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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,		C068274
Plaintiff and Respondent,	(Super. Ct. No. 10F06871)	
v.		
REINALDO RIVERA,		
Defendant and Appellant.		

Defendant Reinaldo Rivera was intoxicated when he led a police officer on a car chase that culminated in defendant's car crashing into a third party's car and defendant fleeing on foot. A jury found defendant guilty of two felonies (evading a peace officer with wanton disregard for safety (count one) and evading a peace officer by driving on the wrong side of the road (count two)) and four misdemeanors.

On appeal from the resulting judgment, defendant raises contentions relating to the sufficiency of evidence,

instructional error, verdict form error, and ineffective assistance of counsel for failing to raise these contentions. Finding no merit in these contentions (and not needing to address the ineffective assistance claim because we address the others on their merits), we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

California Highway Patrol Officer Robert Radford was driving his patrol car about 8:00 p.m. on October 15, 2010, in a 25-mile-per-hour residential area near Oak Park. He saw defendant driving a black Mazda toward him at 75 miles per hour. Defendant's Mazda hit some speed bumps, causing the car to launch into the air.

The officer turned his patrol car to avoid being hit by defendant's Mazda and then activated his car's red lights to pull over defendant's car for excessive speed. Defendant "blew a stop sign" and continued accelerating his Mazda. The officer turned on his siren. The officer was about 600 to 700 feet behind defendant's Mazda. Defendant turned his car left, slamming on his brakes to slow down for the turn and for a stop sign. As defendant braked, the officer was able to get within four to five car lengths. Defendant took the corner short, which caused him to enter the eastbound lane in the opposite direction for about 30 feet. After correcting to the right of the lane, defendant traveled westbound until he got to another cross street with a stop sign. He slammed on his brakes but did not make a complete stop before making a right turn. He then accelerated to 55 miles per hour before reaching another cross

street with a stop sign. He again slammed on his brakes but did not make a complete stop before making a right hand turn, cutting the corner short. Once on that street, defendant made a left turn and started traveling north, accelerating to about 50 miles per hour. He then made a sharp right turn cutting the corner onto another street, slowing down to about 20 miles per hour for a stop sign. Defendant travelled east, then made a right turn and then a left turn, at which point he accelerated close to 75 miles per hour. Defendant slammed on the brakes really hard and turned left. After making the turn, defendant crashed into a green Honda.

Defendant jumped out of the driver's seat of his Mazda and a passenger jumped out of the other side. Defendant ran through a street and over fences into a yard. Defendant was eventually caught by police after jumping over a couple more fences. He smelled strongly of alcohol, had red watery eyes, and was slurring his speech. Defendant's blood-alcohol level was .15 percent.

#### DISCUSSION

##### I

##### *There Was Sufficient Evidence Of Count Two*

Defendant contends there was insufficient evidence he evaded an officer by willingly driving on the wrong side of the road (count two). He claims this is so because his intoxication made it such that a jury could not have reasonably concluded his evasion of police and driving on the wrong side of the road were done willfully. He adds that given the distance between his

Mazda and the patrol car, there also was a reasonable doubt as to whether he knew he was being pursued by the officer.

Viewed in the light most favorable to the verdict as we must on a sufficiency-of-evidence review (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1572), there was substantial evidence to support defendant's conviction for count two. As to whether defendant knew he was being pursued by the officer, his actions before he crashed into the green Honda provided circumstantial evidence defendant knew an officer was pursuing him. For example, defendant accelerated and repeatedly made evasive turns and ran stop signs after the officer had activated the red lights on his patrol car. A jury reasonably could infer defendant took these measures because he knew the officer was pursuing him. As to whether defendant's intoxication made it such that he did not willfully evade police or drive on the wrong side of the road, the details of his driving provide evidence his evasion was willful. For example, when making the evasive turns, defendant would brake to slow down for the turns. Similarly, when running stop signs, he would sometimes slow down, although never coming to a complete stop. A jury reasonably could infer from this conduct that despite his intoxication, defendant was well enough in charge of his faculties to at least attempt to slow down for turns and stop signs and therefore acted willfully in evading the officer and driving on the wrong side of the road.

