Filed 1/20/17 P. v. Gonzalez CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ARTURO GONZALEZ, Defendant and Appellant.	B271270 (Los Angeles County Super. Ct. No. PA081411)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed.

Sharon M. Jones, 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, John Yang, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Arturo Gonzalez (defendant) was convicted of first degree murder (Pen. Code, § 187, subd. (a)[1]) in connection with the gang-related prison killing of victim James Moreno. On appeal, defendant contends that there was insufficient evidence of premeditation and deliberation to support his conviction for first degree murder. Defendant further contends the trial court erred by providing incomplete and/or misleading jury instructions and responses to questions from the jury during deliberations. We reject defendant's claims and affirm the judgment.

BACKGROUND

I. The Murder and the People's Evidence

At all relevant times, victim Moreno was in custody at the North County Correctional Facility (NCCF). Certain inmates at NCCF were subject to an internal inmate power structure overseen by the Mexican Mafia. At NCCF, inmates calling themselves the Southsiders would "run a program" on behalf of the Mexican Mafia. The "program" refers to specific rules and conduct imposed on inmates subject to this internal power structure, including having to pay "taxes" to the gang based on a percentage of inmate purchases from the jail canteen and inmate sales of narcotics within the prison, as well having to make one's bed and engage in exercise routines. If an inmate subject to the Southsiders' program broke the rules, he would be disciplined—also known as "regulated"—by, inter alia, being forced to exercise

---

[1] All statutory citations are to the Penal Code.

more or being attacked by Southsiders. Defendant was an NCCF inmate answering to the Mexican Mafia and subject to the Southsiders' program.

About one month prior to victim Moreno's death, in July 2012, Moreno's aunt Rosa received a letter from Moreno asking for $200 so that Moreno could make a payment to avoid being beaten in prison. The aunt and Moreno's mother went to the jail and paid the requested amount. About one week later, the aunt received another letter from victim Moreno stating "they were going to kill him" before July 19, 2012, if she did not send $200.[2]

During August 2012, in the days leading up to victim Moreno's death, NCCF inmate Antonio Ramirez, a Southsider who lived in the prison dorm next to victim Moreno, saw that victim Moreno had confrontations and exchanges with other NCCF inmates. Those inmates were attempting to discipline Moreno for not tidying his bed or failing to perform exercises required by the Southsider program. Inmate Ramirez also saw that defendant had verbal conflicts with Moreno. Additionally, inmate Ramirez saw that Moreno had spoken to sheriff deputies from inside his cell and, as a result of those conversations, sheriff deputies installed a camera in Moreno's dorm. At trial, Ramirez confirmed that failure to follow the "program" would result in "regulation" or discipline, which might include being attacked. Some attacks would last 13 seconds, but an attack for being a "snitch" who spoke to law enforcement might continue until authorities arrived on scene.

On August 27, 2012, while victim Moreno was sitting in the exercise yard next to another inmate, defendant and two other

---

[2] The record does not disclose whether the requested $200 was paid.

inmates approached Moreno and began to punch him in the head and neck. Moreno eventually fell to the ground, hit his head hard on the concrete, and his eyes rolled back in his head. The punching continued for about 30 seconds after victim Moreno's head hit the ground.

Inmate Marco Coronel, a former member of the Long Beach Longo gang, later described the beating as looking like someone "probably fucked someone up," and believed it had been a situation involving a regulation "gone bad." Inmate Coronel further testified that typical attacks would last between 13 and 39 seconds depending on the seriousness of the violation, and the attackers would let the victim get up if he went to the ground. He said punishment for "snitches," however, was that "[t]hey [would] try to kill them." Inmate Robert Morris also saw the deadly beating of victim Moreno and confirmed at trial that "they said he was a snitch." When asked "what happens to jailhouse snitches?" at trial, Morris testified that "they get killed."

