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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

POE BLUE SIAVII,

Defendant and Appellant.

C066990

(Super. Ct. No.  
08F07611)

A jury convicted defendant Poe Blue Siavii of first degree murder. The trial court sentenced him to life without the possibility of parole for the murder, plus 25 years to life for discharging a firearm causing great bodily injury.

Defendant now contends the trial court prejudicially erred in (1) failing to sua sponte instruct the jury on the defense of third party culpability; (2) instructing the jury with CALCRIM No. 334 [accomplice testimony must be corroborated] along with unmodified versions of the CALCRIM No. 301 [testimony of one

witness can prove any fact] and CALCRIM No. 318 [prior statements as evidence], and referring to witness Stephen Riddick, Jr.'s, pretrial statement to police as "testimony;" and (3) misinstructing prospective jurors on the "beyond a reasonable doubt" standard during jury selection.

We conclude (1) the trial court did not have a sua sponte duty to give a jury instruction regarding third party culpability; (2) even if the trial court erred in giving the CALCRIM No. 334 instruction, any error was harmless, and defendant forfeited his other claims of error; and (3) the trial court's pretrial statements during voir dire did not mislead the jurors and did not substitute for the jury instructions provided by the trial court.

We will affirm the judgment.

#### BACKGROUND

The evidence at trial indicated that the murder victim, Joshua Kalb, sold methamphetamine to defendant. Defendant also sold methamphetamine and recruited Stephen Riddick, Jr., to work with him. Defendant owed Kalb money.

On the day of the murder, Kalb went to defendant's house to collect the debt. That evening, defendant called Riddick, said he was with Kalb, and asked Riddick to pick defendant up at a Park & Ride.

As Riddick drove into the Park & Ride, he saw Kalb get into the driver's seat of a white car and he saw defendant get in the car behind the driver's seat. As Riddick drove by the car he heard two gunshots. Defendant then left with Riddick.

Defendant told Riddick he planned the whole thing. The next day, in response to a news story about Kalb's death, defendant remarked "that's what happens [when] people mess with [me]."

Joshua Kalb's dead body was found in the driver's seat of his white Dodge Stratus. He was shot in the head and neck.

Riddick told police he saw defendant shoot Kalb and gave defendant a ride after the shooting. Working with police, Riddick placed two pretext calls to defendant to talk about what happened. During one of the calls, when Riddick asked defendant "[a]nd you did not tell anybody what you did to Josh?" defendant answered, "[n]o. . . . Nobody knows anything."

Defendant testified at trial. He said that when Kalb visited defendant's house on the day of the murder he was looking for Riddick because Riddick owed Kalb money. Defendant helped set up a meeting between Kalb and Riddick at the Park & Ride and agreed to accompany Kalb to the meeting to make sure that Riddick paid Kalb. According to defendant, Riddick got into the backseat of Kalb's car, told Kalb "I'm not paying you," and shot Kalb twice.

A jury found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a))<sup>1</sup> and found true an enhancement allegation that defendant intentionally and personally discharged a firearm causing great bodily injury. (§ 12022.53, subd. (d)). The trial court sentenced defendant to life without the possibility

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

of parole on the murder count, plus 25 years to life for the enhancement.

Additional facts are mentioned in the discussion where relevant to the contentions on appeal.

#### DISCUSSION

##### I

Defendant's trial defense was that a third party, Riddick, committed the murder. Thus, defendant contends the trial court had a sua sponte duty to give a jury instruction regarding third party culpability.

Defendant recognizes there is no duty under California law to instruct sua sponte regarding third party culpability. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 823-825; *People v. Abilez* (2007) 41 Cal.4th 472, 516-518.) But he contends the duty arises under federal law from the Fifth, Sixth and Fourteenth Amendments to the federal Constitution.

Defendant cites many federal cases, but none of them support his contention. Those cases involve a refusal to give instructions requested by the defendant, not a failure to instruct sua sponte. (*Mathews v. United States* (1988) 485 U.S. 58, 59, 62 [99 L.Ed.2d 54]; *Keeble v. United States* (1973) 412 U.S. 205, 206 [36 L.Ed.2d 844]; *U.S. v. Oreto* (1st Cir. 1994) 37 F.3d 739, 745-749; *Whipple v. Duckworth* (7th Cir. 1992) 957 F.2d 418, 419, 421, 424; *U.S. v. Douglas* (7th Cir. 1987) 818 F.2d 1317, 1318-1322; *U.S. v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372-1373; *Bennett v. Scroggy* (6th Cir. 1986) 793 F.2d 772, 777; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d

1196, 1200; *United States v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337.) Defendant does not contend that he asked the trial court for such an instruction.