II

*The Instruction On Voluntary Intoxication Was Correct*

Defendant contends the instruction on voluntary intoxication was incorrect because it precluded the jury from considering the impact of his intoxication on his willfulness in driving on the wrong side of the road. Defendant reads the instruction too narrowly.

The court instructed the jury as follows:

"You may consider evidence if [*sic*] any of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with the intent to evade Officer Radford by willfully fleeing or attempting to [e]llude the officer.

"[¶] . . . [¶]

"In connection with the charge of Counts 1 [evading an officer] and 2 [evading an officer by driving on the wrong side of the road] and their lesser included offenses the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to evade [O]fficer Radford by willfully fleeing or attempting to [e]llude the officer.

"If the People have not met this burden, you must find the defendant not guilty of Counts 1 and 2 and their lesser included offenses.

"You may not consider evidence of voluntary intoxication for any other purpose.

"Voluntary intoxication is not a defense to Counts 3, 4, 5, 6, 7."

Contrary to defendant's argument, under the facts here, this instruction allowed the jury to consider defendant's intoxication for determining whether defendant willfully drove on the wrong side of the road. This is because for count 2, the driving on the wrong side of the road was part of the means by which defendant evaded the police. Thus, the jury would have understood that the instruction, by allowing the jury to consider whether defendant's voluntary intoxication precluded him from forming the intent to willfully flee or attempt to elude the officer would therefore allow the jury to consider whether defendant's voluntary intoxication precluded him from forming the intent to drive on the wrong side of the road (i.e., the means of evading). (See *People v. Burgener* (1986) 41 Cal.3d 505, 538 [the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction].)

This understanding of the instruction is bolstered by the People's closing argument as to count two. They argued as follows: "[Defendant]'s going so fast that he's careening into the lane of oncoming traffic. . . . [¶] The defendant in his mad dash to get away from Officer Radford is careening around that corner. . . . [¶] . . . [¶] So he did it several times and he's careening around the corners. And quite frankly, Officer Radford said that during the course of the pursuit he is straddling the lane. He is straddling the lane. He's not maintaining the right side of the road traffic. . . . [¶]

[He's going into the opposite lane of traffic willie nilly." Thus, if the jury were to have determined defendant was too intoxicated to form the intent to evade the officer, it follows, it would have determined also defendant was too intoxicated to form the intent to drive on the wrong side of the road.

### III

#### *Defendant's Contentions Regarding The Verdict Form And The Court's Response To The Jury's Question Lack Merit*

In three related contentions, defendant takes issue with the court's verdict form and instruction on the lesser included offense for count two, which was misdemeanor evading a peace officer. Defendant's contentions are as follows: (1) the court erred in sua sponte failing to give a proper verdict form for the lesser included offense of misdemeanor evading a peace officer for count two; (2) the court erred in answering the jury's question regarding the lesser included offense; and (3) "the court erred in providing the misdemeanor version of the charged felony crime as a lesser included offense."

We begin with the factual and procedural background related to these contentions and then address each contention on the merits.

#### A

##### *Factual And Procedural Background*

The court instructed the jury, "Misdemeanor evading a peace officer is a lesser crime to evading a peace officer with wanton disregard for safety as charged in Count 1, and a lesser crime

of evading a peace officer by driving in a direction opposite to that which traffic is lawfully moving as charged in Count 2."

Despite this instruction, the verdict forms for the lesser included offenses for counts one and two were different. For count one, the verdict form correctly described the lesser included offense as "evading a peace officer, a misdemeanor." For count two, the verdict form incorrectly described the lesser included offense as "evading a peace officer by driving in a direction opposite to that which traffic is lawfully moving, a misdemeanor."

During deliberations, the jury asked, "What is the definition/criteria for misdemeanor 'evading a peace officer by driving in a direction opposite that which traffic is lawfully moving' vs. the felony charge."

