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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRIAN MENDEZ, Defendant and Appellant.	B272175 (Los Angeles County Super. Ct. No. VA127484)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Michael C. Keller, Deputy Attorney General, for Defendant and Appellant.

A jury convicted defendant and appellant Brian Mendez (defendant) of first degree felony murder, carjacking, and attempted robbery. The evidence at trial established defendant and his girlfriend Misty Ruiz planned to steal victim Efrain Perez-Ortiz's money; when he resisted, defendant knocked Perez-Ortiz to the ground, pummeled him, took Perez-Ortiz's truck, and drove over his body, killing him. Defendant does not challenge the sufficiency of the evidence used to convict him, but he does ask us to decide a host of instructional error claims, many of which were not raised during the proceedings below.

I. BACKGROUND

A. The Offense Conduct

On January 13, 2012, Defendant and Ruiz were drinking beer together in a parking lot when Perez-Ortiz drove up in a truck. Defendant went over and spoke to Perez-Ortiz, and after a short time, defendant called Ruiz over. All three then got in Perez-Ortiz's vehicle, and defendant told Ruiz they were going to smoke some marijuana. Perez-Ortiz drove to his house, and when they arrived, Perez-Ortiz left defendant and Ruiz in the truck and went into the house to retrieve the marijuana.

While Perez-Ortiz was inside the house, defendant and Ruiz devised a plan whereby Ruiz would pretend to be a prostitute and defendant would play the role of her pimp. Defendant would proposition Perez-Ortiz on Ruiz's behalf and ask Perez-Ortiz to pay $80 up front. With the money in hand, defendant and Ruiz would then leave without consummating the deal. Defendant and Ruiz hatched the plan because they both needed money. Defendant told Ruiz he also wanted to take Perez-Ortiz's vehicle in addition to his money.

When Perez-Ortiz returned to the truck, he showed defendant and Ruiz the marijuana and rolled out a "blunt." All three then took turns smoking the marijuana, and right after they finished, defendant asked Perez-Ortiz whether he wanted to have sex with Ruiz for money. Playing the role of a prostitute, Ruiz began touching Perez-Ortiz's knees and told him she charged $80. Perez-Ortiz agreed to pay Ruiz for sex and asked defendant to get out of the truck. Defendant asked Perez-Ortiz to pay the money first, and when Perez-Ortiz refused, defendant reached over Ruiz and punched Perez-Ortiz in the jaw.

Perez-Ortiz became angry, got out of the truck, and began yelling at defendant, telling him to get out of the truck too. Defendant eventually complied, and he walked around to the side of the truck where Perez-Ortiz was standing. Defendant knocked Perez-Ortiz to the ground, and once he was on the ground, defendant punched him in the face and repeatedly kicked him in the stomach and other areas of his torso.[1] Ruiz hit Perez-Ortiz twice, and defendant stopped attacking Perez-Ortiz once she did so.

When defendant finished kicking and punching Perez-Ortiz, he was still alive, lying on the ground but barely moving. Defendant yelled at Ruiz, telling her to get in Perez-Ortiz's truck. She complied, and defendant got behind the wheel, looking like he was panicked. Defendant then backed the truck over Perez-Ortiz's body and drove off. As a result of the fight and being run over by defendant, Perez-Ortiz suffered 22 broken ribs, punctures

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[1] Defendant (21 years old) was much bigger and much younger than Perez-Ortiz (55 years old).

to both of his lungs, a punctured liver, a broken nose, and a fractured cheekbone. He was pronounced dead at a hospital hours later.

When defendant drove away from the scene of the crime, he abandoned Perez-Ortiz's truck two blocks away and fled on foot with Ruiz. Defendant asked Ruiz if she had taken Perez-Ortiz's wallet, and when she said no, defendant appeared somewhat upset. Defendant and Ruiz eventually arrived at the residence of one of defendant's friends. While there, defendant bragged about what had happened, explaining he had beaten up a guy for some money and taken his vehicle—going so far as to show off the keys to Perez-Ortiz's truck that defendant still had in his possession.