Immediately following the beating, Los Angeles County Deputy Sheriff John Gaudino saw victim Moreno's body lying unresponsive on the ground of the prison exercise yard. Several deputies tried unsuccessfully to wake victim Moreno and began administering cardiopulmonary resuscitation. The paramedics arrived a short time later. Victim Moreno ultimately died as a result of blunt head trauma. An autopsy revealed contusions to both sides of his face, tears inside his mouth, trauma to his outer neck, bleeding inside his neck, and intracranial hemorrhaging consistent with either a fall or being struck in the head.

A few days after victim Moreno's death, Los Angeles County Deputy Sheriff Eddie Carter spoke to NCCF inmate Terrell Thomas, who appeared distraught and volunteered that it

"was fucked up what they did." Inmate Thomas further explained that, before he was killed, victim Moreno told Thomas that he was trying to leave the gang and change his life due to the birth of his baby. Inmate Thomas also told Deputy Carter that the Southsiders were executing a "regulation" by surrounding victim Moreno and punching, kicking, and "stomping" on him. According to inmate Thomas, a Hispanic male inmate with a tattoo on his back delivered the "final blow" by punching victim Moreno in the neck, causing Moreno to fall backward and hit his head on the ground.

In a subsequent interview with Sheriff's Detective Shaun McCarthy, inmate Thomas provided information that identified defendant as the attacker who knocked victim Moreno down.[3] Inmate Thomas also told Detective McCarthy that after victim Moreno fell to the ground, defendant and another inmate kicked Moreno in the head like a ball and kicked him in the neck.

Detective McCarthy also interviewed defendant. Although defendant said he was not involved in the beating and murder of victim Moreno and was "sticking to that story," defendant admitted that both he and the victim were Southsiders. With respect to regulating Southsiders, defendant stated that, when someone goes down to the ground, it is a "rule" that the beating should not continue and that no kicking to the head or anything like that should occur. Defendant, however, acknowledged that an exception to this rule is for snitches, because "[Southsiders] don't tolerate that."

---

[3] Various other NCCF inmate witnesses provided information confirming that defendant was the assailant, including inmate Ramirez, inmate Morris, inmate Dajion Vaughns and inmate Jorge Perez.

While investigating the murder of victim Moreno, Los Angeles County Deputy Sheriff Sterling Haley surreptitiously recorded a conversation between defendant and an undercover informant regarding the beating. In that recorded conversation, defendant admitted "this was a discipline crew, straight up . . . . I fucked him up . . . . It didn't last that long . . . . He hit the ground . . . . One last time, I got on top of him and I said, 'what the fuck you doing motherfucker? Yeah, I'm on top of him for five minutes . . . ."

At trial, Deputy Haley introduced the audio recording of defendant and testified as a prison gang expert. Haley opined that, in Southern California, all but two of the Hispanic gangs have pledged loyalty to the Mexican Mafia. When members of these gangs enter prison, they disavow any prior conflicts with one other and join forces as one single dominant gang known as the Southsiders. Deputy Haley further explained that the Mexican Mafia imposed rules in the prison, such as paying taxes calculated as a percentage of an inmate's prison spending. To enforce such rules, the Mexican Mafia would order assaults on those who did not comply. Moreover, if a gang member inmate cooperated with law enforcement, he would be considered a snitch and retaliated against by the gang. That retaliation could include assault or murder.

With respect to defendant, Deputy Haley testified that defendant was a member of the La Mirada Locos street gang, which had pledged allegiance to the Southsiders. Deputy Haley additionally expressed his expert opinion, based upon his review of photographs of defendant's tattoos and various reports of jail incidents involving defendant, that defendant was a member of the Southsiders when victim Moreno was killed. When the

prosecutor posed a hypothetical incorporating the facts of this case, Deputy Haley testified that defendant committed the murder of victim Moreno for the benefit of, at the direction of, and in association with the Southsider gang.

II. Relevant Proceedings in the Trial Court

The District Attorney of Los Angeles County filed an information charging defendant with one count of murder, in violation of section 187, subdivision (a). The information also alleged that the murder was committed at the direction of, for the benefit of, or in association with a street gang as defined by section 186.22, subdivision (b)(1)(C), and that defendant suffered four prior prison terms as defined by section 667.5, subdivision (b).