The court responded as follows:

"Evading a peace officer by driving in a direction opposite to that which traffic is lawfully moving as charged in Count Two is not a misdemeanor, but is rather a felony.

"The elements of the Misdemeanor evading a peace officer, which is a lesser included offense of Count Two (felony evading a peace officer by driving in a direction opposite to that which traffic is lawfully moving), are set forth in Instruction Number 2182. Specifically, the difference . . . is . . . you do not have to find that he willfully drove on a highway in the direction opposite to that which traffic lawfully moves on the highway."

There was no change made to the lesser included verdict form, so it still stated on the verdict form that the misdemeanor lesser included offense to count two was, as the verdict form put it, "evading a peace officer by driving in a direction opposite to that which traffic is lawfully moving, a misdemeanor."

B

*The Court Did Not Have A Sua Sponte Duty To Correct The Erroneous Verdict Form, And The Error On The Form Was Harmless*

Defendant contends the court had a sua sponte duty to modify the erroneous verdict form sua sponte, citing *People v. Breverman* (1998) 19 Cal.4th 142 at page 162. That case, however, stands for the proposition, "a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*Ibid.*) Defendant thus fails to provide us with authority that the court had a sua sponte duty to correct the verdict form.

More on point is *People v. Osband* (1996) 13 Cal.4th 622. There, the California Supreme Court concluded that the trial court's failure to supply the jury with not guilty verdict forms for the charged first degree murder and a charged rape was harmless. (*Id.* at p. 689.) Our Supreme Court noted that the jury had been properly instructed that it had to find the defendant guilty beyond a reasonable doubt of first degree murder and rape in order to return guilty verdicts for these crimes. (*Ibid.*) The court held, as to the absence of not

guilty verdict forms, "[A]ny failure to provide a form, if error it is, results in no prejudice when the jury has been properly instructed on the legal issue the trial presented. When 'the jury has been properly instructed as to the different degrees of the offense, it must be presumed that if [the jurors'] conclusion called for a form of verdict with which they were not furnished, they would either ask for it or write one for themselves. It certainly could have no necessary tendency to preclude them from finding such verdict. [¶] We discover no reversible error in the record . . . .' [Citations.]" (*Osband*, at pp. 689-690.)

Here, the jury found defendant guilty of the charged felony offense in count two. Since there was no error in the court's instruction pertaining to that count (as we conclude in parts C and D below), the error in the verdict form with respect to the lesser included offense for count two was harmless.

#### C

##### *The Court's Response To The Jury's Question Was Proper*

Defendant contends "the trial court erred when it failed to answer the jury's question regarding the provided lesser included offense verdict form." The question the jury asked was, "What is the definition/criteria for misdemeanor 'evading a peace officer by driving in a direction opposite that which traffic is lawfully moving' vs. the felony charge." Contrary to defendant's argument that "the court failed to answer the question," the court accurately answered the question. Specifically, the court instructed the difference was that for

the misdemeanor "you do not have to find that he willfully drove on a highway in the direction opposite to that which traffic lawfully moves on the highway" and then directed the jury to CALCRIM No. 2182 for the elements of the lesser included offense. Defendant's misplaced argument repeatedly refers to the question having to do with the verdict forms. But the jury's question really had to do with the elements of the offense.

D

*The Court's Instruction Did Not Allow The Jury To Select  
Misdemeanor Or Felony Liability For The Same Crime*

Defendant contends, "the court erred in providing the misdemeanor version of the charged felony crime as a lesser included offense." Defendant's argument seems to be the court erroneously gave the jury the option of selecting either felony or misdemeanor liability for the same crime in count two. The instruction, however, made clear that misdemeanor liability and felony liability were different. Specifically, the court instructed that misdemeanor liability was proper if the jury did not find that defendant "willfully drove on a highway in the direction opposite to that which traffic lawfully moves on the highway." The court therefore did not allow the jury to select misdemeanor or felony liability for the same crime.

DISPOSITION

The judgment is affirmed.

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ROBIE \_\_\_\_\_, J.

I concur:

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

**MURRAY, J.**

I concur in the result.