B. The Charges, Trial, and the Guilty Verdicts

The District Attorney for Los Angeles County charged defendant and Ruiz with murder (Pen. Code, § 187, subd. (a)), attempted second degree robbery (Pen. Code, §§ 211, 664), and carjacking (Pen. Code, § 215, subd. (a)). The information filed against defendant alleged he killed Perez-Ortiz with malice aforethought and further alleged two special circumstances that would permit imposition of a death or life without parole sentence: that the murder was committed in the commission of (1) the crime of robbery and (2) the crime of carjacking. (Pen. Code, § 190.2, subd. (a)(17).)

Ruiz agreed to plead guilty to the carjacking charge and to testify as a witness at defendant's trial in exchange for the dismissal of the other charges against her and an 11-year prison sentence. She later testified as agreed, supplying many of the details we have thus far described in recounting the offense conduct.

In addition to Ruiz's testimony, the prosecution introduced other evidence that incriminated defendant. The police investigating Perez-Ortiz's murder found a hat at the scene of the crime; DNA recovered from that hat matched defendant's DNA (in the sense that the probability a random person, not defendant, would have the same DNA profile found on the hat was 1 in 1.2 quadrillion). The police also recovered an address book from Perez-Ortiz's abandoned truck. Defendant's former girlfriend recognized the address book as one belonging to defendant. Defendant's former girlfriend also testified to a conversation she had with defendant in or after January 2012—defendant was "just upset, talking about different things" and told her that one time he had taken a truck and thought he hit someone.

When the time came for closing argument, the prosecution argued the case to the jury solely on a felony murder theory, i.e., that defendant was guilty of first degree murder (and the alleged special circumstances were true) because he killed Perez-Ortiz during the commission of the crimes of attempted robbery and carjacking. Because the prosecution did not present the case on a malice murder theory, the trial court gave the jury no instruction on malice murder.

The jury convicted defendant on all charges and found true both special circumstances alleged in connection with the murder count. The trial court sentenced defendant to life without the possibility of parole for the murder conviction and stayed the sentence imposed for the carjacking and robbery convictions.

II. DISCUSSION

Each of defendant's arguments for reversal—six in all (seven if we include his cumulative error contention)—is meritless. We hold the trial court had no obligation to instruct the jury on (1) the meaning of "conspire" or "conspiracy" (no conspiracy offense was charged) or (2) the meaning of "aid and abet" (defendant was not prosecuted on an aiding and abetting theory). In addition, we hold (3) California's procedure for determining whether accomplice testimony is supported by the requisite corroboration, as encapsulated in a CALJIC pattern instruction given in this case, does not run afoul of federal due process guarantees. We further hold (4) that any error in incorrectly listing carjacking in the jury instruction on the concurrence of act and general (rather than specific) intent was harmless. And, finally, we hold the trial court had no obligation to instruct the jury on the lesser included offenses of (5) second-degree malice murder or (6) voluntary manslaughter because there was no substantial evidence defendant committed either lesser offense but not the greater offense, i.e., felony murder.

A. Forfeiture

"'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.' [Citations.]" (*People v. Landry* (2016) 2 Cal.5th 52, 99-100; accord, *People v. Livingston* (2012) 53 Cal.4th 1145, 1165; *People v. Rundle* (2008) 43 Cal.4th 76, 151 [defendant forfeited argument that trial court erred in failing to define the term "sexual intercourse" in its instructions because he did not

request a clarifying instruction in the trial court] (*Rundle*).) Two of defendant's contentions implicate this rule.

Defendant concedes he did not argue below that: (1) the trial court should have clarified certain instructions using the terms "conspire" and "conspiracy" by separately giving instructions defining those terms, and (2) the trial court should have clarified instructions that used the term "aid and abet" by separately defining that term too. Without more, these contentions would be forfeited for failure to raise a contemporaneous objection to the instructions given.

Defendant, however, seeks to avoid application of the forfeiture doctrine by asserting these asserted errors affected his substantial rights. (Pen. Code, § 1259 ["Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any . . . instruction . . . which affected the substantial rights of the defendant"]; *People v. Covarrubias* (2016) 1 Cal.5th 838, 904-905 ["To the extent defendant claims the instructions affected his substantial rights, we may review his claim under section 1259 despite his failure to raise the issue below"]; *Rundle*, *supra*, 43 Cal.4th at p. 151 ["We agree that defendant's failure to request that the trial court further define the meaning of the term "sexual intercourse," which is the element set forth in the statute (§ 261, subd. (a)), forfeited his claim on appeal. . . . [¶] Of course, despite defendant's failure to preserve this issue for appeal, we *may* review his claim of instructional error to the extent his substantial rights were affected"].) We agree we may review unobjected-to instructional errors insofar as the errors affect a defendant's substantial rights, but we forego a detailed exploration of these two contentions in favor of brief discussions

of why we believe defendant's substantial rights were not affected. (See generally *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249 ["[T]he failure to object to an instruction in the trial court waives any claim of error unless the claimed error affected the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error"].)

