigate murder to voluntary manslaughter is objective,” the “test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder, on the other hand, is subjective.” (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) Moreover, “provocation and heat of passion must be affirmatively demonstrated. [Citations.] It is not enough that provocation alone be demonstrated. There must also be evidence from which it can be inferred that the defendant’s reason was in fact obscured by passion at the time of the act. [Citations.]” (*People v. Seden* (1974) 10 Cal.3d 703, 719, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 157-162.) In order for a person to be acting in the heat of passion, “the passion aroused need not be anger or rage, but can be any ““violent, intense, high-wrought or enthusiastic emotion”” [citations] other than revenge [citation].” (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

First, although the test for provocation in this context is subjective, there must be some evidence that the victim acted in some manner to provoke the defendant. Here the evidence of provocative conduct is minimal. Moreno did not testify at trial and thus, his subjective beliefs must be gleaned from his words, conduct and demeanor that morning. When Moreno complained about having to fill a lumber order that he thought should have been assigned to Sanchez, according to the eyewitnesses, Alan firmly, but calmly and respectfully told Moreno to do his job or go home. Though Moreno appeared to be angry and agitated by the situation in general, there was no evidence that Alan, or

Sanchez quarreled with or exchanged heated words with Moreno before the shooting spree. In addition, the circumstances that caused Moreno stress, resentment and anger – that he was passed over for a promotion and that he was being required to do Sanchez’ work – were not new, and thus, the murders could not be reasonably characterized as an *immediate response* to such conditions that had existed well before the morning of the murders.

Second, even if it is assumed that Alan’s statement to Moreno to complete his work or clock out was subjectively perceived by Moreno as provocative, Moreno’s actions and statements immediately before murdering Alan undermine his claim that his reason was obscured by passion at the time. Although the entire time interval may not have been very long, Moreno did not shoot as an immediate response to the purported provocation. His intervening conduct and statements do not support an inference that he was acting under provocation. Indeed, after Alan told Moreno for the last time to do his job or leave, Moreno started to walk away but stopped. He turned and said, “you know, I’m not going to do either of those.” He then walked back to Alan, pulled out a gun and shot him five times at close range. This sequence of events and Moreno’s remark are indicative of reflection – of Moreno weighing his options – rather than Moreno acting impulsively.

Furthermore, with respect to Moreno’s murder of Sanchez, there is no evidence from which the jury could find that the Moreno decision to kill was a *direct* and *immediate response* to any provocation. Thus, even if counsel had requested CALJIC No. 8.73, it is unlikely the trial court would have granted the request in the absence of substantial evidence to support the theory that Moreno was acting in the heat of passion. “It is of course the rule that the court is under no duty to give a requested instruction when there is no substantial evidence in support.” (*People v. Hendricks* (1988) 44 Cal.3d 635, 643.)

Moreover, even if the trial court had instructed the jury with CALJIC No. 8.73, there is no reasonable probability that Moreno would have received a better result. Moreno’s evidence of heat of passion was weak compared to the strong evidence of

premeditation and deliberation. Indeed, months before the murder Moreno told colleagues that Alan and Michael should be shot in the head. On the morning of the murders, Moreno brought a loaded gun to work, and he told two co-workers that “things were going to change” that day and that he “was not the same man today.” His repeated statements just before he shot Alan that everything is “going to change” and his response to Alan that he would neither leave nor fill the order are indicative of premeditation. Moreno’s conduct of singling out his victims – shooting Alan and then going after Michael, while leaving others in the room unharmed demonstrate reflection. Similarly, the fact that after pointing the gun at Michael, Moreno walked directly into the warehouse and shot Sanchez repeatedly, even after Sanchez fell from the forklift show deliberation and calculated thought. Finally, the jury could infer planning from the layers of clothes Moreno wore that day. Such bizarre dress could be viewed as an effort by Moreno to disguise himself to evade police or perhaps help him set-up an insanity defense.

Furthermore, the jury was instructed on second degree murder, yet still found Moreno guilty of first degree murder. As we noted earlier in our discussion, there was ample evidence Moreno made a reflective decision to kill both Alan and Sanchez. In light of the totality of the evidence, and the other jury instructions on the requirements for premeditation and deliberation, which we presume the jury followed (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), we cannot find that it is reasonably probable that a result more favorable to Moreno would have occurred had CALJIC No. 8.73 been given upon counsel’s request. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

## ***II. Sentencing Error***

The trial court imposed a sentence of life without the possibility of parole on both counts 1 and 2 based upon this multiple-murder special circumstance charged as to each of those counts. Moreno contends, and the Attorney General concedes, that the court erred in sentencing him to a separate life without possibility of parole sentence on each murder count.

As held by our Supreme Court, Penal Code “section 190.2, subdivision (a)(3) provides as a special circumstance that ‘[t]he defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree.’ Section 190.2, subdivision (a)(3) does not permit a separate multiple-murder special circumstance to be attached to each murder conviction sustained in the capital case because such duplicative use of multiple-murder special circumstances ‘artificially inflates the seriousness of the defendant’s conduct.’” (*People v. Danks* (2004) 32 Cal.4th 269, 315; *People v. Jones* (1991) 53 Cal.3d 1115, 1148-1149.) Accordingly one of the two special circumstances found to be true must be set aside. (*People v. Jones, supra*, 53 Cal.3d at p. 1149.)

The appropriate remedy is to strike one of the special circumstance sentences of life without the possibility of parole, and impose a term of 50 years to life in its place. (See *People v. Diaz* (1992) 3 Cal.4th 495, 565 [striking 11 of 12 multiple-murder special circumstances as duplicative].)

#### ***DISPOSITION***

The judgment is modified to strike one of the special circumstance sentences of life without possibility of parole and to impose in its place an indeterminate life term of 50 years to life. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**ZELON, J.**