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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER CORONA BARAJAS,

Defendant and Appellant.

E053185

(Super.Ct.No. FVA1000110)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Affirmed.

Brett Harding Duxbury, 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, Kristen Kinnaird Chenelia, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant and appellant Javier Corona Barajas guilty of first degree murder (Pen. Code, § 187, subd. (a), count 1)¹ and attempted premeditated murder (§§ 664, 187, subd. (a), count 2). The jury also found true that in the commission of counts 1 and 2, defendant personally and intentionally discharged a firearm causing great bodily injury or death. (§ 12022.53, subd. (d).)² Defendant was sentenced to a total indeterminate term of 82 years to life in state prison with credit for time served. On appeal, defendant contends (1) the trial court’s failure to define “provocation” as it relates to the degree of murder violated his federal due process rights; and (2) the trial court prejudicially erred in failing to instruct the jury on the lesser included offenses of voluntary and attempted voluntary manslaughter. We reject these contentions and affirm the judgment.

I

FACTUAL BACKGROUND

On January 18, 2010, Nereida Lopez was at her apartment in Fontana with her husband, Jose Lopez, their two sons, ages five and seven, and their infant daughter.

¹ All future statutory references are to the Penal Code unless otherwise stated.

² The jury was unable to reach a verdict on another count of attempted premeditated murder (count 3); that count was later dismissed by the People.

Around 8:30 a.m. the doorbell rang.³ Nereida’s five-year-old son opened the door and let defendant inside. Defendant was married to Jose’s cousin, Graciella Corona.

While standing in her bedroom doorway, Nereida noticed that defendant was holding a gun in his hand. She screamed out to Jose that “[defendant] was in the house with a gun.” Jose “jumped” out of bed, as defendant walked toward the bedroom. Nereida tried to close the bedroom door on defendant, but he stopped her and came into the bedroom. Jose told Nereida, “Don’t worry, it’s my cousin.” Defendant ordered Nereida and Jose to the living room.

After Jose and Nereida went into the living room, Jose sat on a couch while Nereida took their five-year-old son into his bedroom. Nereida also tried to take her infant daughter into the bedroom, but defendant stopped her and told her to sit on the couch.

Defendant then told Jose that he was not going to kill him, but they argued about why defendant believed Jose had broken into his house.⁴ Specifically, defendant said “and because I don’t want to sell your friend the gun for cheaper price, . . . you broke into my house and you took everything.” Jose responded, “Well, if you don’t want to sell the gun to him at a cheaper price, . . . that’s not my problem. I had no reason why to

³ Members of the Lopez family will hereafter be individually referred to by their first names, not out of any familiarity or disrespect, but to ease the burden on the reader. (See, e.g., *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 803, fn. 2.)

⁴ No witnesses testified at trial that defendant had been the victim of a home burglary or home invasion robbery. In fact, the testimony was vague on the point. However, the prosecutor referred to a home invasion robbery or burglary in questioning witnesses and in his closing argument.

do that.” The argument lasted about seven to eight minutes, and Nereida characterized it as a calm argument between the two. Jose denied any involvement in the alleged burglary or robbery of defendant’s house. Nereida told defendant “to think about his family,” that they “would help him find the person that broke into his house,” and to not “do something dumb” with the children hearing and watching.

Defendant thereafter told Jose to kneel down and put his head on the couch, but Jose refused. Defendant then tossed a nearby T-shirt to Jose and told him to put it on. Jose told defendant the children “were there” and to “think about what he was going to do.” Defendant responded, “Put your shirt on.” As Jose pulled his T-shirt over his face, defendant shot Jose in the chest. Defendant then walked up closer to Jose and shot him twice in the head. Jose died as a result of gunshot wounds to his chest and head.

After the first shot, Nereida, who was holding her daughter in her arms, stood up and screamed. As defendant turned to face Nereida, she “ducked” to protect her daughter. Defendant then shot Nereida in the back of her left shoulder and neck. He thereafter grabbed Nereida by the back of her hair and shot her in the head.