B. No Instruction Defining "Conspire" or "Conspiracy" Was Necessary

As defendant argues, the terms "conspire" and "conspiracy" were used in two instructions given to the jury. The first was CALJIC No. 3.10, which defines "accomplice" and provided "[a]n accomplice is a person who [was] subject to prosecution for the identical offense charged [in Count[s] One, Three, and Four] against the defendant on trial by reason of [being a member of a criminal conspiracy]." The second was CALJIC No. 8.26 ("First Degree Felony-Murder--In Pursuance of a Conspiracy"), which, in relevant part, stated: "If a number of persons conspire together to commit robbery or carjacking, and if the life of another person is taken by one or more of them in the perpetration of, or an attempt to commit that crime . . . all of the co-conspirators are equally guilty of murder of the first degree . . . ." Defendant agrees he "was not formally charged with conspiracy," but he argues that "once the trial court partially instructed on the concept of conspiracy liability, it was required to instruct on all the elements of conspiracy, sua sponte."

Defendant's argument fails. The term "conspiracy" was not used in its technical, legal sense and no definition was therefore

required. (*People v. Williams* (1988) 45 Cal.3d 1268, 1314-1315 [no sua sponte duty to define the word "conspiracy" as used in CALJIC No. 2.50 because it was used in its common sense of an agreement to do harm], disapproved on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1189-1191.) The term "conspire" was used in an instruction that arguably had no application to the case (CALJIC No. 8.26) because the question of defendant's guilt turned on the jury's findings about his own participation in the charged offenses, not the existence of a legally sufficient conspiracy. The inclusion of CALJIC No. 8.26, however, did not affect defendant's substantial rights. (*People v. Cross* (2008) 45 Cal.4th 58, 67 ["giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal'""]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1247-1248; see also *People v. Earnest* (1975) 53 Cal.App.3d 734, 745 [finding error in failing to define conspiracy but holding the error harmless because the only difference between the "layman's understanding" of the term and its legal meaning was the requirement of an overt act, which the jury (like the jury here) necessarily found].)

C. It Was Unnecessary to Instruct the Jury on the Meaning of Aiding and Abetting

Defendant similarly points out the term "aid and abet" (or variants thereof) was used in two instructions given to the jury.[2]

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[2] Defendant also relies on the trial court's use of CALJIC 8.81.17, which used the term "accomplice" in explaining the elements the prosecution must establish to prove the special circumstances true. In defendant's view, the "common

The first was CALJIC No. 3.00, which defined the term "principal" in part by explaining a principal is one who directly commits the acts constituting the crime or one who aids and abets the commission of the crime.[3] The second was CALJIC No. 9.40.1, which informed the jury that "[f]or the purposes of determining whether a person is guilty as an aider and abettor to robbery, the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety." Defendant argues that "[i]n spite of all the references to aiding and abetting in the jury instruction[s], no instructions whatsoever were given on the definition of aiding and abetting or

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understanding of the word 'accomplice' is a person who 'aids and abets a lawbreaker in a criminal act.'"

[3] CALJIC No. 3.00, as given at trial, stated: "Persons who are involved in [committing] [or] [attempting to commit] a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is [equally guilty]. Principals include: [¶] 1. those who directly and actively [commit] [or] [attempt to commit] the act constituting the crime, or [¶] 2. those who aid or abet the [commission] [or] [attempted commission] of the crime. [¶] [When the crime charged is [murder], the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state. If the aider and abettor's mental state is more culpable than that of the actual perpetrator, that person's guilt may be greater than that of the actual perpetrator. Similarly, the aider and abettor's guilt may be less than that of the perpetrator's, if the aider and abettor has a less culpable mental state.]"

the law of aiding and abetting to allow the jurors to properly evaluate whether [defendant] was an aider and abettor in the crime [of] robbery or attempted robbery." Defendant specifically contends the trial court should have given CALJIC No. 3.01, which defines "aiding and abetting."