Defendant proceeded to trial. After the close of the presentation of evidence, the trial court instructed the jury on the elements of first and second degree murder, using almost verbatim model instruction CALCRIM No. 520 (First or Second Degree Murder with Malice Aforethought)[4] and CALCRIM No.

---

[4] The trial court gave the following instruction based on CALCRIM No. 520: "[T]he defendant is charged with murder in Count 1. [¶] To prove that the defendant is guilty of this crime, the People must prove that: one, the defendant committed an act that caused the death of another person; and two, when the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: one, he intentionally committed an act; two, the natural and probable consequences of the act were dangerous to human life; three, at

521 (First Degree Murder).[5] In so doing, however, the trial court omitted the following language from CALCRIM No. 520: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a

---

the time he acted, he knew his act was dangerous to human life; and four, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time."

[5] The trial court gave the following instruction based on CALCRIM No. 521: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree."

reasonable doubt that it is murder of the first degree as defined in CALCRIM No. [521]."

During deliberations, the jury asked the trial court in a note for a read back of certain testimony. In a second, accompanying note, the jury stated: "1. We are asking for further clarification on [CALCRIM No.] 520. 'The natural and probable consequences of the act were dangerous to human life;' along with an example. [¶] 2. We can't seem to be moving forward deciding between first and second degree."

After the court reporter conducted the requested read back of testimony, the trial court then sent a note to the jury, with the agreement of the parties, asking whether the jury had further questions about CALCRIM No. 520. The jury responded with the following note: "We respectfully ask the court to provide us further clarification regarding [CALCRIM] number 520, along with an example."

With agreement from both parties, the trial court sent another note to the jury, asking: "Does this mean that the jury has already made a decision whether or not the defendant is guilty of murder and the only remaining issue is the degree of the murder? Please advise?" The jury responded in a note, stating: "We all agree at this point that the defendant is guilty of murder. However, whether it is first or second remains to be agreed upon."

With agreement from both parties, the trial court sent another note to the jury asking for the numerical split between first and second degree murder, without stating in what direction the jury is "leaning." The jury informed the trial court that they were numerically split 10 to 2.

After further discussion with the parties and without objection from either party, the trial court sent the jury another note stating, inter alia: "Instruction 520 defines murder and its various degrees. Instruction 521 defines what is required to prove 1st degree murder. [¶] The natural and probable consequence theory of murder is a theory of criminal liability for murder. Instruction 403 defines the natural and probable consequence theory of murder.[6] To prove a defendant is guilty of murder under this theory, the People must prove that the defendant committed an act, and that the natural and probable consequence of the act that he intended to commit, is murder. Furthermore, a natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. Refer to instruction 403 for a full detailed explanation of murder under this theory. [¶] The court cannot provide examples of murder under the natural and probable consequence theory. [¶] If the jury requires further assistance in deciding the degree of the crime, please inform the court."

Thereafter, the jury sent another note to the trial court, asking: "1. Can the court explain the notion of 'intent' under the implied malice theory? [¶] 2. Does 'conscious disregard for human life' mean that the perpetrator assumes the consequences of his actions, no matter the result?"

Again, after discussing the matter with the parties and receiving no objections, the trial court sent the following note to

---

[6] When initially instructing the jury, the trial court had provided an instruction pursuant to CALCRIM No. 403 (Natural and Probable Consequences), explaining a defendant's liability for an offense that is the natural and probable consequence of committing some other offense.

the jury: "The court is in receipt of your question . . . . See instruction 520, which defines implied malice. That instruction, states in pertinent part: [¶] 'The defendant acted with *implied malice* if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life.' [¶] The phrase 'conscious disregard' as used in the jury instructions, is to be defined using the language from instruction 200, which states, in pertinent part: [¶] 'Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

Subsequently, the jury provided the trial court with another note, stating, "The jury would like to report that we are in unanimous agreement with guilt for murder with special gang circumstances. However we are currently deadlocked about the degree of murder. (10-2.) The jury would like to know how to proceed."