Nereida woke up on the living room floor and screamed for help. After her son brought her a telephone, Nereida called her sister-in-law Maria Torres and told her that defendant had shot her and Jose. She also told the responding officers that defendant had shot her.

Nereida denied any contentions between the two families, but noted that they were not “close.” Nereida had not seen defendant in months prior to the shooting, but had seen his wife Corona a few weeks earlier. Corona had called Torres asking for Jose and

Nereida's home address so she could send them an invitation to their daughter's First Communion. Torres did not know the address so she gave her Jose's telephone number. Later, Corona drove to Torres's home and asked Torres to take her to their apartment. Torres took Corona and Corona's three children to Jose and Nereida's apartment. While there, Corona commented that the apartment was nearby and asked Torres, "Is there another entrance to come out and then another entrance to walk inside?" Corona never said anything to Torres or Nereida about a home burglary or home invasion robbery, but Corona had mentioned it to Torres's mother.

Defendant was arrested after he left his home in Pomona on the day of the incident. A search of defendant's home revealed a bag of .38-caliber bullets under defendant's mattress. Bullet fragments found in Jose's body were consistent with .38-caliber bullets. A jacket defendant had been wearing when he came home on the day of the incident had been washed. At 5:20 p.m. on the day of the shooting, defendant's left hand tested positive for gunshot residue.

II

DISCUSSION

A. *Trial Court's Failure to Define "Provocation"*

Defendant contends that his federal constitutional rights were violated when the trial court instructed the jury with CALCRIM No. 522 (Provocation: Effect on Degree of Murder) without providing a further instruction defining "provocation." The People respond that defendant forfeited this issue by failing to request a clarification of the

instruction and, in the alternative, assert that a further instruction was unnecessary and any error was harmless.

CALCRIM No. 522 instructs that “[p]rovocation may reduce a murder from first degree to second degree” and that “[t]he weight and significance of the provocation, if any, are for [the jury] to decide.” This instruction has been held to be an accurate and adequate statement of the law. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1333-1335.)

Initially, it appears defendant’s claim has been forfeited. If defendant believed the instruction, which is an accurate statement of the law, needed clarification or amplification, it was incumbent upon him to request an amplifying or clarifying instruction in the trial court. (*People v. Parson* (2008) 44 Cal.4th 332, 352; *People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [“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”].)

Having failed to do so, he has forfeited any claim on appeal that the instruction needed amplification or clarification. (*People v. Russell* (2010) 50 Cal.4th 1228, 1273.) However, even if we view the claimed error as violative of defendant’s substantial rights and, thus, not requiring an objection in the trial court (see § 1259; *People v. Kelly* (2007) 42 Cal.4th 763, 791; *People v. Salcido* (2008) 44 Cal.4th 93, 155), defendant’s claim fails on the merits.

When we review a challenge to jury instructions as being incorrect or incomplete, we evaluate the instructions given as a whole, not in isolation, to determine whether there is a reasonable likelihood they confused or misled the jury and thereby denied the defendant a fair trial. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 182; *People v. Richardson* (2008) 43 Cal.4th 959, 1028.) We also presume jurors are intelligent and capable of understanding and correlating jury instructions. (*People v. Richardson*, at p. 1028; *People v. Carey* (2007) 41 Cal.4th 109, 130.)

Applying these principles here, and considering the challenged instructions in context, we conclude CALCRIM No. 522 correctly conveyed the relevant law and concept of provocation as it relates to the degree of murder to the jury. Thus, the trial court did not err in instructing the jury with CALCRIM No. 522 without further defining “provocation.”

CALCRIM No. 520 instructed the jury that, in order to convict defendant of murder, the People were required to prove malice aforethought, which may be either express or implied. The jury was also instructed that first degree murder requires a finding that defendant acted willfully, deliberately, and with premeditation, and that “[a]ll other murders are of the second degree.” More importantly, it told the jury, “A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.” Further, the instruction informed the jury that in order to determine that defendant premeditated and deliberated, the jury must find that he “carefully weighed the consideration[s] for and against his choice and, knowing the consequences, decided to kill.”

