

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MATEO ANTONIO DIEGO,

Defendant and Appellant.

E051403

(Super.Ct.No. RIF104178)

OPINION

APPEAL from the Superior Court of Riverside County. Russell F. Schooling, Judge. (Retired judge of the Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Tonja R. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr. and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Mateo Diego, of second degree murder (Pen. Code, § 187, subd. (a)). He was sentenced to prison for 15 years to life and appeals claiming evidence was erroneously admitted, there was insufficient evidence of malice aforethought and the jury was erroneously instructed. We reject his contentions and affirm.

FACTS

Defendant's own pretrial statements and his trial testimony were his undoing. During his pretrial statement, he said that his brother had walked in on defendant's wife, the victim, while she was in bed with another man in Guatemala earlier in their marriage while defendant was working in the United States, but she had asked for his forgiveness and he had agreed. Thereafter, defendant and the victim left Guatemala and immigrated to the United States (he, for the second time), leaving their first-born son behind with defendant's parents, to get away from the situation. Three or four weeks before the murder, the victim told defendant that the cousin of their second landlady loved her and she no longer loved or liked defendant. Defendant and the victim, along with their almost one-year-old second son, moved out of the second landlady's house and into their third rented room about a week before the murder because defendant suspected that the victim was having a relationship with the cousin. At this point, the victim told defendant that she and the cousin had a relationship. When defendant became angry, the victim said she was just joking.

On June 17, 2002, defendant received a call from his second landlady, who told him that the victim was at the first landlady's house, having been brought there by the

cousin. The second landlady told defendant that the victim had called her from the first landlady's house and lied, saying that the victim had left the couple's son at the first landlady's house because the victim was going to work with defendant that day. The second landlady told defendant to go to the first landlady's house and see what was going on between the victim and the cousin. Defendant called the first landlady's house and her daughters confirmed that the victim had gone somewhere with the cousin. Defendant went to an area near the first landlady's house at 8:00 a.m. and hid and waited until 10:30 or 11:00 a.m. when he saw the victim being dropped off at the house by the cousin. Defendant said he "couldn't take it any longer. The anger came." Defendant decided then to kill the victim. He knew he was going to kill the victim in their rented room using a sock. Defendant went into the first landlady's house and told the victim that his car was broken down and she needed to come with him to look at it. As they walked to their car, the victim denied that she had been with the cousin. She told defendant not to touch her. During the walk, defendant knew he was going to kill the victim. He continued to want to kill her as he drove to their rented room. Once there, defendant said, "This is where it's going to end. This is it. I have had enough of your problems." He asked the victim where she had gone with the cousin. The victim got angry and tried unsuccessfully to hit defendant, but she said nothing about her relationship with the cousin. He grabbed her and she said to let go. As she and their son sat on the bed, defendant choked her from the front with a sock around her neck. She tried to remove the sock from her neck and he slapped her and she passed out and fell over. Then she got up and he tied her hands behind her back with a long-sleeved shirt so she could not hurt him and to stop her from

pushing him. He then resumed choking her with the sock. The son cried a little. Defendant then threw her body into the closet. He took another long-sleeved shirt and tied it around her face, but denied putting it across her mouth. He took their son, got in his car and drove to his pastor's home, calling his pastor, who was not home, from the car and telling him to go to the couple's rented room and see if he had left an iron on there. Once at his pastor's home, he gave the pastor's wife the son with a note to take care of the child for him. He asked a man who was at the pastor's house to give him a ride to his uncle's house so he could turn himself in to the police.

Defendant's trial testimony generally tracked his pretrial statement as to the events leading up to June 17, 2002. However, on direct examination, he denied that there were any difficulties between him and the victim about her possible infidelity and no discussion about their feelings for one another or whether the victim still loved defendant. However, on cross-examination, he admitted that a month before the murder, the victim had told him that she no longer loved him.¹ On June 17, the second landlady called defendant on his cell phone while he was at work and told him that the victim was with the cousin, leading defendant to believe that the victim had left with the cousin. Defendant left work and drove 20-30 minutes to their rented room, intending to see the victim there, but she and the son were not there. Defendant was getting angry. The second landlady called defendant again and said the victim was going with the cousin and