The use note to CALJIC No. 3.01 states the instruction "should be given sua sponte in every case in which any defendant is prosecuted as an aider and abettor." Here, the prosecution did not seek to hold defendant criminally liable on an aiding and abetting theory; rather the case was tried and argued on the theory that defendant was the perpetrator.[4] Thus, no sua sponte instruction to define "aid and abet" was required. (*People v. Young* (2005) 34 Cal.4th 1149, 1201-1202.) In addition, the

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[4] Defendant counters that the jury could have convicted him of attempted robbery on an aiding and abetting theory because Ruiz testified that she, and not defendant, was supposed to take Perez-Ortiz's money. While Ruiz and defendant may have planned a theft to occur in that manner, such a planned theft would not involve the force or fear necessary to constitute robbery: the idea was for Ruiz to pretend to be a prostitute, trick Perez-Ortiz into surrendering money, and then get away before consummating the deal. The evidence introduced that did support the actual commission of an attempted robbery, by contrast, concerned acts perpetrated by defendant personally. When Perez-Ortiz refused to pay for sex up front, it was defendant who demanded the money from Perez-Ortiz and then punched Perez-Ortiz when he refused. The jury necessarily relied on the acts personally perpetrated by defendant because it found true the allegation that he personally inflicted great bodily injury upon Perez-Ortiz in the commission of the charged attempted robbery offense.

absence of such an instruction had no conceivable effect on defendant's substantial rights. At most, the references to aiding and abetting in the instructions defendant identifies should have been stricken as inapposite, but the failure to eliminate the references does not require reversal for reasons we have already explained. (See *People v. Cross*, *supra*, 45 Cal.4th at p. 67.)

D. The Trial Court's Accomplice Corroboration Instruction Does Not Violate Federal Constitutional Due Process Principles

Penal Code section 1111 provides that a defendant may not be convicted based solely on the testimony of an accomplice; instead, the testimony of an accomplice who participated in the commission of the crime must be corroborated by other evidence tending to connect the defendant with the commission of the offense. The trial court instructed the jury on the requirements of Penal Code section 1111 with CALJIC No. 3.12. As pertinent here, that pattern instruction states: "In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated."

Defendant contends CALJIC No. 3.12 asks too much of jurors. He maintains the procedure the instruction calls jurors to perform violates due process principles "because it imposes an impossible task upon jurors to segregate accomplice testimony from non-accomplice testimony and jurors will be reluctant to

find a lack of corroboration once the accomplice testifies that the defendant is guilty."

Defendant's argument lacks merit. As recently as 2005, our Supreme Court has approved—if not explicitly, then at least tacitly—using CALJIC No. 3.12 to tell jurors how they should ensure the requirement for accomplice corroboration is met. (*People v. Davis* (2005) 36 Cal.4th 510, 544-545 ["As explained above, CALJIC No. 3.12 and Special Instruction B correctly explained to the jury that it had to disregard [the accomplice's] testimony, including his voice identifications, before attempting to find statements by defendant on the jailhouse tape linking defendant to the crimes. Thus, these instructions correctly told the jury how to find independent corroboration of [the accomplice] on the jailhouse tape"].) Our Supreme Court's decision in *People v. Davis* post-dates the inapposite high court cases from the 1960s that defendant relies on to attack CALJIC No. 3.12, *Jackson v. Denno* (1964) 378 U.S. 368 and *Bruton v. United States* (1968) 391 U.S. 123.[5]

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[5] As we explain in the immediately following paragraph, federal constitutional due process principles do not require corroboration of accomplice testimony in the manner that California law does. It necessarily follows that federal constitutional law does not dictate the manner in which California courts assure compliance with state law corroboration requirements. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 473.) In any event, *Jackson v. Denno* and *Bruton v. United States* are at bottom cases about the admissibility of "powerfully incriminating" confession evidence that the defense may have no effective means to rebut. (*Bruton v. United States*, *supra*, 391 U.S. at pp. 135-136; *Jackson v. Denno*, *supra*, 378 U.S. at p. 388.)