CALCRIM No. 522, as given, provided: “Provocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder.”

These instructions informed the jury of the necessary mental state for first and second degree murder and explained that provocation can mitigate first degree murder to second degree murder. Although the trial court did not explicitly define “provocation,” when the instructions are read as a whole there is no reasonable likelihood the jury did not understand or misapplied this concept. Based on CALCRIM No. 521, the jury was instructed that unless the defendant acted with premeditation and deliberation, he is guilty of second, not first, degree murder, and that a rash, impulsive decision to kill is not deliberate and premeditated. Also, pursuant to CALCRIM No. 522, the jury was instructed that provocation may reduce the murder to second degree.

As the court in *People v. Hernandez, supra*, 183 Cal.App.4th at page 1334, explained: “In this context, provocation was not used in a technical sense peculiar to the law, and we assume the jurors were aware of the common meaning of the term. [Citation.] Provocation means ‘something that provokes, arouses, or stimulates’; provoke means ‘to arouse to a feeling or action[;] ... to incite to anger.’ (Merriam-Webster’s Collegiate Dict. (10th ed. 2001) p. 938; see *People v. Ward* (2005) 36 Cal.4th 186, 215 [30 Cal.Rptr.3d 464, 114 P.3d 717] [‘provocation . . . is the defendant’s emotional reaction to the conduct of another, which emotion may negate a requisite mental state’].)

Considering CALCRIM Nos. 521 and 522 together, the jurors would have understood that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation. [¶] We are satisfied that, even without express instruction, the jurors understood that the existence of provocation can support the absence of premeditation and deliberation. Thus, without a request for further instruction, the trial court was not required to amplify the instructions to explain this point. [Citation.]”

Finally, there was simply not sufficient evidence of provocation such that any error in failing to define “provocation” could be deemed anything but harmless beyond a reasonable doubt. (*People v. Mayfield* (1997) 14 Cal.4th 668, 774; *Chapman v. California* (1967) 386 U.S. 18, 24.) Although there was some vague evidence indicating defendant was acting out of revenge for a home burglary or home invasion robbery that was allegedly committed by Jose, there was no evidence of when Jose purportedly committed the burglary or robbery at defendant’s house. While the prosecutor mentioned a burglary or robbery of defendant’s home, Nereida’s and Torres’s testimony in this regard was vague, and there is no other evidence to suggest that defendant had even been a victim of a burglary or robbery. Indeed, defendant’s trial counsel did not argue provocation in her closing argument. There was also no evidence of an emotional confrontation prior to the shooting or that defendant was upset about Jose’s denials in any involvement in the alleged home burglary or home invasion robbery of defendant’s house. Nereida testified that both Jose and defendant remained calm during the discussion before the shooting. Thus, there was no evidence adduced at trial that

defendant's shooting of the victims was committed in the immediacy of any ostensible provocation.

Likewise, there was nothing in the record to show that defendant feared the victims or that the victims represented a threat to defendant. Rather, substantial evidence shows that the shootings were premeditated and deliberate. Indeed, the evidence established that defendant brought a loaded revolver with him when he went to the victims' apartment after having his wife previously assess its layout. Defendant then confronted Jose regarding the purported burglary or robbery. After Jose denied any involvement, defendant shot Jose, execution style, first in the chest and then twice in the head. Defendant then shot Nereida in the back of her left shoulder and neck. He then grabbed Nereida by the back of her hair and shot her in the head. Hence, there was no evidence from which a reasonable jury could have concluded that defendant acted immediately in response to provocation when he murdered Jose and attempted to murder Nereida.

Accordingly, we find no instructional error here.