¹ He testified that he had witnessed what he thought was inappropriate interaction between the victim and the cousin (hand shaking and hugging) one month before the murder and this made him sad.

their son was at the first landlady's house. This made defendant sad. At 7:15 or 7:30 a.m., he went to the first landlady's house to see if the victim was with the cousin, but she was not there. His testimony about his feelings at this point was in conflict—he testified variously that he was sad and mad, that he was just mad, and that his mind was a complete blank, but he thought he would talk to the victim to see how she reacted. He waited for the victim down the street from the first landlady's house and he got angry. He thought about how he would confront her with the information the second landlady had given him. As the three hours he waited went by, he got angrier. He knew the victim no longer loved him and that others knew about her relationship with the cousin. He vacillated between crying and being angry. When the cousin dropped the victim off and she shook his hand, defendant was very angry. Defendant waited another ten minutes before entering the first landlady's house. Once inside the house, he saw that the son was not being well taken care of by the first landlady's daughters and this made him very sad. However, he controlled his emotions and went to the first landlady's bedroom and told the victim, who was there with the first landlady, that his car had broken down, he didn't feel good and they should go home. He testified that he wanted to fix things, but the victim did not want to listen to him. On the way to their car, defendant asked the victim who dropped her off and the victim said a Mexican man (not the cousin) did and defendant accused her of lying. However, he continued to control himself. In the car, the victim yelled at defendant because he had had her leave the first landlady's house and defendant yelled back. She said she wanted to see the cousin more than she wanted to see defendant, and this upset defendant, but he did not hit her. Defendant suggested that

they go to their rented room to talk. The victim repeated her claim that a random Mexican man had dropped her off at the first landlady's house. Defendant told her he had seen who dropped her off and the victim looked at defendant and was getting angry. When they returned to their rented room, defendant thought that their current landlady was there at the home, but he claimed he did not see her.² While their son sat on the bed in their rented room, defendant repeated to the victim that he had seen who had dropped her off. She initially denied, then admitted that it was the cousin and she tried to hit defendant's face. Defendant claimed that that was when he "lost his mind" for a minute, meaning he became angry. He said that was the angriest he had ever been in his life. He testified on direct and redirect that before this moment, he did not have thoughts of killing the victim. Although he claimed he did not remember what he did, he recalled picking a sock up off the floor and using it to choke the victim, who fell down. He testified on direct that he did this to scare her. However, on cross-examination, he admitted that he put the sock around her neck to kill her. She got back up and hit his face. He tied her hands behind her back because he was scared and so she could not struggle or hit him. He testified variously that when she got back up, she told him that now was the moment she wanted to die, that she said she wanted to die right then and if defendant wanted to do something to her, he should do it right then, and that she smiled at him and said she was going to die just one time. This caused the room to go very dark so that he saw nothing. He knotted the sock around her neck and squeezed as he faced

² In contrast, she testified that he greeted her as he went past her.

her and she fell down onto the floor. He testified that while he was strangling her, he did not stop because she had smiled in his face and said words that made him more angry. He admitted that while in the rented room, he meant to kill her, but he denied wanting to kill her before the physical altercation between them started, presumably meaning when she first tried to hit him. He put her body in the closet and put a shirt over her face, but he denied tying it in such a way as to strangle her, claiming, once again, that he was trying to scare her.³ However, during cross-examination, he admitted that he saw her die, therefore, she had to have been dead before he put her in the closet. He claimed he wanted to call the police, but did not because he did not know how to. He admitted that he did not ask his current landlady to call the police for him. He took the son and left in his car, driving to his pastor's house. On the way, he called the pastor's house on his cell phone and told a family member of the pastor's that he had left an iron on in his rented room, which was a lie. While at the pastor's house, he told his pastor's family that the victim was dead. He asked someone there to call the police for him, but no one would. He wrote a note asking the pastor's family to take care of the son and he had someone at his pastor's house drive him to his uncle's house.