In addition, defendant's argument, which is grounded solely in the Fourteenth Amendment to the United States constitution, fails because "[t]he federal constitutional requirement that sufficient evidence support every element of an offense does not require corroboration of accomplice testimony as a matter of course." (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 473.) In other words, the United States constitution (as distinguished from California law) generally does *not* require corroboration of an accomplice's testimony; only where such testimony is incredible or insubstantial on its face are federal due process concerns potentially implicated. (*Laboa v. Calderon* (9th Cir. 2000) 224 F.3d 972, 979 [California's accomplice corroboration rule "is not required by the Constitution or federal law" unless the accomplice testimony is incredible or insubstantial on its face]; see also *Lisenba v. California* (1941) 314 U.S. 219, 226-227; *People v. Felton* (2004) 122 Cal.App.4th 260, 273 ["[T]he corroboration requirement itself is a matter of state law, not due process"].) Defendant has made no argument, nor is it in our judgment true, that Ruiz's testimony was incredible on its face.

There is no question in this case that Ruiz's testimony was admissible (*People v. Bowley* (1963) 59 Cal.2d 855, 858; *Laboa v. Calderon* (9th Cir. 2000) 224 F.3d 972, 979), and she was subject to cross-examination.

E. Any Error in Including Carjacking in the Instruction That Listed General Intent Crimes Was Harmless

The trial court gave the jury two instructions on the union of act and criminal intent; one listed crimes that required proof of specific intent and the other listed crimes that ostensibly required proof only of general intent. The trial court's instruction on the concurrence of act and general criminal intent, CALJIC No. 3.30, incorrectly listed carjacking as a general intent crime.[6] Two of the other instructions given by the court, however, correctly informed the jury it must make a specific intent finding to conclude defendant was guilty of carjacking. The most significant of these was CALJIC No. 9.46, the instruction that defined the elements of carjacking. It twice told the jury the prosecution must prove defendant had the intent to permanently or temporarily deprive the person in possession of the vehicle (i.e., Perez-Ortiz) of that possession.[7] The second of the two

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[6] The instruction, as given, stated: "In the crime[s] of carjacking and assault [and] [allegation[s]] charged in Count[s] Three and Four there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful." Carjacking was also correspondingly absent from the list of crimes in CALJIC No. 3.31, the instruction on the concurrence of act and specific intent.

[7] The instruction, as given and in relevant part, stated: "[Defendant is accused [in Count Four] of having committed the crime of carjacking, a violation of Section 215 of the Penal Code.] [¶] Every person who takes a motor vehicle in the possession of

instructions, CALJIC No. 9.40.2 (which advised the jury that an intent to take property formed only after the property was taken from the immediate presence of the victim is insufficient to convict) made reference to the crime of carjacking as requiring specific intent.

Defendant argues reversal is required in light of the "conflicting and inconsistent jury instructions on the intent element" of carjacking, which he believes to be an error "of federal constitutional dimension" that was not harmless beyond a reasonable doubt. We have doubts as to whether, considering the trial court's charge to the jury as a whole (*People v. Grimes* (2016) 1 Cal.5th 698, 729), defendant has shown error. Regardless, we are certain that any error did not contribute to the verdict obtained and does not warrant reversal. (*Chapman v. California*

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another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the vehicle of his or her possession, accomplished by means of force or fear, is guilty of the crime of carjacking in violation of Penal Code Section 215. [¶] . . . [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A person had possession of a motor vehicle; [¶] 2. The motor vehicle was taken from his or her person or immediate presence, or from the person or immediate presence of a passenger of such vehicle; [¶] 3. The motor vehicle was taken against the will of the person in possession; [¶] 4. The taking was accomplished by means of force or fear; and [¶] 5. The person taking the vehicle had the intent to either permanently or temporarily deprive the person in possession of the vehicle of that possession."

(1967) 386 U.S. 18, 24 (*Chapman*); accord, *Neder v. United States* (1999) 527 U.S. 1, 15 (*Neder*).)

