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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN FARLOW, Defendant and Appellant.	B233969 (Los Angeles County Super. Ct. No. BA291210)

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

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Sonya Roth, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Steven Farlow guilty in count 1 of first degree murder (Pen. Code, § 187, subd. (a))[1] and in count 2 of possession of a firearm by a felon (§ 12021, subd. (a)). The jury found true allegations that defendant personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)) and personally used a firearm (§12022.53, subd. (b)). Defendant admitted serving three prior prison terms as defined in section 667.5, subdivision (b).

On June 14, 2011, the trial court sentenced defendant to 25 years to life as to count 1, enhanced by a consecutive term of 25 years to life for personally discharging a firearm causing death, and three years for the prior prison terms. In count 2, he was sentenced to the upper term of three years, which was stayed pursuant to section 654.

Defendant argues his conviction for first degree murder must be reversed because there was insufficient evidence to support the jury's finding that the killing was deliberate and premeditated. He also argues the jury was erroneously instructed under the 1996 version of CALJIC No. 8.71 that all jurors were required to have a reasonable doubt with respect to whether the killing was deliberate and premeditated to return a verdict of second degree murder.

We affirm the judgment.

FACTS

Prosecution

At around 6:15 a.m. on September 29, 2005, defendant shot Ki Rhee ("Tony") in a converted garage behind a house located on Hoover Street in Los Angeles. The garage was a hangout and party room for methamphetamine users. Tony lived in the main house in a room he shared with Guong Lee for about three months prior to the shooting.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

Marlon Greuskin, also known as "Cowboy," testified that defendant was a drug dealer and he worked as an "enforcer" for defendant. Cowboy was in the garage at the time of the shooting. He had come to the house that morning to collect around $200 that Tony owed defendant for drugs. Tony told Cowboy he did not have the money, but Cowboy stayed at the house to get high and use the computer.

Susan Milleson, Michael Bell, and several other people were also present when Tony was killed. At around 6:00 a.m., Bell drove his motorcycle to a 7-Eleven close to the house. Defendant was also at the store. The men knew each other and had done drugs together at the Hoover Street house and other places. Defendant told Bell he was waiting for someone and he planned to go over to the Hoover Street house. Defendant mentioned to Bell that Tony owed him $170. Bell offered defendant a ride to the house. Defendant accepted, but as they started to pull out of the parking lot, a young Hispanic man pulled up in a car and wanted to talk to defendant. Defendant spoke to the man and then got back on the motorcycle. The Hispanic man followed Bell and defendant back to the house. Bell parked his motorcycle on the sidewalk in front of the Hoover Street house and walked straight back to the garage to drop off the drinks and ice he bought at the 7-Eleven.

Defendant went into the room of the main house where Tony and Lee stayed. He was carrying a gun in his hand. Lee was in the room, and defendant asked him where Tony was. Defendant told Lee it was "serious." Lee told him that Tony was in the garage. Defendant left the room and headed toward the garage.

Bell had dropped off the drinks and ice and was on his way back out of the garage to smoke a cigarette when defendant passed him. Bell testified that defendant went through the open door of the garage. Bell had his back to defendant when he heard defendant say, "Where's my money?" in a loud voice. Bell turned around and saw defendant standing about four to five feet inside the doorway holding Tony by the neck with his left hand and holding a large revolver under Tony's chin with his right hand. Defendant was pushing into Tony, and Tony was raising his arms and trying to push away from him. Bell heard the gun go off. He saw a young Hispanic man standing

outside the door of the garage almost like an observer. He did not know the man and had not seen him before. Bell saw defendant leave in a car with the young Hispanic man and a few other people.

Cowboy was inside the garage when defendant entered. He testified that the garage door was closed and defendant kicked it in. Defendant had a cocked .44-caliber revolver in his hand and was yelling, "Where's my fucking money?" Tony turned around and Cowboy saw defendant point the gun about a foot away from the back of his head. There was a loud bang and smoke, and Tony fell to the ground. Cowboy got into his car to leave, and his girlfriend, defendant, and a young Hispanic man also got into the car. Cowboy drove a few blocks but then realized he could be an accessory to murder. He told defendant to take the car, and he got out.

Milleson said that she heard an argument and then a loud pop or bang. She left the room without waiting to find out what happened.