He claimed that the assertion in his pretrial statement that he decided to kill the victim using a sock when he saw the cousin drop her off was due to confusion on the part of the police, due to a language barrier. However, he testified that the victim deserved to die because "she d[id] wrong things." He said she deserved to die by having a sock

³ He also made a conflicting statement about when he tied the shirt around her face, which is set forth later in the text.

wrapped around her neck and being slowly strangled while her hands were tied behind her back so she could not defend or protect herself. He added that she deserved to have her face covered with the shirts, so that when she died, she was in darkness, because she had said that she was going to die just one time.⁴ When asked when he decided that she deserved to die, defendant claimed he did not remember, adding, “Just she told me.” He later testified that he killed the victim because he believed that she had cheated on him and because of this belief, she deserved to die.

On redirect examination, defendant was asked, twice, “If you hadn’t . . . lost your mind, would you have killed [the victim]?” Twice, defendant replied in the affirmative. He said he would have killed the victim if the victim hadn’t made the statement she made to him in their rented room, which he felt was her mocking him, making fun of him and encouraging him to do something about her infidelity. He interpreted her words as meaning that she wanted to die. He said that when he saw the cousin drop the victim off, he was more sure than he had been before that the victim was having an affair, but he wanted to give the victim a chance to explain, and if she had admitted it and said she would stop, he would have forgiven her.

The second landlady testified that she spoke to defendant only once the morning of June 17, 2002, and she told him that she thought the victim was with the cousin and the first landlady had told her that the victim had left in a white car.

⁴ This contradicts defendant’s earlier statement that the victim was dead when he put the shirt on her face.

One of the detectives who conducted the interview during which defendant made his pretrial statement testified that the interview was conducted in Spanish and defendant exhibited no difficulty understanding what was asked of him and responding appropriately. This detective testified that defendant never asserted during this interview that the victim smiled at him as he began to kill her or taunted him by telling him that he could kill her only one time.

Defendant's pastor testified that on June 17, 2002, someone in his family had received a call from someone saying an iron was on in the room defendant and the victim rented and this family member had called him with the information. The pastor went to the home and told defendant's current landlady to disconnect the iron. The landlady testified that she opened the closet door in the rented room and found the victim's body inside.

The pastor's cousin testified that defendant was crying and yelling and told him at the pastor's house that he had killed the victim. He said defendant asked what he had done and what he was going to do and added, "I did what I shouldn't have done." Defendant was very angry and said he wanted someone at the house to turn him into the police. The pastor's cousin did not believe defendant and defendant said he would take him to the room he rented to show him. On the way, they passed a police car and the pastor's cousin said if defendant wanted him to contact the police, he would stop the car and defendant could speak to the officer. Defendant got out of the car and spoke in Spanish to the officer, who did not speak Spanish, but she caught the name of a street and the word "dead." The officer was aware that the victim's body had been discovered on

that street and she drove defendant to his residence. Once there, defendant, who appeared to have something wrong with him, told a Spanish speaking officer that he was worried because he had killed his wife.

The shirt that defendant had put on the victim's face was wrapped around her nose and mouth and knotted tightly at the back of her head. It had blood and mucous stains on it. The coroner opined that she had tried to breathe when the shirt was covering her mouth, but was unable to. The shirt used to tie her hands was knotted tightly and appeared to have been tied more than once. The sock around her neck had also been tied tightly at the back of her head. She had scratches near where the sock had been, most prominently in the front of her neck. She had contusions on her face, abdomen and left leg, scratches on her arms, defensive wounds on her hands, an abrasion on her forehead and cheek and a swollen lip. There was a hemorrhage under her scalp caused by blunt force trauma, which occurred either when something hit her head or her head hit something. The fingernail on her right ring finger was broken. She had died of slow strangulation that had been accomplished by the application of a tremendous amount of force to the neck for minutes and by having the shirt around her nose and mouth, preventing her from breathing. The coroner opined that rigor mortis had set in before the victim had been placed in the closet.