B. Trial Court's Failure to Instruct on Lesser Included Offenses

Defendant also contends that the trial court prejudicially erred in failing to sua sponte instruct the jury on the lesser included offenses of voluntary and attempted voluntary manslaughter. The People claim defendant invited the error. They also argue that the evidence did not support the instructions based on heat of passion, and any possible error was harmless. We agree with the People.

During a discussion of jury instructions, the following exchange occurred:

“[DEFENSE COUNSEL]: And, Judge, just for the record, in case this case happens to go up on appeal, [defendant] and I have discussed the defense of voluntary manslaughter and whether or not we would request that jury instruction from the Court. And for tactical trial reasons, we have requested not to request that instruction from the Court.

“THE COURT: Thank you.

“[DEFENSE COUNSEL]: That is correct, [defendant]?”

“THE DEFENDANT: Yes.

“[DEFENSE COUNSEL]: Okay.

“THE COURT: Thank you, Counsel and [defendant]. Anything further we need to place on the record before the jury comes in?”

“[THE PROSECUTOR]: No. Just a question off the record.

“THE COURT: All right.

“[THE PROSECUTOR]: About scheduling.

“THE COURT: Very well. I have submitted jury instructions to counsel. Did counsel have a chance to review the jury instructions?”

“[THE PROSECUTOR]: Yes.

“[DEFENSE COUNSEL]: Yes.

“THE COURT: Any additions or subtractions, other than what we discussed yesterday; namely, taking the voluntary manslaughter option away from all the jury instructions?”

“[DEFENSE COUNSEL]: No. They looked fine to me.

“[THE PROSECUTOR]: We had a couple of things regarding the provocation instruction. There are—well, I don’t believe it should be given. But if it is given, the reference to voluntary and involuntary manslaughter should be removed from that instruction.”

“[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.” (*People v. Breverman* (1998) 19 Cal.4th 142, 162 (*Breverman*)).) However, “a defendant may not invoke a trial court’s failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court’s failure to give the instruction.” (*People v. Barton* (1995) 12 Cal.4th 186, 198 (*Barton*)).)

Defendant suggests the doctrine of invited error does not apply because defendant “never *objected* to the instruction on lesser offenses,” but “‘requested to not request’ instruction on voluntary manslaughter.” He further asserts that “[i]t appears the trial court had ‘already removed’ instructions on lesser offenses . . . *before* [defendant] ‘requested to not request’ such instructions.” He therefore believes the record fails to show defendant had expressly objected to instructions on the lesser offenses.

Defendant’s assertions belie the record. It is clear from the record that defendant expressly objected to instructions on voluntary manslaughter for tactical reasons and not out of ignorance or mistake. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057; see also *Barton, supra*, 12 Cal.4th at pp. 195, 198 [doctrine of invited error bars review of

asserted instructional error on appeal even though trial court has sua sponte duty to instruct on lesser included offense over defendant's objection].)

People v. Hardy (1992) 2 Cal.4th 86, is instructive. In *Hardy*, the defendants argued that the trial court erroneously failed to instruct, sua sponte, on the lesser included offenses of second degree murder and voluntary manslaughter, as well as the defenses of diminished capacity and voluntary intoxication. (*Id.* at p. 182.) Our high court rejected the defendants' arguments finding that the record reflected a conscious tactical decision by the defendants' attorneys not to have the jury instructed on the lesser included offenses and, therefore, that the defendants had waived any claims with regard to the asserted instructional errors. (*Id.* at p. 185.) The court concluded, "The record clearly shows such a waiver as to [one of the defendants], whose counsel unequivocally indicated that he did not want instructions on diminished capacity or voluntary intoxication because those defenses were inconsistent with [that defendant's] proffered defense in the guilt phase." (*Id.* at p. 184.)