Lee, who was not in the garage, also heard the gunshot and saw defendant walking from the garage to the front door of the house. The Hispanic male Lee had seen earlier was following defendant. Defendant got into a car and left.

Lee and Milleson went to the 7-Eleven at about 6:30 a.m. and called 911. Police officers responded to the scene in about 10 minutes. The police found Tony dead with a gunshot wound to the head. Lee, Milleson, Cowboy, and Bell all identified defendant as the person who shot Tony from a six-pack photo identification.

Deputy Medical Examiner Paul Glienicki of the Los Angeles Coroner's Department autopsied Tony's body. He determined that Tony had been killed by a gunshot wound to the head. Tony was shot in the back of the head at an upward angle of about 45 degrees. The wound was a "loose contact wound," which indicated to Glienicki that Tony had been shot at close range, but that the gun had not been held tight against Tony's head. Tony's neck had abrasions on it that had been inflicted at or near the time of his death.

The police recovered a bullet consistent with a .44-caliber Magnum from the wall of the garage.

Defense

Defendant testified that he was a drug dealer. On September 29, 2005, at 6:00 a.m. he was at a 7-Eleven near the house on Hoover Street waiting for some friends who were going to buy $4,000 of methamphetamine from him. Bell arrived at the 7-Eleven while defendant was waiting for his friends. Bell said that he had just been at the Hoover Street house and that Cowboy and Tony were there. Defendant decided to go to the house and talk to Tony, so he got a ride with Bell. Defendant and Bell met up with defendant's friends as they were leaving the 7-Eleven. Defendant got into his friends' car and sold the methamphetamine. Defendant got a ride with his friends, who dropped him off at the house on Hoover Street. As he was walking into the house, he saw Cowboy and his girlfriend going to the front of the house. He said a few words to Cowboy, but kept walking.

Defendant and Tony had been friends for 10 years. They were both using methamphetamine around the time Tony was shot, but Tony had never bought drugs from defendant. At the time of the shooting, Tony did not owe defendant money. Tony previously owed defendant about $300, but someone else had repaid defendant three days earlier. Defendant testified that Cowboy had never worked for him and that he had never asked Cowboy to collect money for him.

Defendant went through the side door and into the garage when he arrived at the Hoover Street house. He saw Bell leaving the garage as he walked up. Defendant walked through the open door and saw Tony. Defendant did not kick the door in. Defendant said a few words to Tony when he entered. He was concerned about Tony and had tried to get him to change before, but Tony would not listen to him. He was "agitated" and asked Tony why he kept "fucking up." Tony did not respond to him. He did not ask Tony "Where's the money?" or say anything like "Give me the money." Defendant always carried a loaded gun with him because of his work dealing drugs. He pulled the gun out of his waistband to scare Tony and it just went off. Tony spun around

and then fell to the ground. Defendant panicked when he realized he had shot Tony and ran from the garage.

The events in the garage happened very quickly. Defendant did not know whether the gun was cocked or not, but he knew it was loaded. He did not know how to use the gun and had not done any target practice. He kept the gun for protection. Tony was not a big person, but he did not scare easily, so defendant felt he needed the gun to scare him. Defendant was standing a few feet away from Tony when the gun went off. He did not put the gun to Tony's neck, push him, or turn him around. Defendant thought that Tony had turned around because he was trying to get away.

Defendant left in a car with Cowboy, his girlfriend, and a young Hispanic man. Cowboy and his girlfriend got out of the car at some point, and the young Hispanic man got out later. Defendant went back to his house.

DISCUSSION

Whether There was Sufficient Evidence to Support the Jury's Finding That the Killing was Deliberate and Premeditated

Defendant argues his conviction for first degree murder must be reversed because there was insufficient evidence to support the jury's finding the killing was deliberate and premeditated. Defendant asserts there was not substantial evidence that he planned to kill Tony, had a motive to kill Tony, or acted according to a preconceived design. Defendant further contends the prosecutor's closing arguments misstated the definitions of deliberation and premeditation, likely contributing to the conviction for first degree murder on insufficient evidence. We reject defendant's argument.

The Fifth and Sixth Amendments, which apply to the states through the Fourteenth Amendment, require the prosecution to prove all elements of a crime beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278.) A conviction supported by insufficient evidence violates the Due Process Clause of the Fourteenth Amendment and

must be reversed. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-319.) "'In reviewing the sufficiency of evidence . . . the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citations.] . . . 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must . . . presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).)

We review the record in the light most favorable to the prosecution to determine whether the challenged conviction is supported by substantial evidence, meaning "evidence which is reasonable, credible, and of solid value . . . ." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) "[M]ere speculation cannot support a conviction. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) Nor does a finding that "the circumstances also might reasonably be reconciled with a contrary finding . . . warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) The reviewing court does not reweigh the evidence, evaluate the credibility of witnesses, or decide factual conflicts, as these are the province of the trier of fact. (*People v. Culver* (1973) 10 Cal.3d 542, 548; *In re Frederick G.* (1979) 96 Cal.App.3d 353, 367.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*Young, supra,* 34 Cal.4th at p. 1181.)

The jury convicted defendant pursuant to section 189, which defines first degree murder, in relevant part, as: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, *or by any other kind of willful, deliberate, and premeditated killing . . . .*" (Emphasis added.) There is a presumption that an unjustified killing is murder in the second degree. (*People v.*

Anderson (1968) 70 Cal.2d 15, 25 (*Anderson*).) Where there is not substantial evidence to support a conviction for first degree murder, we must reduce the conviction to murder in the second degree. (*Id*. at p. 23.)

To sustain a conviction under section 189, there must be evidence of deliberation, defined as "'careful weighing of considerations in forming a course of action[, and the act must have been premeditated or] thought over in advance. [Citations.]' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 812 (*Solomon*).) Deliberation and premeditation may occur within a very short time period, however. (*Ibid*.) "The test is not time, but reflection." (*People v. Bloyd* (1987) 43 Cal.3d 333, 348.)

In *Anderson*, the California Supreme Court articulated a framework for courts to utilize when assessing whether evidence is sufficient to support a conviction for first degree murder. The *Anderson* court surveyed precedent distinguishing first and second degree murder and concluded that "[t]he type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing -- what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation.]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson*, *supra*, 70 Cal.2d at pp. 26-27.) The *Anderson* court noted that although the cases in which the court determined the evidence was sufficient to establish that the murder was deliberate and premeditated generally contained all three types of

evidence, a conviction could be sustained where not all three types are present. (*Id*. at p. 27.) The *Anderson* court stated that where there is extremely strong evidence of planning activity, or evidence of motive in conjunction with either planning activity or preconceived design, a conviction may be sustained. (*Ibid*.)

Subsequently, the Supreme Court has repeatedly clarified that "'*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' [Citations.]" (*Solomon*, *supra*¸ 49 Cal.4th at p. 812.) *Anderson* emphasized that the court's ultimate duty is to assess "'whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citations.]" (*Ibid*.)

Here, defendant argues the evidence against him was insufficient because the record contains contradictory evidence in his favor. We agree with the Attorney General that this type of argument misapprehends the role of this court. Our task is not to re-weigh the evidence but rather to determine whether there is substantial evidence to support the verdict irrespective of any contrary evidence. Viewing the evidence in the light most favorable to the prosecution, we hold that there is sufficient evidence to sustain defendant's conviction for first degree murder. Although we are not bound to the factors articulated in *Anderson*, even if we were restricted to that framework, the evidence in the record is sufficient to support the jury's finding that the killing was deliberate and premeditated because there is substantial evidence that defendant planned to kill Tony coupled with evidence that he had a motive for doing so. (*See Anderson, supra,* 70 Cal.2d at p. 27 [substantial evidence of planning activity and motive is sufficient to sustain a conviction for first degree murder].)

The record contains substantial evidence that defendant planned to kill Tony. When defendant and Bell reached the house on Hoover Street, defendant told Bell not to make any noise so that no one would know he was coming. This supports the inference that defendant planned to kill Tony prior to entering the house and wished to avoid alerting Tony or any of the other people at the house of his plan. Upon entering the

house, defendant immediately went to the room that Tony shared with Lee, carrying a loaded gun in his hand. He asked Lee where Tony was and went to the garage when Lee responded that Tony was there. Once at the garage, defendant acted in a decisive manner, kicking the door open and yelling, "Where's my fucking money?" He then grabbed Tony's neck and shot him in the head from approximately a foot away. It is reasonable to infer from defendant's actions that he entered the house with the intention of finding Tony and killing him with the gun. Defendant did not engage in any dialogue with Tony that would have precipitated the killing. Defendant broke through the door and killed Tony before Tony was able to answer him. Moreover, the fact that Tony did not say anything to defendant when he entered the garage or provoke him in any way lends further support to the jury's finding that the killing was deliberate and premeditated. (See *People v. Lunafelix* (1985) 168 Cal.App.3d 97, 102 ["The utter lack of provocation by the victim is a strong factor supporting the conclusion that appellant's attack was deliberately and reflectively conceived in advance."].)

Second, there is substantial evidence in the record that defendant had a motive to kill Tony. Tony owed defendant $170. It can be inferred from the evidence that the debt was significant to defendant because he sent Cowboy to collect it. Defendant also mentioned the debt when he ran into Bell at the 7-Eleven, shortly before he shot Tony, from which it can be inferred that the debt was of concern to him. Finally, defendant yelled, "Where's my fucking money?" just before he shot Tony. It is reasonable to conclude that defendant shot Tony because Tony had not repaid him.

Defendant argues that the prosecutor's statements contributed to the jury's misunderstanding of the terms "deliberate" and "premeditated." At trial, the prosecutor likened the deliberation and premeditation required for first degree murder to a motorist's decision whether to cross an intersection upon approaching a yellow light. Regardless of whether the prosecutor's analogy was correct, defendant's argument is unavailing. As we discussed above, substantial evidence supports the verdict. Moreover, the jury was properly instructed as to the meanings of "deliberated" and "premeditated" under CALJIC No. 8.20. The jury was additionally admonished under CALJIC No. 1.00 that,

to the extent counsel's statements of the law conflicted with the instructions, the instructions were controlling. It is presumed that the jury understands and follows the trial court's instructions, and thus would have looked to the instructions to define "deliberated" and "premeditated." (See *People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502.) We have no reason to believe that the jury disregarded the instructions and instead utilized the prosecutor's explanation of these terms.

The substantial evidence of planning and motive contained in the record supports the inference that the killing was a result of reflection and not simply a rash impulse. Accordingly, we hold that the evidence was sufficient to sustain defendant's conviction for first degree murder.

Whether the Trial Court's Instructions to the Jury Prejudiced Defendant

The jury was instructed under former CALJIC No. 8.71 (6th ed. 1996), which states: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you *unanimously agree* that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree." (Emphasis added.)

Defendant argues his constitutional due process and jury trial rights were violated because the jury was erroneously instructed under CALJIC No. 8.71, that *all* jurors were required to have a reasonable doubt with respect to whether the killing was deliberate and premeditated to return a verdict of second degree murder. Defendant contends the instruction improperly conditioned any single juror's decision in favor of second degree murder on the unanimous agreement of all jurors that a doubt existed as to the degree of murder, effectively making first degree murder the verdict by default if doubt was not unanimous. Defendant argues that the trial court's failure to instruct under CALJIC No. 17.11—which admonishes jurors that if they have reasonable doubt as to the degree of the offense, they must find defendant guilty of the lesser degree—compounded the

problem and was itself error. Defendant contends that giving CALJIC No. 8.71 was error per se and requires reversal, or alternately that it was prejudicial error under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). We disagree.

"A trial court must instruct the jury, even without a request, on all general principles of law that are '"closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.] . . .' [Citation.]" (*People v. Burney* (2009) 47 Cal.4th 203, 246.) "'An instruction should contain a principle of law applicable to the case, expressed in plain language, indicating no opinion of the court as to any fact in issue.' [Citations.]" (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.)

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . .' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

Preliminarily, we reject the prosecution's contention that defendant forfeited his claim by failing to object to the instruction at trial, because if the instruction had been given in error, defendant's substantial rights would have been implicated. (§ 1259; *People v. Franco* (2009) 180 Cal.App.4th 713, 719 [The failure to object to an instruction in the trial court waives any claim of error unless "the instruction was an incorrect statement of the law [citation], or . . . the instructional error affected the defendant's substantial rights."].) Nonetheless, defendant's argument fails because the trial court did not err in instructing the jury pursuant to CALJIC No. 8.71, and even if the instruction had been given in error, such error would have been harmless.

In support of his argument that instructing the jury under CALJIC No. 8.71 was error, defendant relies on *People v. Moore* (2011) 51 Cal.4th 386, 411 (*Moore*), in which the California Supreme Court examined the 1996 revisions of CALJIC Nos. 8.71 and 8.72 and concluded that "the better practice is not to use the 1996 revised versions . . . as the instructions carry at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder, and between murder and manslaughter." Defendant emphasizes that as a result of the decision in *Moore*, CALJIC No. 8.71 was revised to eliminate the potentially confusing language with respect to juror unanimity.

In *Moore*, the court examined two prior Court of Appeal cases, *People v. Pescador* (2004) 119 Cal.App.4th 252 (*Pescador*) and *People v. Gunder* (2007) 151 Cal.App.4th 412 (*Gunder*), in which the defendants argued the same point unsuccessfully. (*Moore*, *supra*, 51 Cal.4th at pp. 410-411.) In both cases, the Court of Appeal held that there was no instructional error, because CALJIC No. 8.71 had been given in conjunction with other instructions that made it unlikely jurors would believe they had to vote for first degree murder if any other juror found first degree murder had been proven. (*Gunder*, *supra*, at pp. 424-425; *Pescador*, *supra*, at pp. 255-258.)

In *Pescador*, the trial court had given CALJIC Nos. 17.11 and 17.40 in addition to CALJIC No. 8.71. (*Pescador*, *supra*, 119 Cal.App.4th at p. 257.) CALJIC No. 17.11 states: "If you find the defendant guilty of the crime of [murder], but have a reasonable doubt as to whether it is of the first or second degree, you must find [him] [her] guilty of that crime in the second degree." CALJIC No. 17.40 provides: "The People and the defendant are entitled to the individual opinion of each juror. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision. [¶] Do not decide any issue in this case by the flip of a coin, or by any other chance determination." The trial court

also instructed the jury to "'[c]onsider the instructions as a whole and each in light of all the others.'" (*Pescador, supra,* at p. 257.) Viewing CALJIC No. 8.71 in light of the court's entire charge, *Pescador* held that it was not reasonably likely that the jurors misinterpreted CALJIC No. 8.71 as requiring them to unanimously find that they had a reasonable doubt as to the degree of the murder to convict the defendant of murder in the second degree.[2] (*Ibid*.)

In *Gunder*, the jury was also instructed under CALJIC No. 17.40, but it was not instructed under CALJIC No. 17.11. (*Gunder, supra,* 151 Cal.App.4th at p. 425.) *Gunder* rejected the defendant's argument that it was error to give CALJIC No. 8.71 in the absence of CALJIC No. 17.11. (*Ibid*.) *Gunder* reasoned that, "[w]hat *is* crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in *decisionmaking.* Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for *returning verdicts,* as indeed elsewhere the jurors are told they cannot *return* any verdict absent unanimity and cannot *return* the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder. Thus, nothing in the instruction is likely to prevent a minority of jurors from voting against first degree murder and in favor of second degree murder." (*Ibid*.)

As in *Gunder*, the trial court in *Moore* instructed the jury pursuant to CALJIC No. 17.40, but not CALJIC No. 17.11, as had the trial court in *Pescador*. (*Moore, supra,* 51 Cal.4th at p. 411.) Although the *Moore* court concluded the "better practice" was to avoid the use of CALJIC No. 8.71, it did not hold the instruction was given in error and declined to decide whether *Gunder* was correct that giving CALJIC No. 17.40 in conjunction with CALJIC No. 8.71 removed the danger of jurors being confused by the unanimity language in CALJIC No. 8.71. (*Moore, supra,* at pp. 411-412.) Instead,

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[2] *Pescador* also noted that the Supreme Court had previously upheld the validity of CALJIC No. 8.71. (*Pescador, supra,* 119 Cal.App.4th at p. 257.)

Moore held that any error was harmless beyond a reasonable doubt because, having found that the defendant had killed the victim while committing robbery and burglary, the jury was precluded from finding the defendant guilty of either the lesser offenses of second degree murder or manslaughter. (*Id.* at p. 412.) With respect to the language of CALJIC No. 8.71, the *Moore* court opined that "[t]he references to unanimity . . . were presumably added to convey the principle that the jury as a whole may not return a verdict for a lesser included offense unless it first reaches an acquittal on the charged greater offense. [Citation.] But inserting this language . . . was unnecessary, as CALJIC No. 8.75 fully explains that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury as a whole may return verdicts on the lesser." (*Id.* at p. 411-412.)

Defendant asserts that *Pescador* and *Gunder* were wrongly decided but provides no authority in support of his position. We are inclined to agree with the *Gunder* court that the crucial factor in determining whether the jury is likely to be confused by CALJIC No. 8.71 is whether the jury has been properly instructed as to the jurors' duty to *make decisions* individually. The trial court's instruction under CALJIC No. 17.40 accomplished this task. The unanimity language of CALJIC No. 8.71 is framed in terms of *returning verdicts*, not individual juror *decision making*. Moreover, the jury was instructed to read the instructions as a whole and generally instructed as to reasonable doubt (CALJIC No. 2.90). The omission of CALJIC No. 17.11 from the instructions does not change the analysis, because, as *Gunder* stated, "[CALJIC No. 17.11] does not refute [the proposition that there must be unanimous doubt as to the degree of murder] any more directly than the instruction on the duty to deliberate individually [contained in CALJIC No. 17.40]."[3] (*Gunder, supra*, 151 Cal.App.4th at p. 425.) Taking the whole of

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[3] Defendant argues that the trial court erred in not instructing the jury under CALJIC No. 17.11, because under the holding in *People v. Dewberry* (1959) 51 Cal.2d 548, 555, jurors must be instructed that "if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." Defendant's argument fails because CALJIC No. 8.71 informs the jury that it

the instructions to the jury together, we conclude it is not reasonably likely that the jurors misinterpreted CALJIC No. 8.71 as requiring them to unanimously find that they had a reasonable doubt as to the degree of the murder to convict defendant of murder in the second degree.

Even if the trial court had given CALJIC No. 8.71 in error, however, any such error was harmless. First, defendant's argument that giving CALJIC No. 8.71 constituted error per se is without merit. Structural error requiring reversal exists only when there is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Improper instructions presented to the jury on a single element of an offense are reviewed for harmless error, where the error does not vitiate all of the jurors' findings and the effect of the error is quantifiable. (See *People v. Avila* (1995) 35 Cal.App.4th 642, 660 (*Avila*).) Here, the jury unanimously agreed that defendant committed the act of murder. The instruction at issue concerned only whether the act was deliberate and premeditated—an effect that is capable of evaluation. We therefore evaluate any error for prejudice under *Chapman*, *supra*, 386 U.S. at page 24, to determine whether it is reasonably possible that any instructional error might have contributed to the verdict.

In this case, it is not reasonably possible that any confusion caused by CALJIC No. 8.71 contributed to defendant's conviction. Evaluating the "'entire record . . .' [and] 'weigh[ing] the probative force of that evidence as against the probative force of the [erroneous instruction] standing alone . . .'" we hold that "the evidence and proof of guilt [with respect to deliberation and premeditation] is overwhelming . . . ." (*Avila, supra,* 35 Cal.App.4th at pp. 662-663.) The only evidence supporting a conviction of second degree murder is defendant's own testimony. Lee, Bell, and Cowboy all testified that defendant wanted to collect a debt from Tony. Cowboy testified that defendant had previously sent him to collect the money, and Bell testified that defendant mentioned the

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must find the defendant guilty of second degree murder if it has a reasonable doubt as to whether the defendant is guilty of first degree murder, and CALJIC No. 17.40 makes clear that each juror must decide the question for himself.

debt to him when they ran into each other at the 7-Eleven shortly before defendant killed Tony. Defendant told Bell to be quiet because he wanted to surprise the people at the house. He entered the house with a loaded gun in his hand and went directly to Tony's bedroom. When he did not find Tony there, he asked Lee where Tony was, and immediately went to the garage when Lee said that he could find Tony there. Defendant kept his loaded gun drawn, kicked in the door, and grabbed and shot Tony from about a foot away. As he burst into the room, defendant yelled, "Where's my fucking money?" Tony did not provoke the attack or speak to defendant before he was killed. In light of the overwhelming evidence that defendant murdered Tony with deliberation and premeditation, any error in instructing pursuant to former CALJIC No. 8.71 was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.