Thereafter, during a discussion with jurors on the record, the jury revealed it was split 10 to 2 in favor of first degree murder. In the foreman's opinion, the jury was not "hopelessly deadlocked," but one juror disagreed with that assessment. In light of those representations, the trial court gave the jury additional time to deliberate, explaining: "So 11 of you think that perhaps the jury could use a little more time to further discuss

and deliberate, so I'm going to go ahead and have you do that. [¶] Let us know in a little while if there's anything we can do for you." After further deliberation, the jury reported that it was able to reach a verdict.

The jury found defendant guilty of first degree murder and found the gang allegation true. The trial court ultimately sentenced defendant to state prison for a term of 26 years. This appeal followed.

DISCUSSION

I. Sufficiency of the Evidence

Defendant contends his conviction for first degree murder cannot stand because there was insufficient evidence to support any finding that defendant's murder of victim Moreno was premeditated and deliberate. We disagree.

A. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine '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.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the

evidence.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. Applicable Law

A willful, deliberate, and premeditated killing "is murder of the first degree. All other kinds of murders are of the second degree." (§ 189.) "'[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) In assessing the sufficiency of the evidence as to the element of premeditation and deliberation, "'[t]he true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.' [Citations.]" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated and remanded on other grounds in *California v. Velasquez* (1980) 448 U.S. 903, and overruled as stated in *People v. Jones* (2013) 57 Cal.4th 899, 914-915; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 370-371.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court explained: "The 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]; [and] (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)." (*Id*. at pp. 26-27.)

The *Anderson* factors do not establish strict rules, and they are not a sine qua non to finding deliberation and premeditation. (*People v. Sanchez* (1995) 12 Cal.4th 1, 32-33, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) But they do provide guidelines for a reviewing court's analysis. (*People v. Sanchez*, *supra*, 12 Cal.4th at p. 32; *People v. Raley* (1992) 2 Cal.4th 870, 887 [when evidence of all three *Anderson* factors are not present, appellate courts look for "'either very strong evidence of planning or some evidence of motive in conjunction with planning or a deliberate manner of killing'"].) "The test on appeal is whether a rational juror could, on the

evidence presented, find the essential elements of the crime—here including premeditation and deliberation—beyond a reasonable doubt. [Citations.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 495.)

C. Analysis

The record is replete with evidence from which the jury could have concluded that the murder of Moreno was premeditated and deliberate. That evidence showed that defendant's brutal and fatal beating of Moreno was a pre-planned killing motivated by a desire to "regulate" Moreno for failure to comply with the Southsiders' program and/or to punish Moreno for being a "snitch."

The manner in which defendant killed Moreno indicates the beating was planned in advance and designed to kill. It took place in the prison yard, as opposed to the prison dorm where sheriff deputies had recently placed a camera. The three assailants approached the victim and immediately began to beat him without any prior provocation, advance warning, or exchange of words to indicate it was otherwise some spur of the moment incident of prison violence. And the beating continued long after the victim was brought to the ground in submission, consisting of a barrage of punches and kicks to the head and neck. Indeed, defendant admitted that the normal Southsider "rule" was for a beating to stop once a victim fell to the ground and that kicks to the head should not occur. However, as defendant acknowledged, that rule would not apply to "snitches" because the Southsiders do not "tolerate" them. From this evidence, the jury certainly could have concluded, as it did, that the beating of victim Moreno was specifically intended to result in his death.

Moreover, there was ample evidence that the killing was motivated by victim Moreno's failure to comport with the Southsiders' "program" and his perceived activities as a "snitch." In the days prior to the killing, inmate Ramirez saw various Southsiders—including defendant—confront Moreno in connection with his failure to abide by the "program." Moreover, Ramirez observed that Moreno had spoken to sheriff deputies, conduct that would have caused him to be viewed as a "snitch." Likewise, inmates Coronel and Thomas testified unequivocally that the fatal beating of Moreno was a "regulation." Inmate Thomas further opined that victim Moreno tried to leave the gang, which explained Moreno's failure to comply with the "program" and his resulting need to be "regulated." And the inmates' testimony, as well as the People's expert on gangs, established that the Southsiders ordered both attacks on inmates needing "regulation" and killings of "snitches."