1. *Exclusion of Evidence*

Before trial began, the People moved to exclude from evidence the results of testing that revealed the presence of sperm in the victim's vagina that did not belong to defendant, but its source could not be identified. The People asserted that the fact that the

sperm was present in the victim's vagina was not known by the defendant at the time he killed the victim, nor had defendant seen the victim having intercourse with another man, therefore it was irrelevant to his anticipated provocation/heat of passion defense. The prosecutor went on to assert that the evidence was more inflammatory than the idea that the victim was cheating on defendant—that, at the time he killed the victim, defendant *suspected* the victim of being unfaithful, but he was unaware that she actually had been, which the evidence would prove. Defense counsel agreed that the jury should not hear and consider evidence that was not part of defendant's state of mind at the time he killed the victim. However, the fact that she was actually being unfaithful proved that he was not fabricating or just imagining that she was being unfaithful. Defense counsel said he would like to see an instruction that the evidence could be used only to determine if defendant's heat of passion, i.e., his belief that the victim was cheating on him, was contrived or believed by him, and, therefore, reasonable. Counsel argued that the evidence confirmed defendant's suspicions about the victim. However, the trial court pointed out that the evidence did not confirm those suspicions before defendant killed the victim. The prosecutor also argued that aside from this evidence being irrelevant, it was inflammatory and would prejudice the jury against the victim and would confuse the jury as to how they should use it and, therefore, it was inadmissible under Evidence Code section 352. As to the inflammatory aspect, the prosecutor pointed out that this evidence painted the victim as a person who did not use protection during sex with someone outside her marriage, thereby risking the health of defendant and a possible pregnancy.

The trial court ruled that the evidence was not admissible, noting that the prosecutor had not asserted that defendant's suspicions of infidelity were contrived. The court added, "If [defendant] had had that knowledge [(that the victim was actually having sex with the cousin or someone else)] and acted upon it, that would be a different thing, but he did not have that knowledge, and to try to bootstrap the latter acquired information to say, 'See, I was right. You were unfaithful, and . . . this just confirms my suspicion, and therefore, I'm justified in killing you, I just didn't get there at the right time and the right place [to see you having sex with someone else]. But it shows that, from after the fact, that had I been there at the right time and the right place, I would have had a good heat of passion justification,' . . . based on that later acquired information. [¶] . . . [The evidence] verifie[s defendant's] worst suspicions, but the problem . . . is that . . . he didn't have it at the time [he killed her]"

Defendant here contends that the trial court abused its discretion in excluding this evidence (*People v. Waidla* (2000) 22 Cal.4th 690, 717, 718). We disagree. As the trial court correctly pointed out, no one, including the prosecutor, ever called into question the genuineness of defendant's claim that he suspected the victim of cheating on him. The unassailed evidence at trial was that she had cheated on him earlier in their marriage when he was in the United States and she was in Guatemala⁵ and even the evidence

⁵ Interestingly, as part of his argument that this evidence would not have prejudiced the jury, defendant points out that the jury heard evidence about the victim's prior infidelity in Guatemala. Of course, this is a concession that this evidence was uncontested and established as a matter of fact, which it was. Additionally, the circumstances of the past infidelity and this one were very different, i.e., defendant was

[footnote continued on next page]

presented by the prosecution suggested that she had had an inappropriate relationship with the cousin when all were living under the second landlady's roof and she lied to her friends in order to see the cousin at the time of the murder. Defendant's claims (although inconsistently spoken about by him) that he and the victim discussed her infidelity weeks before the murder went unchallenged by anything presented at trial. There was absolutely no evidence suggesting that defendant did not *reasonably believe* the victim was being unfaithful, as a provocation defense requires (see *People v. Lujon* (2001) 92 Cal.App.4th 1389, 1411, 1412).⁶ Contrary to defendant's assertion, the evidence "would [not] have assisted the jury in evaluating the reasonableness of [defendant's] belief that [the victim] had just returned from having . . . sex . . . with [the cousin when he dropped her off]" unless defendant was aware of the evidence at the time he killed her. As the People succinctly put it, "[T]he DNA results played no role in provoking defendant to kill."

Because the genuineness of defendant's belief that the victim was cheating on him was never an issue in this trial, even if the trial court somehow erred in excluding this evidence, we could not agree with defendant that this led to a fundamental miscarriage of

[footnote continued from previous page]

not in the country when the victim cheated on him the first time. This time, he was, and the fact that she exposed him to diseases, one of which may be fatal, and risked a pregnancy during this infidelity, made it substantially more prejudicial than the earlier one.

⁶ Because we conclude that the evidence was irrelevant, defendant's assertion that, if relevant, it could have been admitted under Evidence Code section 1103, subdivision (a)(1) to show that she acted in conformity with her reputation for infidelity (assuming she had such a reputation, which the evidence did *not* prove—one affair does not a reputation make) is pointless.

justice requiring reversal (Evid. Code, § 354), particularly in light of the strength of evidence supporting the verdict, which we address in the next section of this opinion.

2. Sufficient Evidence of Malice Aforethought

Defendant contends that the prosecution failed to prove the absence of heat of passion beyond a reasonable doubt, therefore, there is insufficient evidence of malice aforethought to support second degree murder. We disagree.

As already stated, defendant, in his pretrial statement said that three or four weeks before the murder, the victim told him that the cousin loved her and she no longer loved or liked defendant. A week before the murder, they moved out of their home because defendant suspected the victim was having a relationship with the cousin and the victim confirmed that this was the case, although after he became angry, she said she was joking. Hours before the murder, defendant was informed that the victim had lied to her friend in order to be with the cousin and that she was, in fact, with the cousin, a matter which was confirmed by an independent source. Defendant decided to kill the victim and he decided where and how to do it hours before the crime occurred. He then contrived a lie to get the victim to go with him to the place he intended to kill her. His desire to kill her continued as they walked to the car and as he drove to their home. Once there, defendant announced his intent—that this was where it was going to end, that this was it and he had had enough of her problems. Although interrupted in mid-choking by the victim passing out, defendant resumed his attack on her after she came to.

Despite his claim at trial, which was contrary to his pretrial statement, that he and the victim did not discuss their relationship or her infidelity and had no difficulties before

June 17, defendant testified that a month before the murder, the victim told him that she no longer loved him and when he was waiting outside the first landlady's house, he knew then that the victim felt this way and that others were aware of her relationship with the cousin. He waited 10 minutes between seeing her being dropped off and going into the house, and controlled his emotions once inside the house, contriving a lie to get the victim to go to where he killed her. He acknowledged that despite his desire to "fix things" the victim did not want to listen to him. He controlled himself in the car on the way to the scene of the murder, despite the fact that she said she wanted to see the cousin more than she wanted to see him. All the foregoing established a basis upon which the jury could reasonably conclude that the provocation defendant had to kill the victim occurred long before the few minutes leading up to the murder, and that he was capable of controlling himself after that and while he took steps to get the victim to the murder scene. His pretrial statements did this even more concretely, suggesting that he was aware of the affair and the victim's unwillingness to patch things up days or weeks before the murder. The statements he claimed at trial she made that provoked him to want to kill her had never been uttered by him before trial—not to his pastor's family, not to the person to whom he first admitted killing the victim, not to the police officer to whom he first admitted killing the victim and not during his very extensive pretrial statement.⁷ On

⁷ For this reason, in addition to rejecting any assertion by the defendant that was self-serving, the jury would have been reasonable in disbelieving defendant's claims that the statements had been made. Thus, defendant's assertion that taunts by an unfaithful spouse are sufficient to establish provocation to reduce murder to manslaughter are beside the point because the evidence did not establish, as a matter of law, that the taunts

[footnote continued on next page]

the stand, defendant said that the victim deserved to die because she did wrong things and because he believed she cheated on him—that she deserved to die by being slowly strangled as her hands were tied behind her back, leaving her defenseless, and the shirt was tied over her face, leaving her in the dark, while she died. The jury was free to interpret this testimony not as the declaration of a man who had killed the mother of his child in a fit of anger or provocation, and, *years later*, (i.e., at the time of trial) upon cool reflection, regretted what he had done, but the statement of a man who felt fully justified in acting as judge, jury and executioner. An earlier version of this philosophy was contained in his statement to the first person to whom he confessed the killing—that “I did what I should have done.” His interpretation of her statements that she was expressing a desire to die could also be viewed by the jury as inconsistent with a killing upon sudden provocation or heat of passion. The manner of death also suggested that defendant did not act upon provocation or heat of passion. It took a while to kill the victim, there was a break in the action, during which defendant had the opportunity to reflect on what he was doing, he killed the victim in the presence of her child, and he engaged in overkill, both strangling her with the sock and with the shirt while she was defenseless. While these facts are not inconsistent with a killing in the heat of passion or upon provocation, the jury was free to interpret them as suggesting that he did not kill for those reasons.

[footnote continued from previous page]

even occurred. Even if they had, the jury was free to accept defendant’s pretrial statement that he decided to kill the victim long before these taunts were made.

3. Jury Instruction

Defendant contends that the trial court had a sua sponte duty to give CALJIC No. 8.72 and its failure to do so requires reversal of his conviction. We disagree.

That instruction provides, “If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.”

The jury was instructed on the presumption of innocence and the People’s burden of proving guilt beyond a reasonable doubt. It was told that any fact essential to complete a set of circumstances necessary to establish defendant’s guilt had to be proven beyond a reasonable doubt and that the People had the burden of proving beyond a reasonable doubt each fact or circumstance upon which an inference essential to establish guilt rested. If the circumstantial evidence permitted two reasonable interpretations, one of which pointed to defendant’s guilt and the other to his innocence, the latter interpretation must be chosen. It was given instructions on first and second degree murder and voluntary manslaughter, the latter due to heat of passion/provocation. Second degree murder was described as a lesser crime to first degree murder and voluntary manslaughter was described a lesser included offense to second degree murder. The jury was also instructed, “To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.” The jurors were further instructed that if they unanimously

found beyond a reasonable doubt that defendant committed murder, but unanimously agreed that they had a reasonable doubt whether it was first or second degree murder, they should convict defendant of second degree murder. They were instructed, pursuant to CALJIC Nos. 8.75 and 17.10,⁸ “If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged . . . and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime. [¶] Murder in the second degree is a lesser crime to that of murder in the first degree. Voluntary manslaughter is lesser to that of murder in the second degree. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto. [¶] The [c]ourt cannot accept a verdict of guilty of second-degree murder . . . unless the jury also unanimously finds him not guilty as to murder of the first degree. [¶] The [c]ourt cannot accept a verdict of guilty of voluntary manslaughter unless the jury also unanimously finds and returns a signed not guilty verdict form as to both murder of the first degree and murder of the second degree.”

Defendant contends that because the jury was instructed that if it found that murder was committed, but had a reasonable doubt whether it was first or second degree murder, it must convict him of second degree, and there was not a corresponding

⁸ CALJIC No. 8.75, at the time of this trial, was CALJIC No. 17.10 as applied to murder and manslaughter. CALJIC No. 17.10, at that time, provided, “In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict[s].”

instruction that if the jury had a reasonable doubt whether the crime was murder or manslaughter, it must convict defendant of manslaughter, there was a “gap” in the instructions not filled by any other instructions given. He argues that under *People v. Dewberry* (1959) 51 Cal.2d 548, 555 (*Dewberry*), reversal is required.

In *Dewberry*, the trial court refused to give an instruction that if the jury found defendant guilty of the charged offense of murder or the lesser offense of manslaughter, but had a reasonable doubt as to the degree of the offense of which he was guilty, they should convict him only of the lesser offense. (*Dewberry, supra*, 51 Cal.2d at p. 554.) The jury was specifically instructed that if defendant was guilty of murder, but it had a reasonable doubt as to the degree, it was to convict defendant of second degree murder. The jury was also instructed that if it had a reasonable doubt whether the killing was manslaughter or justifiable homicide, they were to acquit defendant. The Supreme Court concluded, “The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder. This case was a close one on its facts. While there was sufficient evidence to support a conviction of second degree murder, a finding that the offense was manslaughter would be equally warranted. . . . The record demonstrates that the jury considered the distinction between these two offenses crucial and had difficulty with it. . . . [¶] The proposed instruction should have been given. . . . [I]t was essential to cure

the misleading effect of its absence in the light of the other instructions given. Under these circumstances there exists ‘such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result’ and accordingly the error is prejudicial.” (*Id.* at pp. 557-558.)

In *People v. Barajas* (2004) 120 Cal.App.4th 787, 794, the appellate court rejected defendant’s contention that the failure to give CALJIC No. 8.72 sua sponte required reversal of the defendant’s conviction. It held, “. . . CALJIC No. 1710 satisfies the requirements of *Dewberry*. . . . [W]hen its blanks are filled in for murder and manslaughter, [it] is logically equivalent to CALJIC No. 8.72. If a jury is convinced beyond a reasonable doubt that a defendant is guilty of either a greater or a lesser offense, this can only be because it has had a reasonable doubt about elements of the greater offense and no reasonable doubt about any elements of the lesser. Under these circumstances, CALJIC No. 17.10 instructs the jury to convict of the lesser offense. CALJIC No. 8.72 does the same. As we recently stated, “the court is required to instruct sua sponte only on general principles which are necessary for the jury’s understanding of the case. It need not instruct on specific points . . . which might be applicable to a particular case, absent a request for such an instruction.” [Citation.]” (*Barajas* at pp. 793-794.) (Accord, *People v. Gonzales* (1983) 141 Cal.App.3d 786, 793, 794 [disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330]; *People v. St. Germain* (1982) 138 Cal.App.3d 507, 521, 522.) In *People v. Musselwhite* (1998) 17 Cal.4th 1216 and *People v. Friend* (2009) 47 Cal.4th 1, the California Supreme Court

held that other instructions can substitute for the absence of an instruction like CALJIC No. 8.72.⁹

In *People v. Crone* (1997) 54 Cal.App.4th 71, 76 (*Crone*), which predated *Barajas*, this court noted, “When the defendant is charged with a greater offense which

⁹ In *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262, 1263, the Supreme Court rejected defendant’s contention that the trial court’s failure to instruct that if the jury had a reasonable doubt whether defendant committed attempted murder or assault with a deadly weapon, it should convict defendant of the latter, while giving a similar instruction as to first and second degree murder and murder and manslaughter, constituted *Dewberry* error. The court noted, “[T]he trial court . . . g[a]ve the jury several generally applicable instructions governing its use of the reasonable doubt standard. All redounded to defendant’s benefit in the sense that each required the jury, where it had a reasonable doubt as to *any included or related offenses or degrees*, to find defendant guilty of the lesser included or related offense or lesser degree, that is, to give defendant the benefit of any reasonable doubts it may have had. Granted, the trial court gave *specific* reasonable doubt benefit instructions only with respect to first and second degree murder . . . and murder and manslaughter . . . and did not give such a specific instruction with respect to attempted murder and [aggravated] assault [¶] But that omission alone does not place this case within *Dewberry*’s orbit. . . . [Here] the jury was [instructed:] ‘[I]f the evidence as to any such specific intent or mental state is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to the absence of the specific intent or mental state, you must adopt that interpretation which points to the absence of the specific intent or mental state.’ In effect, the jury instruction just quoted fulfilled the same function as the instruction proffered by the defendant in . . . *Dewberry*” (*Musselwhite, supra*, 17 Cal.4th at pp. 1262, 1263.)

In *People v. Friend* (2009) 47 Cal.4th 1, 55, 56, the Supreme Court concluded that there was no *Dewberry* error where the trial court had given the “benefit of the reasonable doubt” instruction as to second degree murder and manslaughter, but not as to first and second degree murder, where CALJIC No. 17.10 and instructions on the benefit of the reasonable doubt as to intent for felony murder and as to intent when the defendant is intoxicated were given.

has one or more uncharged less included offenses, the trial court ordinarily will give CALJIC No. 17.10, which satisfies the requirement of *Dewberry*.”¹⁰

While citing *Barajas*, *Gonzales* and *St. Germain* in his opening brief, defendant waits until his reply brief to concede that they were correctly decided, but he asserts that they do not apply here because CALJIC No. 17.10 was not given. A careful reading of the oral and written instructions given to the jury will demonstrate to defendant that he is mistaken.¹¹

4. *Cumulative Error*

Having concluded there is no merit in the assignments of error raised here by defendant, we necessarily reject his contention that the cumulative weight of that error requires reversal of his conviction.

¹⁰ Defendant twice erroneously cites *People v. Crone* (1997) 54 Cal.App.4th 71 in support of his position. *Crone* held that when a defendant is *charged with* both a greater and a lesser offense, and, therefore, the wording of CALJIC No. 17.10 is not appropriate, *CALJIC No. 17.03 fails* to satisfy the requirements of *Dewberry*. (*Crone*, pp. 76, 77.)

¹¹ See footnote eight, *ante*, at page 18.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

KING
J.

CODRINGTON
J.