I write separately because I do not agree with the majority view expressed in the heading to part III.B. of the Discussion, which states that the trial court did not have a sua sponte duty to correct the verdict forms. I find it unnecessary to reach that issue here because any error is harmless.

**I. Defective Verdict Forms**

The majority dismisses defendant's argument concerning the verdict forms for count two because defendant relies upon *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*), which is not on point, and because defendant failed to cite any other case on point. The majority then goes on to suggest that our high court's decision in *People v. Osband* (1996) 13 Cal.4th 622 (*Osband*) is "[m]ore on point."

I agree that defendant's reliance on *Breverman* is misplaced. *Breverman* addressed the trial court's duty to instruct on lesser included offenses, holding that trial courts have a sua sponte duty to instruct on all lesser included offenses which find substantial support in the record. (*Breverman, supra*, 19 Cal.4th at p. 162.) Here, the trial court accurately instructed the jury on the lesser included offense and later accurately instructed on the distinction between the charged offense and the lesser offense.

Turning now to the majority's reliance on *Osband*, the court in that case did not address the issue of whether a trial court has a sua sponte duty to ensure that the verdict forms it

provides to the jury are correct. Indeed, *Osband* did not involve incorrect verdict forms at all; it involved the failure to provide verdict forms.

In *Osband*, the defendant was charged, among other things, with murder, rape, and rape/murder special circumstances. (*Osband, supra*, 13 Cal.4th at p 652.) As part of the oral reading of the instructions, the trial court neglected to read the not guilty form for the first degree murder charge and the rape charge. Also, the trial court failed to provide the jury with a not guilty form for first degree murder and any forms for second degree murder. (*Osband, supra*, 13 Cal.4th at p. 689.) Defendant contended that these errors, in effect, directed the jury to return guilty verdicts on the first degree murder and rape charges. Our high court noted, "The parties do not raise, and we do not address, *the question whether the court has any duty to provide the jury with verdict forms*" (*ibid.*, italics added), and then went on to conclude that any error was harmless (*id.* at pp. 689-690). The *Osband* court did not have occasion to address the issue presented here, which is whether, once the trial court provides verdict forms, it has a sua sponte duty to ensure those forms are correct -- an issue that is substantively different in that the provision of incorrect verdict forms potentially can mislead the jury and produce a miscarriage of justice for a defendant or the People.<sup>1</sup>

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<sup>1</sup> *Osband* is not the only case in which our high court addressed verdict form errors. In two cases where the defendant did not

To be sure, there is no statutory requirement to provide verdict forms. (6 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Judgment, § 47, p. 79.) Courts have long held that trial courts have no duty to do so. Indeed, this court so held in *People v. Mundt* (1939) 31 Cal.App.2d 685, 688; see also *People v. Hill* (1897) 116 Cal. 562, 570 (*Hill*); *People v. Elliott* (1953) 115 Cal.App.2d 410, 424 (*Elliott*).

But that does not necessarily mean that when the trial court provides verdict forms to the jury, it is somehow excused from an obligation to ensure that the forms the jury receives are accurate. Trial courts supply written verdict forms to the jury "in the interests of convenience and accuracy."

(6 Witkin & Epstein, Cal. Criminal Law, *supra*, Criminal Judgment, § 47, p. 80, italics added.)

Nonetheless, we need not address the issue of whether the court has a sua sponte duty to be accurate, because any error in failing to provide the jury with correct verdict forms or to correct the forms in connection with the trial court's response

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assert on appeal that the trial court had a sua sponte duty to provide accurate verdict forms, our high court has held the defendants forfeited assertions of error related to the forms. (*People v. Jones* (2003) 29 Cal.4th 1229, 1259 (*Jones*) [failure to object to assertedly ambiguous verdict form]; *People v. Bolin* (1998) 18 Cal.4th 297, 330 [defendant forfeited claim of error related to verdict form that contained incorrect code section reflecting prior serious felony conviction on a Penal Code section 667, subdivision (a) finding and, in any event, the erroneous form used by the jury to reflect their finding was not prejudicial]; see also *People v. Harders* (1962) 201 Cal.App.2d 795, 798-799 [failure of counsel to object to verdict form identifying charged crime for which guilty verdict was returned by the wrong count number].)

to the jury question is harmless. Because any error is harmless, defendant's claim of ineffective assistance fails for lack of prejudice.