Here, although defendant approaches the asserted instructional error as if the trial court failed to recognize its obligation to give the instructions on the lesser offenses sua sponte, the record demonstrates that defendant and his counsel made a tactical decision to not instruct the jury on voluntary manslaughter and attempted voluntary manslaughter. (See *People v. Bunyard* (1988) 45 Cal.3d 1189, 1235 (*Bunyard*) [asserted instructional error invited by the defendant where he withdrew second degree murder instruction and his attorney's closing argument was entirely consistent with tactical strategy].)

We note that the invited error doctrine does not require that counsel explain on the record the tactical basis for an objection. “The question . . . is whether the attorney’s conduct went beyond a mere failure to object and constituted an invitation to the court.” (*People v. Graham* (1969) 71 Cal.2d 303, 319, overruled on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 29, fn. 7, 32.) “The issue centers on whether counsel deliberately caused the court to fail to fully instruct, not whether counsel subjectively desired a certain result. The error, in other words, must be ‘invited.’” (*People v. Wickersham* (1982) 32 Cal.3d 307, 335, disapproved on another point in *Barton, supra*, 12 Cal.4th at p. 200.) “[T]he record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to counsel, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice.” (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) Indeed, the tactical basis for defense objections to lesser included instructions is so well understood as to be commonplace; it is to avoid compromise verdicts and force an all or nothing choice between conviction of the greater offense or acquittal. (See, e.g., *Barton, supra*, 12 Cal.4th at p. 204; *Bunyard, supra*, 45 Cal.3d at p. 1235; *People v. Duncan* (1991) 53 Cal.3d 955, 969-970; *People v. Lara* (1994) 30 Cal.App.4th 658, 674.)

Here, the record clearly shows that both defense counsel and defendant affirmatively invited the court not to instruct on voluntary manslaughter as a lesser

included offense. This was a deliberate tactical choice expressed by counsel, and the invited error doctrine applies. Defendant's remedy is limited to a claim of ineffective assistance of counsel. (*People v. Cooper, supra*, 53 Cal.3d at p. 831.) He makes no such claim, but we note that where the record discloses counsel's choice was a matter of trial tactics, the deference accorded to counsel's tactical decisions generally precludes any finding of incompetence on the appellate record. (*People v. Duncan, supra*, 53 Cal.3d at pp. 966, 970.)

Defendant further argues that even if his "request not to request" could be characterized [as] an objection, it does not apply to instruction on *attempted* voluntary manslaughter, because its specified subject was instruction on voluntary manslaughter alone." Again, we disagree with defendant's interpretation of the record. In fact, during closing argument, defense counsel repeatedly argued that defendant was not "the gunman," and pointed out that there was nothing to corroborate Nereida's testimony. Counsel also attempted to discredit the testimony of Nereida and the physical evidence found in the case. In part, counsel stated, "When I said I was going to get to the nuts and bolts, it's basically this: Is [defendant] the gunman? That is the question, Ladies and Gentlemen. Is he the one? [¶] And what evidence have you received? What evidence have you heard from that witness stand that would convince you beyond a reasonable doubt that he is in fact the gunman in this case? [¶] . . . [¶] You have the testimony of Ms. Lopez. Other than that, we have no other witnesses who can identify [defendant]. No neighbors saw him at the scene, either coming or going. We don't have any anybody

that puts him in the area at all. [¶] As far as physical evidence to connect [defendant] to the crime scene, there is no gun. There is no blood found on him or his clothing.”

In *People v. Horning* (2004) 34 Cal.4th 871, which involved an appeal from a conviction for first degree murder, the Supreme Court found the defendant was barred under the invited error doctrine from challenging the trial court’s failure to give instructions on second degree murder because the record showed the defendant’s lack of objection to the instructions was more than mere unconsidered acquiescence; rather, the record showed that the “defendant did not want the instructions because they were inconsistent with his defense that he did not commit the crime at all.” (*Id.* at p. 905.)

