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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL VICENTE SANDOVAL,

Defendant and Appellant.

B234556

(Los Angeles County  
Super. Ct. No. BA326469)

APPEAL from the judgment of the Superior Court of Los Angeles County,  
Bob S. Bowers, Jr., Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General of California, Dane R. Gillette, Chief  
Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General,  
Stephanie A. Miyoshi and Rama R. Maline, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Defendant and appellant Rafael Vicente Sandoval was convicted by a jury of murder (Pen. Code,<sup>1</sup> § 187, subd. (a)) and attempted murder (§ 664/187, subd. (a)). He asserts instructional error requires reversal. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Sandoval and Marina Amaya dated for about two years.~(RT 42-43)~ After the breakup, Sandoval repeatedly asked Amaya to be his girlfriend again until Amaya told him she was seeing someone else. A few weeks later, on July 29, 2007, Amaya and her family friend Oscar Miranda were sitting in Miranda's car; Sandoval drove up and parked behind them. Sandoval then drove next to Miranda's car and fired into it. Amaya was not wounded but Miranda died from gunshot wounds.

Sandoval was charged with murder and attempted murder; shooting at an occupied motor vehicle (§ 246); and two counts of shooting from a motor vehicle (§ 12034, subd.(c) & (d)). Each count also bore special allegations (§ 12022.53, subd. (d); § 190, subd. (d); §190.2, subd. (a)(21)). At trial, the court instructed the jury as to the elements and degrees of murder (CALJIC Nos. 8.10, 8.20, 8.25.1, 8.30, 8.31) and the elements of attempted murder (CALJIC Nos. 8.66, 8.67). The court also instructed the jury on voluntary manslaughter and attempted voluntary manslaughter, along with instructions on heat of passion or provocation (CALJIC Nos. 8.40, 8.41. 8.42). At the request of both attorneys, the court then instructed the jury with CALJIC No. 8.50, which focuses on the distinction between murder and manslaughter. That instruction informs the jury that the burden is on the prosecution to prove beyond a reasonable doubt each element of murder and the absence of heat of passion or a sudden quarrel.

Neither counsel objected to the jury instructions. The jury found Sandoval guilty on all counts and also found true all special allegations. Sandoval appeals.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## DISCUSSION

Following the murder and manslaughter instructions, the court instructed the jury with CALJIC No. 8.50: “The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. When the act causing the death, though unlawful, is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, the offense is manslaughter. [¶] In that case, even if an intent to kill exists, the law is that malice, which is an essential element of murder, is absent. [¶] 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.”

On appeal, Sandoval argues that a portion of CALJIC 8.50—that the prosecution had to prove beyond a reasonable doubt “that the act causing death was not done in the heat of passion”—should have also been read directly following the murder instructions. Because this portion was only read after the manslaughter instructions, Sandoval claims the instructions as read presented the absence of adequate provocation as an exclusive element of manslaughter and not murder. According to Sandoval, this could have led the jury to believe that it could convict him of murder without considering whether the killing was committed in the heat of passion.

The People contend that Sandoval is barred from raising this claim because his counsel, by expressly requesting CALJIC No. 8.50, invited any error. (*People v. McKinnon* (2011) 52 Cal.4th 610, 675.) However, because Sandoval also claims his counsel provided ineffective assistance by failing to request modified instructions, we address the merits of his claim.<sup>2</sup>

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<sup>2</sup> While all criminal defendants have a right to effective representation, ineffective assistance does not warrant reversal of criminal convictions unless the defendant suffered prejudicial error. (*Strickland v. Washington* (1984) 466 U.S. 668, 691). The court may therefore “dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice,” rather than counsel’s deficient performance. (*Id.* at p. 697.)

Sandoval's contention focuses on an isolated portion of CALJIC No. 8.50 and the order in which it was read. However, "the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citation.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 161.) In fact, Sandoval's argument was rejected by the Court of Appeal in *People v. Najera* (2006) 138 Cal.App.4th 212. In that case, defendant also argued that the order of instructions led the jury to convict him of murder without considering whether the killing was adequately provoked. (*Id.* at p. 227) The court noted that the jury heard all of the instructions in their entirety—including the instruction on the prosecution's burden of proving the absence of adequate provocation—before retiring to deliberate. (*Id.* at p. 228) The Court of Appeal presumed that the jury understood and considered all of the instructions as a whole, in whatever order they might have been read, and found that the defendant was properly convicted of murder. (*Ibid*; see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1321 [jurors are presumed to be "capable of understanding and correlating all jury instructions . . . given.""].)

Here, we can do more than presume that the jurors understood and considered all of the instructions given. The jury sent out two questions during deliberations. First, the jury requested clarification on whether the "drive-by murder" instructions applied to attempted murder. Then the jury asked, "Does the element of 'drive-by' murder negate any relevance of 'heat of passion' for the first degree murder?" In response to the second question, the court instructed the jury to consider heat of passion when deliberating on the "drive-by" murder charge.

Moreover, the court gave additional instructions that reinforced CALJIC No. 8.50's provision that the prosecution must have shown an absence of provocation beyond a reasonable doubt for Sandoval to be convicted of murder. For example, CALJIC No. 8.40 informed the jury that malice is not established "if the killing occurred upon a sudden quarrel or heat of passion." The jury was instructed that "if [it] should find [Sandoval] guilty of an unlawful killing, [it] must agree unanimously as to whether he is

guilty of murder of the first degree or murder of the second degree” or voluntary manslaughter. (CALJIC No. 8.74) The jurors were also told that they could not find Sandoval guilty of manslaughter unless they also unanimously found him not guilty of murder. (CALJIC No. 8.75) When all of these instructions are read a whole, we do not find that the jurors could have reasonably inferred any preclusion from considering heat of passion during deliberations.

We conclude the jury was properly instructed on the applicable law. We identify neither a deficient performance by Sandoval’s counsel nor any prejudice from the failure to request modified instructions.

### **DISPOSITION**

The judgment is affirmed.

ZELON, J.

We concur:

WOODS, Acting P.J.

JACKSON, J.