## **II. Harmless Error/Ineffective Assistance of Counsel**

I view the problem with the verdict forms here to be a clerical error. (See *People v. Camacho* (2009) 171 Cal.App.4th 1269, 1274 (*Camacho*); *People v. Trotter* (1992) 7 Cal.App.4th 363, 370 (*Trotter*).) The record does not demonstrate otherwise.<sup>2</sup>

Any error here is harmless beyond a reasonable doubt. The jury was properly instructed on the lesser included offense and properly instructed about the difference between the charged and lesser included offense. And the defense focused not on those differences, but rather on the evading element of both of the evading charges.

The evidence is uncontradicted that defendant drove on the wrong side of the road. After Officer Radford made a U-turn, activated his lights and began pursuing defendant, Radford observed defendant straddling the opposite traffic lane. Then later in the pursuit, Radford observed defendant make a left-hand turn and drive in the opposite lane of the road onto which he had turned for about 30 feet because defendant "took the corner too short." Finally, defendant made another "short" left-hand turn and crashed head-on into a car that was

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<sup>2</sup> Defendant implies the trial court intentionally provided a verdict form reflecting a "misdemeanor version of 'evading a peace officer by driving down the wrong side of the road,'" but cites nothing in the record to support this claim.

approaching the intersection on the road onto which defendant had turned. No rational jury could have found that defendant did not drive on the wrong side of the road. (See *Jones, supra*, 29 Cal.4th at p. 1260.) Indeed, given the evidence, defense counsel appropriately conceded that element.<sup>3</sup>

The jury was not misguided by the erroneous verdict forms. The jury asked for an explanation of the difference between misdemeanor and felony evading in count two. The court provided the jury with an accurate explanation, specifically telling the jury that the misdemeanor did not require the jury to find defendant willfully drove on the wrong side of the road. The jury did not specifically inquire about the verdict forms for the lesser included offense in count two. Ultimately, the jury returned a verdict of felony evasion on count two as charged. In doing so, the jury necessarily found beyond a reasonable doubt that defendant willfully drove on the wrong side of the road. The verdict form on the lesser included offense did not compel that finding. Had the jury had a reasonable doubt that defendant willfully drove on the wrong side of the road, it is

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<sup>3</sup> In his closing argument, defense counsel told the jury that "the evidence shows that [defendant] was driving recklessly," and went on to point out, "We saw the video. We saw him come around the corner for from [*sic*] 15th onto northbound 42nd *swerving into the opposite lane*. I'm not going to dispute he was driving recklessly. [¶] And then of course he crashed into Ms. Cobian's vehicle." (Italics added.) Later counsel told the jury, "Now, one thing I want to clear up off the bat, I think it is obvious that I'm not disputing the fact that [defendant's] driving was reckless. And I'm not going to dispute the fact that at certain points he crossed over into the opposite lane."

likely it would have asked for additional clarification, asked specifically about the form, or found defendant not guilty of both the charged offense and the lesser offense as erroneously defined in the verdict form. (See *People v. Cisneros* (1973) 34 Cal.App.3d 399, 429-430 [failure to provide not guilty verdict forms for voluntary and involuntary manslaughter not error because if the jury had a reasonable doubt whether any crime was committed it could have completed the not guilty verdict, or if puzzled, asked for further instructions], disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 30, fn. 8; see also *Hill, supra*, 116 Cal. at p. 570 [if jury has been properly instructed and jury's finding calls for a verdict for which no form has been provided, it is presumed the jury will ask for the form or write one themselves]; *People v. Schindler* (1969) 273 Cal.App.2d 624, 642 [same]; *Elliott, supra*, 115 Cal.App.2d at p. 424 [same].)