Here, as already discussed, defendant’s counsel did not request that the trial court instruct the jury on the lesser included offenses of voluntary manslaughter for tactical purposes. The record abundantly demonstrates the defense made a deliberate, tactical decision to not request voluntary and attempted voluntary manslaughter instructions because the theory of the defense was that defendant was not “the gunman” or even at the scene when Jose and Nereida were shot. Such instructions would have been inconsistent with his defense.

Even if we assume the error was not invited, there is insufficient evidence here to suggest that the trial court had a duty to instruct the jury on voluntary manslaughter and attempted voluntary manslaughter. A defendant who commits an intentional and unlawful killing, but who lacks malice is guilty of voluntary manslaughter. (*Breverman, supra*, 19 Cal.4th at p. 153.) Malice is negated when the defendant acts in a ““sudden quarrel or heat of passion.”” (*Id.* at pp. 153-154.) A trial court has a sua sponte

obligation to instruct on voluntary manslaughter or attempted voluntary manslaughter when the offense is supported by the evidence. (*Id.* at p. 154.) The duty to instruct does not arise if there is “any evidence, no matter how weak” in support of the lesser offense, but rather only arises if there is evidence “substantial enough to merit consideration’ by the jury.” (*Id.* at p. 162.) Substantial evidence exists if there is evidence that a reasonable jury could find persuasive. (*Ibid.*) In deciding whether there is substantial evidence to warrant the instruction, the court should not evaluate the credibility of witnesses and should resolve doubts in favor of giving the instruction. (*Ibid.*) On appeal, “we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of voluntary manslaughter [or attempted voluntary manslaughter] should have been given. [Citation.]” (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.)

To show heat of passion for voluntary manslaughter, the defendant’s reason must be “actually obscured as the result of a strong passion aroused by a ‘provocation’ sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.”” (*Breverman, supra*, 19 Cal.4th at p. 163.) The passion aroused can be any intense emotion other than revenge. (*Ibid.*) The killing is not voluntary manslaughter if sufficient time elapsed between the provocation and the killing for passion to subside and reason to return. (*Ibid.*) Provocation must be affirmatively shown and is evaluated under an objective standard, i.e., the conduct must be sufficiently provocative that it would

cause an average person to be so inflamed that he or she would lose reason and judgment. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1143.)

Provocation may exist for second degree murder but not for manslaughter because second degree murder provocation is only determined under a subjective test, whereas voluntary manslaughter provocation must satisfy both a subjective and an objective test. That is, the existence of provocation to negate deliberation and premeditation and reduce the crime to second degree murder from first degree murder rests on a subjective evaluation of the defendant's actual state of mind. (*People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295-1296 [Fourth Dist., Div. Two].) In contrast, provocation that negates malice and reduces the crime to voluntary manslaughter also requires a determination that a reasonable person under like circumstances would have reacted with deadly passion. (*Ibid.*) Thus, a defendant who is subjectively precluded from deliberating because of provocation is guilty of second degree murder rather than first degree murder, even if a reasonable person would not have been so precluded. (*Ibid.*)

The evidence here fails to show that a reasonable person under like circumstances would have shot the victims. As discussed, *ante*, II.A., although there was some vague evidence indicating defendant was acting out of revenge for a home burglary or home invasion robbery that was allegedly committed by Jose, there was simply no evidence to suggest defendant was acting out of provocation or in the heat of passion. Defendant's shooting of the victims cannot be deemed to arise from legally adequate provocation that dispels malice absent some type of extraordinary conduct by the victims. There is nothing in the record to indicate the victims had provoked defendant on the day of the

shooting or any clear evidence to even suggest defendant had been a victim of a robbery or burglary. There was also no evidence of an emotional confrontation prior to the shooting or that defendant was upset about Jose’s denials in any involvement in the alleged robbery or burglary. Indeed, defendant’s defense was that he was not “the gunman,” and his trial counsel did not argue provocation in her closing argument. Because there was no evidence worthy of jury consideration to show provocation sufficient to cause an average person to kill in the heat of passion, we conclude there was no sua sponte duty to instruct on voluntary and attempted voluntary manslaughter.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.