When presented with the relevant instructions, one that listed carjacking as a general intent crime and another (not to mention CALJIC No. 9.40.2) that informed the jury of the specific intent that must be proven to find defendant guilty, we believe the jury would have concluded one of the instructions prevailed over the other. (*People v. Rogers* (2006) 39 Cal.4th 826, 874 [in case involving concurrence of act and specific intent instruction that conflicted with an instruction on implied malice second degree murder, it was reasonably likely the jury "would have concluded that one instruction prevailed over the other"].) And under the circumstances here, there is good reason to believe the jury followed the more specific of the instructions, namely, the CALJIC No. 9.46 instruction that was the sole instruction to identify the elements of carjacking and that required the jury to decide whether defendant intended to permanently or temporarily deprive Perez-Ortiz of the possession of his vehicle. (*People v. Hill* (1967) 67 Cal.2d 105, 118 ["[T]his court has previously stated that it is permissible to instruct the jury on general intent in such cases if that instruction is clearly qualified by a specific intent instruction which leaves no doubt in the jury's mind that specific intent is not to be automatically inferred from the doing of the physical acts involved in the crime"]; cf. *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878 ["[W]here two instructions are inconsistent, the more specific charge controls the general charge"]; but see *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165 [conflicting mental state instructions are error even if "the court's instructions on the offense itself correctly explain the required intent[ ] because we

have 'no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict'"].) If the jury adhered to the CALJIC 9.46 instruction defining the elements of carjacking in arriving at its verdict—the likely scenario in our view—the theoretical conflict between the correct CALJIC 9.46 and the incorrect CALJIC 3.30 never in fact materialized.

But if we assume the contrary, that a conflict in the instructions did in fact operate to remove the issue of intent from the jury's determination of the carjacking charge, defendant still is not entitled to reversal. Jury instructions that erroneously omit the mental state element of an offense will not result in reversal unless the omission contributed to the verdict obtained. (*Neder*, *supra*, 527 U.S. at p. 15; *People v. Gonzalez* (2012) 54 Cal.4th 643, 662-663.) In other words, we consider the record as a whole and decide whether we can confidently say the error was harmless beyond a reasonable doubt. (*Neder*, *supra*, at pp. 15-16; *People v. Lee* (1987) 43 Cal.3d 666, 674-675; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1128 ["If conflicting instructions on the mental state element of an alleged offense can act to remove that element from the jury's consideration, the instructions constitute a denial of federal due process and invoke the *Chapman* 'beyond a reasonable doubt' standard for assessing prejudice"].)

We can confidently say any error was harmless beyond a reasonable doubt in this case. There was overwhelming evidence defendant had the requisite intent, that is, the intent to permanently or temporarily deprive Perez-Ortiz of his vehicle when using force or fear to take the truck. Because Perez-Ortiz drove defendant and Ruiz to the scene of the crime, Perez-Ortiz's

truck was their only quick means of escape after the planned robbery. Ruiz testified that defendant told her he wanted to take the truck before defendant began punching and hitting Perez-Ortiz. Then, once defendant was behind the wheel of the truck and Perez-Ortiz was lying on the ground, defendant ran Perez-Ortiz over and drove off—a further application of force that ensured defendant would not be deterred in taking the truck. And once defendant arrived at the house of one of his friends, defendant bragged about taking the truck, showing he still had Perez-Ortiz's keys. In light of the strength of this evidence, no reasonable jury would have concluded defendant did not intend to temporarily, if not permanently, deprive Perez-Ortiz of the possession of his vehicle.[8]

F. The Absence of Instructions on Lesser Included Offenses of Murder Is Not Reversible Error

"[M]urder is a crime that can be committed in different ways. A conviction of murder in the first degree can be based on malice with premeditation and deliberation or on first degree felony murder. Even if second degree murder and manslaughter

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[8] In closing argument, the prosecution reviewed the elements of carjacking as set forth in CALJIC 9.46 and the defense did not argue defendant lacked the intent to temporarily or permanently deprive Perez-Ortiz of the possession of his truck. The defense did argue defendant and Ruiz did not plan to take the truck before defendant began attacking Perez-Ortiz, but that argument, even if accepted, does not undermine the strength of the evidence establishing defendant had the requisite specific intent.

are not lesser included offenses of first degree felony murder, they are lesser included offenses of a premeditated and deliberate murder with malice. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344-1345 [65 Cal.Rptr.2d 145, 939 P.2d 259]; *People v. Breverman* (1998) 19 Cal.4th 142, 153-154 [77 Cal.Rptr.2d 870, 960 P.2d 1094] (*Breverman*).) The accusatory pleading in our case alleged a malice murder [i.e., a killing committed with malice aforethought] . . . . While the accusation permits the prosecution to pursue a theory of first degree felony murder, it nonetheless gives rise to the trial court's sua sponte duty to instruct on lesser crimes of malice murder with premeditation and deliberation *when warranted by the evidence*." (*People v. Campbell* (2015) 233 Cal.App.4th 148, 161-162 (emphasis added); see also *People v. Smith* (2013) 57 Cal.4th 232, 242-243 [describing accusatory pleading test for lesser included offenses].)