We can look to the arguments of counsel in determining whether any error was harmless. The prosecutor's argument here was not at all inconsistent with the instructions, which clearly set forth the elements of the charged and lesser included offenses. (*Trotter, supra*, 7 Cal.App.4th at pp. 369-370; see also *Jones, supra*, 29 Cal.4th at p. 1259 [argument of counsel considered in determining the intent of jury in rendering guilty verdict using an ambiguous verdict form]; *Camacho, supra*, 171 Cal.App.4th at p. 1274 [argument of counsel considered in determining the intent of jury in rendering guilty verdict using an inaccurate verdict form].)

The defense focused on the evading elements in counts one and two. Given the evidence, this strategy was sound. Defense counsel pointed out the inconsistencies between Radford's testimony and the video taken from the CHP air unit and argued that the evidence was insufficient to establish defendant knew the police were pursuing. From that, counsel argued that the prosecution had not established the evading element of both charged evading offenses. Counsel conceded that defendant was driving recklessly and drove on the wrong side of the road.<sup>4</sup> Indeed, he argued that because of the way defendant maneuvered around corners, it was more likely he was focused on making those turns than whether he was being followed.<sup>5</sup> Neither attorney ever mentioned the lesser included offenses to either count one or two.

It would have been better if the clerical error in the verdict forms had not been present, but a better result would not have been obtained had the clerical error not been present. (*Trotter, supra*, 7 Cal.App.4th at p. 370.) The error was harmless beyond a reasonable doubt.

Defendant asserts that his counsel was constitutionally ineffective in his assistance because of his failure to object

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<sup>4</sup> Defense counsel also conceded that defendant drove with willful and wanton disregard.

<sup>5</sup> Defense counsel also argued that defendant did not have the intent to evade because his intoxication impaired his perception and affected his awareness that he was being followed.

to the verdict forms. The record reflects that the trial court and counsel discussed the verdict forms. There was discussion about the form for count seven, driving with a suspended license. When the court asked counsel if there was "[a]nything else on the verdict forms, the prosecutor stated, "No. I reviewed them and all they look accurate." When the court asked defense counsel if he was satisfied with the rest of the verdict forms," defense counsel stated, "I am." Defense counsel only expressed concern that the lesser included offense on counts one and two was the same -- misdemeanor evasion -- and noted that the jury could theoretically find defendant not guilty of the charged offenses in counts one and two, but guilty of misdemeanor evasion on both counts. Counsel stated that such verdicts "seem[ed] a bit redundant."

Thus, the record reflects that defendant did not object to the verdict forms for the lesser included offense to count two or otherwise call the court's attention to the fact that the forms included the phrase "by driving in a direction opposite to that which traffic is lawfully moving." Nevertheless, defendant's claim of ineffective assistance of counsel fails.

Defendant must establish prejudice to prevail on an ineffective assistance of counsel claim. (*Strickland v. Washington* (1984) 466 U.S. 668, 692, 693-694 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.) To show prejudice, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" (*Harrington v. Richter* (2011) \_\_\_ U.S. \_\_\_, \_\_\_ [178 L.Ed.2d

624, 642] (*Richter*).) Defendant must show a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland, supra*, 466 U.S. at pp. 693-694; *Ledesma, supra*, 43 Cal.3d at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694; accord, *Ledesma, supra*, 43 Cal.3d at p. 218.)

"`Surmounting *Strickland's* high bar is never an easy task.' [Citation.]" (*Richter, supra*, \_\_\_ U.S. at p. \_\_\_ [178 L.Ed.2d at p. 642; *Padilla v. Kentucky* (2010) \_\_\_ U.S. \_\_\_, \_\_\_ [176 L.Ed.2d 284, 297].) Yet, claiming to have established that the verdict form resulted in a misinformed verdict, defendant asserts that there is a reasonable probability he would have received a more favorable result if trial counsel had objected to the form. This assertion must be rejected. For the same reasons that support the conclusion that any error was harmless, I conclude that defendant has failed to show prejudice.

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MURRAY, J.