Defendant also states that in *People v. Earp* (1999) 20 Cal.4th 826 (*Earp*), the California Supreme Court "assumed" it was error for a trial court to refuse to give an instruction regarding third party culpability. But like the federal authorities cited by defendant, *Earp* involved a refusal to give jury instructions requested by the defendant. (*Id.* at pp. 886-887.)

Contrary to defendant's assertion, the California Supreme Court has held that a trial court does not have a sua sponte duty to instruct regarding third party culpability where, as here, the jury is instructed that a defendant is presumed innocent, the prosecution must prove the defendant's guilt beyond a reasonable doubt, and the defendant is entitled to a verdict of not guilty if the jury has reasonable doubt regarding his guilt. (*People v. Gutierrez, supra*, 45 Cal.4th at pp. 823-825; *People v. Abilez, supra*, 41 Cal.4th at pp. 516-518.)

Defendant nonetheless argues that the failure to provide a sua sponte instruction on third party culpability is reversible error because without such an instruction, a juror may have interpreted his failure to prove that Riddick killed Kalb as evidence of defendant's guilt. Viewing the entire charge to the jury, however, we find no merit to this argument. At the conclusion of voir dire, the trial court told the jury that defendant was not required to present any evidence because he

was presumed innocent and did not have to prove that he was not guilty. And at the end of trial, the trial court instructed the jury pursuant to CALCRIM No. 220 that a "defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise." In instructing the jury on the charge of murder, the trial court stated, "[t]o prove that the defendant is guilty of this crime, the People must prove: [¶] One. The defendant committed an act that caused the death of another person. [¶] And two. When the defendant acted, he had a state of mind called malice aforethought. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." The jury was repeatedly told thereafter that the People had the burden of proof on the charges against defendant. The jury could not have understood from the instructions given that it may convict defendant if defendant failed to prove that someone else killed Kalb.

## II

Defendant next claims the trial court committed prejudicial error in (a) instructing the jury with CALCRIM No. 334 [accomplice testimony must be corroborated], (b) instructing with unmodified versions of CALCRIM No. 301 [testimony of one witness can prove any fact] and CALCRIM No. 318 [prior

statements as evidence], and (c) referring to Riddick's pretrial statement to police as "testimony."

A

Defendant contends it was error to give CALCRIM No. 334 because there was no evidence that defendant or Riddick aided and abetted the other or conspired with each other in Kalb's murder. He says the error was prejudicial because it lowered the prosecution's burden of proof. He urges that his conviction must be reversed under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] (*Chapman*) or *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

Even if the trial court erred in giving the jury the CALCRIM No. 334 instruction, any such error was harmless under either the *Chapman* or *Watson* standard of prejudice. (*Chapman, supra*, 386 U.S. at p. 24 [17 L.Ed.2d at pp. 710-711], *Watson, supra*, 46 Cal.2d at p. 836.) The instruction told the jury to view Riddick's testimony with caution either because he was an accomplice to murder or because he testified under a grant of immunity and had motive to be untruthful.<sup>2</sup> The instruction could not have prejudiced defendant or reduced the prosecution's burden of proof.

After defining the term "accomplice," the trial court told the jury that if it decided Riddick was not an accomplice, it must evaluate his statement or testimony as it would that of any

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<sup>2</sup> Riddick was granted use immunity for his testimony at defendant's trial.

other witness. Using CALCRIM No. 226, the trial court instructed the jury on the factors to consider in evaluating the testimony of any witness, including whether the witness had a personal interest in how the case was decided, whether other evidence proved or disproved any fact about which the witness testified, and whether the witness was promised immunity in exchange for his testimony. Defendant does not explain how these instructions reduced the prosecution's burden of proof.

The trial court also told the jury, in accordance with CALCRIM No. 334, that if it decided Riddick was an accomplice to murder, Riddick's statement or testimony must be corroborated by independent evidence tending to connect the defendant to the commission of the crime, and any statement or testimony by Riddick which tended to incriminate defendant should be viewed with caution. Again, we do not see how this instruction reduced the prosecution's burden of proof. The instruction required the prosecution to present additional corroborating evidence if the jury determined Riddick was an accomplice and Riddick's testimony was offered against defendant. (*People v. Howard* (2008) 42 Cal.4th 1000, 1022 [requirement of independent corroboration of accomplice testimony serves to ensure that a defendant will not be convicted solely upon the testimony of an accomplice].)

Defendant appears to challenge the statement in CALCRIM No. 334 that independent evidence supporting an accomplice's statement or testimony may be slight. But this is a correct statement of the law. (*People v. Williams* (2008) 43 Cal.4th

584, 636-638 ["Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense".]) Defendant cites no authority to the contrary. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283 [appellate claim must be supported by citation to supporting authority and analysis].)

Moreover, contrary to defendant's claim, the evidence of defendant's guilt was compelling. Riddick testified that defendant owed Kalb money and defendant suspected Kalb was responsible for a burglary of defendant's house, providing a motive for defendant to kill Kalb. Evidence independent of Riddick's testimony provided another motive for defendant to kill Kalb. Defendant admitted that he previously bought drugs from Kalb. (*People v. Williams* (1997) 16 Cal.4th 635, 680 [defendant's conduct, testimony and the inferences therefrom can corroborate an accomplice's testimony].) The evidence showed that defendant was involved in a drug transaction with Kalb the day before his body was found. Defendant admitted he arranged the meeting with Kalb at the Park & Ride, which was their "meeting spot" for drug transactions. The jury could have reasonably found that the drug transaction between defendant and Kalb motivated Kalb's killing.

Defendant's testimony and forensic evidence also connected defendant to Kalb's car and the Park & Ride. But there was no DNA evidence connecting Riddick to Kalb's car. The forensic evidence is consistent with Riddick's account of the murder.

After the shooting, defendant engaged in conduct evincing a consciousness of guilt: he destroyed evidence, lied to police, and told Riddick and others not to tell the police anything. Moreover, during the pretext calls with Riddick, defendant did not deny shooting Kalb.

Defendant says the jury did not regard defendant's responses during the pretext calls as adoptive admissions, because the jury deliberated 7 hours after requesting transcripts of the pretext calls. But that is mere speculation. Based on the record as a whole, any error in giving the instruction regarding accomplice testimony did not result in prejudice to defendant.

B

Defendant also asserts that the trial court compounded the instructional error by instructing the jury with CALCRIM No. 301 and CALCRIM No. 318.

However, defendant did not object to the instructions during trial and he did not request modifications. Accordingly, he forfeited his challenge to the instructions. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570 [a party may not complain on appeal that an instruction correct in law and responsive to the evidence was incomplete unless the party has requested appropriate clarifying or amplifying language]; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 364.)

C

Defendant further argues that the trial court erred in referring to Riddick's pretrial statement to police as

"testimony." During voir dire, the trial court read a background of the case -- one that was also included in the juror questionnaire -- to prospective jurors. Among other things, the background statement said that "through the use of cell phone data, the testimony of a witness, Steven Riddick, and other evidence, the Police arrested Poe Blue Siavii for the murder of Mr. Kalb." Defendant argues the word "testimony" suggested that Riddick's pretrial statement to police was made under oath.

Again, however, defendant's challenge must be rejected because he did not object to the background statement in the trial court. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406 [to preserve an issue for appeal, a party ordinarily must raise the objection in the trial court and cite to the record showing exactly where the objection was made].) By failing to object, defendant deprived the trial court of the opportunity to correct the alleged error, which could have been easily addressed. (*Ibid.* [the rule regarding forfeiture is founded on considerations of fairness to the trial court and opposing party].)

In any event, the record establishes that defendant consented to the summary of the case read to the jury. Defense counsel and the prosecutor prepared the juror questionnaire, including the background statement. The trial court's statement was consistent with the statement in the juror questionnaire. There was no error.

### III

Defendant contends the trial court misled prospective jurors, during jury selection, regarding the "beyond a reasonable doubt" standard.

The trial court told the members of the first prospective jury panel that it would speak with them "preliminarily." Among other things, the trial court said: "Under our system of laws the People must prove guilt as to each and every material element of each charge beyond a reasonable doubt. The standard is reasonable doubt. It is not beyond a shadow of a doubt or all possible doubt. [¶] It is that standard of proof that is required when jurors such as yourself are summoned to court to ponder the question of the guilt or innocence of persons accused of a crime. [¶] It's the same standards that is used whether it be a petty theft through and including a murder case like we have here. [¶] Is there any problem with that? Do you all have a problem with that standard?"

The trial court told the members of the second prospective jury panel that it was giving them "some preliminary rules of law" and the case would not start in terms of jury selection until the following week. The trial court said: "The People of the State of California must prove the guilt of Mr. Siavii beyond a reasonable doubt. That does not mean beyond all possible doubt. The standard is beyond a reasonable doubt and that's the standard that is used in criminal cases throughout this country when prospective jurors such as yourself are summoned to court to ponder and consider the question of the

guilt or innocence of a person accused of a crime. [¶]  
[Defendant] is also presumed to be innocent and that presumption is attached to him and will follow him throughout this trial until a jury determines, if in fact a jury can make such a determination, that his guilt has been proved beyond a reasonable doubt. [¶] . . . [¶] Do any of you have any problem with the rules I've given you?" The trial court again referenced its statements as "preliminary rules."

The trial court told the third prospective jury panel: "The People of the State of California have the burden of proving the guilt of the accused beyond a reasonable doubt. The standard is not a shadow of a doubt or all possible doubt. [¶] The standard is beyond a reasonable doubt. That is the standard that is used when prospective jurors throughout this nation are summoned to court to ponder the question of the guilt or innocence of the person accused of a crime and it is that standard that is the same whether it be a trespass case or a death penalty case. [¶] Any problem with that standard of proof? [¶] A person accused of a crime under our system of law is presumed innocent and that presumption has attached to [defendant] and remains with him until a jury determines, if in fact a jury can make such a determination, that his guilt has been proved beyond a reasonable doubt. [¶] And, in other words, there's no affirmative duty or any type of obligation on his part that he prove that he is innocent. Rather the total -- the People of the State of California shoulder the total burden of proving guilt. [¶] . . . [¶] Now, in terms of what I have

represented so far in terms of the law, do any of you quarrel with it or do any of you feel you cannot follow those basic premises?"

Defendant claims the trial court "assured" prospective jurors that, in order to obtain a conviction, the prosecutor did not have to remove all doubt about defendant's guilt. But, according to defendant, the trial court did not inform the prospective jurors, pursuant to CALCRIM No. 220, that to obtain a conviction, the prosecutor must present proof that produces in the jurors' minds an abiding conviction of defendant's guilt. Defendant contends this error skewed the case in favor of the prosecution from the outset. He says the admonition in the jury questionnaire, and the giving of CALCRIM No. 220 at the end of trial, were insufficient to cure the harm created by the trial court's remarks during voir dire.

We agree that the trial court's pretrial statements should have been consistent with its jury instructions. But defendant did not object to any of the trial court's voir dire statements regarding the "beyond a reasonable doubt" burden of proof. And the trial court's pretrial statements were not jury instructions. They were merely used to determine the ability of prospective jurors to be fair to all sides. The trial court told the jurors that after all the evidence was presented, it would instruct them on the applicable law. The pretrial statements did not substitute for the instructions given at the end of trial. (*People v. Romero* (2008) 44 Cal.4th 386, 423; *People v. Avila* (2009) 46 Cal.4th 680, 716; *People v. Livaditis*

(1992) 2 Cal.4th 759, 781 [rejecting claim of instructional error based on summary comments made to prospective jurors because comments were not intended to be a substitute for full instructions at the end of trial and defendant did not ask the trial court to give a fuller explanation during jury selection]; *People v. Edwards* (1991) 54 Cal.3d 787, 840-841 [same].)

The trial court instructed the jurors after the close of evidence. Among other things, it instructed with CALCRIM No. 220. We presume the jurors understood and followed the trial court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

The statements by counsel during closing argument echoed the trial court's instructions. The prosecutor reiterated that the People bore the burden of proving that defendant killed Kalb beyond a reasonable doubt and read the definition of this standard from CALCRIM No. 220. Defense counsel also told the jury that in order to convict defendant the jury must believe Riddick's testimony "beyond a reasonable doubt to an abiding conviction. . . ."

On this record, there is no indication that the trial court's voir dire statements resulted in error or prejudice to defendant. (*People v. Holt, supra*, 15 Cal.4th at p. 662 [finding that general statements made during voir dire did not create such an indelible impression on prospective jurors that they were unable to follow specific instructions given at the time the case was submitted to the jurors for decision].) Viewing the entire record, we find no reasonable likelihood that

the jury understood the instructions to allow conviction based on anything less than proof beyond a reasonable doubt. We have reviewed the authorities defendant cites and none of them require a contrary result.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ HOCH \_\_\_\_\_, J.