Defendant contends the trial court should have instructed the jury on the lesser included offenses of implied malice second degree murder and voluntary manslaughter, with the latter offense encompassing both a heat of passion and an imperfect self-defense theory. (See generally *People v. Elmore* (2014) 59 Cal.4th 121, 133-134 [reviewing the elements of second degree murder (an unlawful killing with either express or implied malice but without additional elements that would support a conviction for first degree murder) and voluntary manslaughter (an unlawful killing, without malice, attributable to the heat of passion or unreasonable self-defense)]; see also *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 653 ["Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to human life, and the person knowingly acts with conscious disregard for the danger to

life that the act poses"].) A trial court must give a lesser included offense instruction "whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.]" (*Breverman*, *supra*, 19 Cal.4th at p. 162; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1008 ["even on request, a trial judge has no duty to instruct on any lesser offense *unless* there is substantial evidence to support such instruction"].) "This substantial evidence requirement is not satisfied by "'*any* evidence . . . no matter how weak,'" but rather by evidence from which a jury composed of reasonable persons could conclude 'that the lesser offense, but not the greater, was committed.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

As defendant recognizes, the upshot of these governing legal principles is that the trial court was obligated to instruct on second degree murder and voluntary manslaughter only if there was substantial evidence to support a finding defendant did *not* commit felony murder (in other words, if there was evidence that only the lesser and not the greater crime was committed). (*People v. Banks* (2014) 59 Cal.4th 1113, 1161 [error not to instruct on second degree murder as lesser included offense of felony murder because "evidence permitted the inference that [the] defendant shot [the victim] with malice in the course of an argument or fight, not necessarily in the course of a robbery], disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 386-387; *People v. Anderson* (2006) 141 Cal.App.4th 430, 446 [duty to instruct on second degree murder and voluntary manslaughter as lesser included offenses of felony murder only arises if there is substantial evidence to support a finding that the events of the crime did not constitute a felony murder].)

The only argument defendant offers to contend there was such substantial evidence in this case is the claim that he "did not have the required mental state of intending to commit robbery or carjacking at the time he drove the truck over Perez-Ortiz." At least as to the carjacking predicate for felony murder, to state defendant's argument is to refute it. Defendant unquestionably intended to commit a carjacking at the time of the killing: Perez-Ortiz's own truck, with defendant already behind the wheel in the midst of forcibly taking the vehicle, was the very instrument of death. Under the circumstances (some of which we have also recited *ante*), any claim that there was evidence that could allow a reasonable jury to find defendant killed Perez-Ortiz other than in the course of a carjacking is untenable.[9]

Moreover, even if we were to accept defendant's argument that there was sufficient evidence to clear the relatively low substantial evidence hurdle to warrant lesser included offense instructions, we would still find the absence of such instructions harmless. As *People v. Banks* explains, "an erroneous failure to instruct the jury on a lesser included offense is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 837 [299 P.2d 243], and . . . evidence sufficient to warrant an instruction on a lesser included offense does not necessarily

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[9] The answer to the question of whether there was evidence from which a reasonable jury could conclude defendant killed Perez-Ortiz other than in the commission of an attempted robbery (the other predicate felony for the felony murder theory) is not quite as obvious. But we need not analyze that question in light of our conclusion as to the carjacking predicate felony.

amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*People v. Banks*, *supra*, 59 Cal.4th at p. 1161.) That is the case here—a felony murder guilty verdict is the far more plausible result on the evidence presented even if the trial court had instructed the jury on second degree implied malice murder or voluntary manslaughter.

G. Cumulative Error

Defendant argues that a series of trial errors, even if independently harmless, may in some circumstances rise to the level of reversible error if considered cumulatively. At most, we have found one error that was harmless, the instruction that incorrectly listed carjacking as a general intent crime. Reversal on a cumulative error theory is therefore unwarranted. (*People v. Hines* (1997) 15 Cal.4th 997, 1075.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution