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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN JOSE CASILLAS et al.,

Defendants and Appellants.

D058622

(Super. Ct. No. RIF 130939)

APPEALS from a judgment of the Superior Court of Riverside County, Craig G. Riemer, Judge. Affirmed.

I.

INTRODUCTION

A jury found appellants Juan Jose Casillas (Juan) and Daniel Federico Casillas (Daniel) guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189)<sup>1</sup> (count 1), and attempted murder (§§ 664, 187, subd. (a)) (count 2). With respect to the murder (count 1), the jury found true allegations that each appellant personally and intentionally

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<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

discharged a firearm (§ 12022.53, subd. (c)), and allegations that each appellant personally and intentionally discharged a firearm causing death to another person (§ 12022.53, subd. (d)). With respect to the attempted murder (count 2), the jury found true allegations that each appellant personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). The jury also found, as to both appellants, that the attempted murder was willful, deliberate, and premeditated (§§ 664, 187). The trial court sentenced appellants to terms of 50 years to life in prison.

On appeal, appellants contend that the trial court erred in instructing the jury concerning the natural and probable consequences theory of accomplice liability on counts 1 and 2. Specifically, appellants contend that the trial court was required to specify that the jury had to determine whether *premeditated* murder (count 1) and *premeditated* attempted murder (count 2)—rather than murder and attempted murder—were reasonably foreseeable consequences of the appellants' commission of various other offenses. We conclude that any such instructional error was harmless under any standard of prejudice in light of the jury's findings that *both* appellants personally and intentionally discharged a firearm during the commission of the charged offenses.

Appellants also contend that the trial court erred in instructing the jury concerning the proper standard to apply in considering evidence of provocation, in determining whether appellants committed first or second degree murder. We conclude that the trial court's provocation instructions were legally adequate, and that appellants forfeited their contention that the trial court should have provided additional clarifying instructions.

Finally, appellants contend that the trial court erred in failing to instruct the jury that if it had a reasonable doubt concerning whether the murder was of the first or second degree, it was required to give appellants the benefit of the doubt and find them guilty of second degree murder. We conclude that the trial court adequately conveyed this principle to the jury through its instructions.

## II.

### FACTUAL BACKGROUND

#### A. *The Peoples' evidence*

At approximately 1:00 a.m. on June 20, 2006, a high school graduation party in Moreno Valley was winding down. Juan and Daniel, who are brothers, had attended the party along with several friends, including Juan's girlfriend, Cynthia Torres. Sean Risdall, the victim of the attempted murder, and his brother, Chas O'Grady, the murder victim, also attended the party.

As the party ended, a fight broke out between two other individuals who had also attended the party, Anthony Romero and Daniel Stone. During their struggle, Romero and Stone fell onto the hood of Torres's car. Juan pushed Romero and Stone off the hood of the car. Risdall believed that Juan was involving himself in the fight and angrily said to Juan, " 'Let them be men. Let them handle it.' " Someone in appellants' group said something to the effect, " 'This is my sister's car,' " and Risdall replied, " 'Fuck your car.' "

A larger fight then broke out between Daniel and Juan and their friends, on one side, and a group consisting of Risdall and O'Grady and their friends, on the other. At

some point during the fighting, someone in Daniel and Juan's group (not Daniel or Juan) pulled out a gun and said to Risdall something to the effect of, " 'You want to get shot?' " That individual pointed the gun at Risdall and pulled the trigger, but the gun did not fire.

Several eyewitnesses testified that during the ensuing melee, they saw Daniel firing a gun. Joshua Delgado testified, "I see [Daniel] with a gun shooting into the crowd of people fighting." Other eyewitnesses testified that they saw Juan firing a gun. Eric Carreon testified that he "saw [Juan] shooting," and agreed with the prosecutor that he was "one hundred percent" certain that Juan had fired a gun.

Risdall, the victim of the attempted murder, was "shot from behind" and also suffered a gunshot wound to the hand. O'Grady, the murder victim, also suffered multiple gunshot wounds. Police recovered three bullets from the shooting, two of which were recovered from O'Grady's body. Risdall gave police a third bullet that had lodged in his wallet. Law enforcement authorities could not determine whether all three bullets had been fired from the same gun. Police also recovered six shell casings from the scene of the shootings, all of which were later determined to have been fired from the same gun. Three of the casings were found together on some grass, and three others were found approximately 10 to 15 feet away, on the sidewalk, which suggested that the same gun had been fired from two different locations.

After the shooting, Juan drove Daniel, Torres, and the rest of their group away from the scene in Torres's car. Daniel was in the back seat of the car. During an ensuing investigation, police discovered gunshot residue on the gear shifter of the car and in the back seat area of the car. Police also found a particle of gunshot residue on Juan's jeans.

B. *The defense*

Both defense counsel argued during closing argument that their respective clients had not fired a gun during the incident. Both counsel argued, in the alternative, that the shooter had not acted with premeditation and instead, acted in self-defense or upon a sudden quarrel. Both defense counsel also briefly argued that their respective clients had not aided and abetted any other participant in the shooting.

III.

DISCUSSION

A. *Any error in the trial court's natural and probable consequences instructions did not prejudice either Daniel or Juan in light of the jury's findings that both appellants personally discharged a firearm during the commission of the murder and attempted murder*

Appellants claim that the trial court committed reversible error in instructing the jury on the natural and probable consequences doctrine of aider and abettor liability.<sup>2</sup> Specifically, appellants contend that the trial court was required to instruct the jury that it had to determine whether a *premeditated* murder (count 1) and *premeditated* attempted murder (count 2)—rather than murder and attempted murder—were reasonably foreseeable consequences of the defendant's commission of various target offenses.<sup>3</sup> We

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<sup>2</sup> Daniel raises this argument in his brief, and Juan joins in the argument in his brief.

<sup>3</sup> A related issue is currently pending in the Supreme Court. (See *People v. Favor*, review granted May 16, 2011, S189317, 2011 Cal. LEXIS 2669 [granting review limited to the following issue: "In order for an aider and abettor to be convicted of attempted willful, deliberate and premeditated murder by application of the natural and probable consequences doctrine, must a premeditated attempt to murder have been a reasonably

need not decide whether the trial court was required to provide such an instruction, because we conclude that any such instructional error was harmless under any standard of prejudice.<sup>4</sup>

1. *Factual and procedural background*

The trial court instructed the jury pursuant to standard modified CALCRIM instructions on murder (CALCRIM Nos. 520, 521) and attempted murder (CALCRIM No. 600). The court also instructed the jury on the allegation that "the attempted murder was done willfully, and with deliberation and premeditation" (CALCRIM No. 601).

The trial court instructed the jury concerning the general principles of aiding and abetting pursuant to a modified version of CALCRIM No. 400, as follows:

"A person may be guilty of a crime in two ways:

"1. He or she may have directly committed the crime. I will call that person the perpetrator;

"2. He or she may have aided and abetted the perpetrator, who directly committed the crime.

"A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.

"Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

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foreseeable consequence of the target offense or offenses, or is it sufficient that an attempted murder would be reasonably foreseeable?")

4 In light of our conclusion, we also need not consider the People's contention that appellants forfeited this claim by failing to request a modification of the natural and probable consequences jury instruction in the trial court.

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 401, that it could find appellants guilty of the charged offenses if it found that the appellants had aided and abetted those offenses, in relevant part as follows:

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"1. The perpetrator committed the crime;

"2. The defendant knew that the perpetrator intended to commit the crime;

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and

"4. That defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

The trial court also instructed the jury concerning the natural and probable consequence doctrine pursuant to a modified version of CALCRIM No. 403 as follows:

"Before you may decide whether a defendant is guilty either of murder or of attempted murder on an aider-and-abettor theory<sup>5</sup>, you must decide whether that defendant is guilty of battery, brandishing, or assault with a firearm.

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5 At this point in the instruction, the trial court should have included the phrase "under the natural and probable consequences theory" or words to this effect, so as to make clear that CALCRIM No. 403 did not apply if the jury was considering whether a defendant *directly* aided and abetted the charged offenses under CALCRIM No. 401. However, any error in this regard could have only benefitted appellants, and appellants raise no contention on appeal concerning the omission of such language from the trial court's modified version of CALCRIM No. 403.

"To prove that that defendant is guilty of murder or attempted murder on that theory, the People must prove that:

"1. That defendant is guilty of battery, brandishing, or assault with a firearm;

"2. During the commission of the battery, brandishing, or assault with a firearm, a coparticipant in that battery, brandishing, or assault with a firearm, committed the crime of murder or attempted murder; and

"3. Under all of the circumstances, a reasonable person in that defendant's position would have known that the coparticipant's commission of the murder or attempted murder was a natural and probable consequence of the commission of the battery, brandishing, or assault with a firearm.

"A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder or attempted murder was committed for a reason independent of the common plan to commit the battery, brandishing, or assault with a firearm then the commission of murder or attempted murder was not a natural and probable consequence of battery, brandishing, or assault with a firearm.

"To decide whether the crime of murder or attempted murder was committed by the coparticipant, please refer to the separate instructions that I have given you on those crimes.

"The People are alleging that the defendant originally intended to aid and abet either battery, brandishing, or assault with a firearm.

"The defendant is guilty of murder or attempted murder if you all agree that the defendant aided and abetted one of those crimes and that murder or attempted murder was the natural and probable consequence of one of those crimes. However, you do not need to

agree about which of these three crimes the defendant aided and abetted."

In instructing the jury on the alleged firearm enhancements, with respect to murder (count 1), the court instructed the jury that it was required to consider whether each defendant "personally and intentionally discharged a firearm during that crime, causing death." With respect to both murder (count 1) and attempted murder (count 2), the court instructed the jury that it was required to consider whether each defendant "personally and intentionally discharged a firearm" during each offense. The court specifically instructed the jury that "the doctrine of aiding and abetting d[id] not apply" to any of the firearm allegations and that a "person cannot be found to have personally discharged a firearm by aiding and abetting that conduct in another."

The jury found both Daniel and Juan guilty of first degree murder (count 1) and attempted murder (count 2), and found that that the attempted murder was premeditated. As to the crime of first degree murder, the jury specifically found that both Daniel and Juan "did personally and intentionally discharge a firearm and proximately cause death to another person," and "did personally and intentionally discharge a firearm." As to the crime of attempted murder, the jury specifically found that both Daniel and Juan "did personally and intentionally discharge a firearm."<sup>6</sup>

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<sup>6</sup> The verdict form as to Daniel on this enhancement is not contained in the record. However, the reporter's transcript indicates that the jury found the enhancement allegation true.

2. *The asserted error in the trial court's natural and probable consequences instructions was harmless in light of the jury's findings that Daniel and Juan both personally discharged a firearm during the commission of the murder and the attempted murder*

The fact that the jury found that each appellant personally and intentionally discharged a firearm during the commission of each offense makes it clear beyond any doubt that the jury did not rely on the natural and probable consequences doctrine in finding either appellant guilty of the charged offenses. Rather, these findings demonstrate that the jury likely found that both Daniel and Juan were direct perpetrators of both offenses, or, at the very least, that both Daniel and Juan directly aided and abetted the target crimes of murder or attempted murder. Stated differently, it is inconceivable that the jury would have found that both Daniel and Juan fired a weapon during the commission of the offenses and at the same time have found that either appellant had *not* directly aided and abetted the target crimes of murder and attempted murder.<sup>7</sup>

Since it is clear from the firearm enhancement findings that the jury believed that, at a minimum, both Daniel and Juan *directly* aided and abetted the target offenses of murder and attempted murder, any error concerning the specification of the non-target offenses under the natural and probable consequences doctrine was harmless under any standard of prejudice. (See *People v. Sakarias* (2000) 22 Cal.4th 596, 628 [concluding that any error in natural and probable consequences jury instruction was harmless because jury's findings that defendant personally used deadly weapons in the commission of crimes was inconsistent with supposition that jury relied on natural and probable

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<sup>7</sup> In fact, as to the murder, the jury found that the Daniel and Juan personally and intentionally discharged a firearm and *proximately caused death*.

consequences doctrine]; accord *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 184 [finding asserted error on natural and probable consequences jury instruction harmless where "the jury's true findings on the special circumstance allegations essentially negate the possibility that the jury relied upon the natural-and-probable-consequences doctrine in convicting defendants of murder"].)

Accordingly, we conclude that the asserted instructional error on the natural and probable consequences doctrine was harmless under any standard of prejudice.

B. *The trial court's instructions concerning the jury's consideration of evidence of provocation in determining whether the murder was a first or second degree murder were legally adequate; appellants forfeited their contention that additional clarifying instructions were needed*

Appellants contend that the trial court erred in failing to instruct the jury that it was to apply a subjective test in considering evidence of provocation in determining whether the murder was a first or second degree murder.<sup>8</sup>

1. *Governing law*

a. *General principles of law governing jury instruction claims*

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In determining whether error has been committed in giving jury instructions, we consider the instructions as a whole and assume jurors are intelligent persons, capable of understanding and correlating all jury instructions which

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<sup>8</sup> Daniel raises this argument in his brief, and Juan joins in the argument in his brief.

are given. (*Ibid.*) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid.*)

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.]" (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011–1012.) However, this "rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*Id.* at p. 1012.)

b. *The law governing provocation*

In *People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 (*Hernandez*), this court explained the manner by which evidence of provocation relates to the crimes of murder and voluntary manslaughter:

"First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. [Citation.] Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). [Citation.] Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation which elevate the killing to first degree murder. [Citation.] To reduce a murder to second degree murder, premeditation and deliberation may be negated by heat of passion arising from provocation. [Citation.] If the provocation would not cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder. [Citation.] If the provocation would cause a reasonable person to react with deadly passion, the defendant is deemed to have acted without malice so as to further reduce the crime to voluntary manslaughter. [Citation.]"

2. *The trial court's instructions concerning provocation and voluntary manslaughter based on heat of passion*

The trial court instructed the jury pursuant to a modified version of CALCRIM

No. 522 (Provocation: Effect on Degree of Murder) as follows:

"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 decide that a defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first degree or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

The trial court instructed the jury pursuant to a modified version of CALCRIM

No. 570 (Voluntary Manslaughter: Heat of Passion—Lesser Included Offense) as follows:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if a defendant kills someone because of a sudden quarrel or in the heat of passion.

"A defendant killed someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, that defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and

"3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough that the defendant simply was provoked. A defendant is not allowed to set up his own standard of conduct. You must decide whether that defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

"If enough time passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

### 3. *Application*

Appellants contend that the trial court erred by failing to instruct the jury sua sponte that it was to apply a subjective test in considering evidence of provocation in determining whether the murder was a first or second degree murder.

A trial court does not have a sua sponte duty to provide the jury with an instruction concerning how it is to consider evidence of provocation in determining whether a defendant committed first or second degree murder. (*People v. Rogers* (2006) 39 Cal.4th 826, 878-879.) Further, this court has held that the provocation instruction that the court provided in this case, CALCRIM No. 522, is an accurate and adequate statement of the

law (*Hernandez, supra*, 183 Cal.App.4th at pp. 1333–1335), and appellants have not identified any portion of CALCRIM No. 522 that contains an incorrect statement of the law. In addition, the Supreme Court has rejected the contention that a provocation instruction similar to CALCRIM No. 522 "fail[ed] to sufficiently specify the subjective factors that the jury ought to consider in deciding how provocation bears on the elements of first and second degree murder." (*People v. Mayfield* (1997) 14 Cal.4th 668, 778 (*Mayfield*)).<sup>9</sup> For these reasons, we reject appellants' contention that the trial court had a sua sponte duty to instruct the jury that it was to apply a subjective test in considering evidence of provocation in determining whether appellants committed a first or second degree murder.

Appellants also contend that the "the jury was reasonably led to believe that the objective standard applied to the resolution of the factual issue whether the evidence of provocation was sufficient to negate premeditation and deliberation and thereby reduce first degree murder to second degree murder." In support of this contention, appellants cite the trial court's voluntary manslaughter heat of passion instruction. However, nothing in the language of CALCRIM No. 570, which the jury was informed applied to its consideration of the crime of voluntary manslaughter, indicated that CALCRIM No. 570 also applied to the jury's consideration of evidence of provocation for purposes of

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<sup>9</sup> The provocation instruction at issue in *Mayfield* (quoting CALJIC No. 8.73 (1979 rev.)) stated: "When the evidence shows the existence of provocation that played a part in inducing the unlawful killing of a human being, but also shows that such provocation was not such as to reduce the homicide to manslaughter, and you find that the killing was murder, you may consider the evidence of provocation for such bearing as it may have on the question of whether the murder was of the first or second degree." (*Mayfield, supra*, 14 Cal.4th at p. 778.)

determining the degree of murder. Further, the jury instruction that did relate to this issue, CALCRIM No. 522 (Provocation: Effect on Degree of Murder), specifically informed the jury that, "[t]he weight and significance of the provocation, if any, are for you to decide." We therefore reject appellants' contention that the trial court improperly suggested to the jury that it had to find objective provocation in order to reduce first degree murder to second degree murder.

Finally, to the extent appellants contend that the trial court should have modified CALCRIM No. 522 to inform the jury that it was to apply a subjective test in considering evidence of provocation for the purpose of determining the degree of murder, it was incumbent upon appellants to request such a modification. Having failed to do so, they have forfeited any claim on appeal that the instruction needed amplification or clarification. (See *Hudson, supra*, 38 Cal.4th at pp. 1011–1012.)<sup>10</sup>

C. *The trial court adequately instructed the jury on the application of the beyond a reasonable doubt standard in determining the degree of murder*

Appellants contend that the trial court erred in failing to instruct the jury that if it had a reasonable doubt concerning whether the murder was of the first or second degree, it was required to give appellants the benefit of the doubt and find them guilty of second

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<sup>10</sup> Appellants also contend that the trial court erred in failing to instruct the jury that it was to apply a subjective test in considering whether appellants acted with premeditation and deliberation in committing *attempted* murder. This claim fails because an instruction concerning provocation as it relates to premeditated attempted murder need be given only upon request (*People v. Lee* (1994) 28 Cal.App.4th 1724, 1734), and appellants have failed to demonstrate that the defense requested such an instruction in the trial court.

degree murder.<sup>11</sup> In considering this contention, we apply the general principles of law that govern jury instruction claims, as outlined in part III.B.1.a., *ante*.

1. *The law governing the application of the beyond a reasonable doubt standard to a jury's determination of the degree of murder committed by a defendant*

Section 1097 provides: "When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only."

In *People v. Dewberry* (1959) 51 Cal.2d at 548, 555, a defendant claimed that the trial court erred by refusing his request to give an instruction "that in the case of a reasonable doubt as between second degree murder and manslaughter, defendant was to be found guilty of manslaughter." The *Dewberry* court concluded that the trial court had erred in refusing the instruction, reasoning, "It has been consistently held in this state since 1880 that when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*Ibid.*) The *Dewberry* court rejected the People's argument that this rule was inconsistent with section 1097, "conclud[ing] that the words 'offense' and 'degrees' in section 1097 refer to all the degrees of criminality involved in a criminal act." (*Dewberry, supra*, at p. 556.)

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<sup>11</sup> Juan raises this argument in his brief, and Daniel joins in the argument in his brief.

In *People v. Barajas* (2004) 120 Cal.App.4th 787, 793 (*Barajas*), the court concluded that a trial court had "satisfie[d] the requirements of *Dewberry*" by instructing the jury pursuant to CALJIC No. 17.10 in relevant part as follows:

" [I]f you . . . are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may, nevertheless, convict on a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.' " (*Barajas, supra*, at p. 792)

A trial court has a sua sponte duty to instruct the jury on the principles of *Dewberry* in any case in which the jury is considering whether the defendant committed a lesser included offense of a charged offense. (*People v. Crone* (1997) 54 Cal.App.4th 71, 76.)

## 2. *Factual and procedural background*

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 521 concerning first and second degree murder in relevant part as follows:

"If you decide that a defendant has committed murder, you must decide whether it is murder of the first degree or second degree. [¶] A defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. [¶] . . . [¶] All other murders are of the second degree.

"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 trial court also instructed the jury pursuant to a modified version of CALCRIM No. 640 in relevant part as follows:

"If all of you agree the defendant is not guilty of first degree murder, but also agree that the defendant is guilty of second degree murder,

complete and sign the verdict form for not guilty of first degree murder and the form for guilty of second degree murder. Do not complete or sign any other verdict forms for that count."

In addition, the trial court instructed the jury pursuant to a modified version of CALCRIM No. 3517 in relevant part as follows:

"If all of you find a defendant is not guilty of a greater charged crime, you may find him guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime."

3. *Application*

The trial court instructed the jury pursuant to CALCRIM No. 521 that if it decided that a defendant had committed murder, it then had to decide whether the defendant committed a first or second degree murder. In this regard, the trial court specifically advised the jury that the People had to prove beyond a reasonable doubt that the murder was first degree murder, and that if the People failed to sustain this burden, the jury had to find the defendant not guilty of that offense.

In addition, like CALJIC No. 17.10, CALCRIM No. 640 told the jury that if it found a defendant not guilty of greater crime (i.e. first degree murder), it could find the defendant guilty of a lesser crime (e.g., second degree murder). (See *Barajas, supra*, 120 Cal.App.4th at pp. 792-793 [concluding instruction satisfied *Dewberry* by informing the jury that if it was " 'not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may, nevertheless, convict on a lesser crime' "].) CALCRIM No. 3517 reinforced the principle that the jury could find a defendant guilty of a lesser crime, upon finding the defendant not guilty of a greater crime.

Considered as a whole, the instructions that the trial court gave satisfied the requirements of section 1097 and *Dewberry* because they "make[] clear that the principle of reasonable doubt applies . . . between first and second degree murder." (*Dewberry*, *supra*, 51 Cal.2d at p. 557.) Accordingly, we conclude that the court adequately instructed the jury on the application of the beyond a reasonable doubt standard in determining whether a defendant committed first or second degree murder.

IV.

DISPOSITION

The judgment is affirmed.

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AARON, J.

WE CONCUR:

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NARES, Acting P. J.

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IRION, J.