Defendant also admitted he had a purpose behind his beating victim Moreno, stating to the undercover informant that "this was a discipline crew, straight up." In that same conversation, defendant elaborated that he got on top of Moreno even after Moreno fell to the ground—an action contrary to the Southsiders' rules, unless the victim was a snitch whose existence could no longer be tolerated. Moreover, victim Moreno was himself well aware that he was in danger of being beaten or killed, as his letters to his aunt about one month before his murder clearly predicted.

Taken all together, and viewed in the light most favorable to the prosecution, the evidence at trial amply supported the jury's finding that defendant engaged in first degree premeditated murder of victim Moreno.

II. The Trial Court's Jury Instructions on Murder

Defendant contends the instructions pursuant to CALCRIM Nos. 520 and 521, as given by the trial court, violated his constitutional right to a fair trial. We disagree.

A court has a sua sponte duty to "instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) "In reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he 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. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) ""Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case."" [Citation.]" (*People v. Hajek and Vo*, *supra*, Cal.4th at p. 1220.) Furthermore, "'[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such an interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We review claims of instructional error de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581; *People v. Posey* (2004) 32 Cal.4th 193, 218.)

A. CALCRIM No. 520

In claiming that the trial court erred when giving its jury instruction based on CALCRIM No. 520, defendant does not contend that CALCRIM No. 520 erroneously sets forth the

elements of murder or that the trial court failed to convey those elements as set forth in CALCRIM No. 520. (*Cf. People v. Genovese* (2008) 168 Cal.App.4th 817, 827-832 [upholding the standard series of CALCRIM jury instructions for homicides, including No. 520].) Rather, defendant's complaint is much more limited in scope. Defendant merely contends that it was error for the trial court to omit the following language from the CALCRIM No. 520 standard pattern jury instruction: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521."

We do not find the trial court erred by omitting that language from the jury instructions given here. When instructing the jury, the trial court clearly instructed them, pursuant to CALCRIM No. 521, that: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." That language from CALCRIM No. 521 conveys precisely what defendant contends the trial court erroneously omitted from CALCRIM No. 520. Accordingly, defendant's contention of error must be rejected. (*People v. Hajek and Vo***,** *supra***,** 58 Cal.4th at p. 1220 ["The correctness of jury instructions is to be determined from the entire charge of the court, not from considerations of parts of an instruction . . . ."].)

B. CALCRIM No. 521

With respect to CALCRIM No. 521, defendant contends that the trial court erred by relying on certain standardized

language from that model instruction when defining the elements of first degree murder. More specifically, with respect to CALCRIM No. 521's definition of premeditation, defendant claims the instruction was deficient by instructing the jury that a defendant acts with premeditation "if he decided to kill before completing the acts that caused death." (Italics omitted.) Focusing only on that limited portion of CALCRIM No. 521's definition of "Deliberation and Premeditation," defendant contends that premeditation as defined by that single phrase "is tantamount to merely requiring that the defendant killed *intentionally,*" as opposed to killing with deliberation and premeditation as is required for first degree murder.

To begin with, the phrase in CALCRIM No. 521 with which defendant takes issue is an accurate statement of the law. (*People v. Jennings* (2010) 50 Cal.4th 616, 645 [premeditation means considered beforehand]; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419 [defining premeditation as "thought over in advance"]; *People v. Mayfield*, *supra*, 14 Cal.4th at p. 767 [defining premeditation as considered beforehand].) Moreover, and more to the point, CALCRIM No. 521 as a whole—and as given by the trial court here—makes abundantly clear that a defendant can only be found guilty of first degree murder if it is proven that defendant "acted willfully, deliberately, and with premeditation," and not merely intentionally. Indeed, in addition to requiring a finding that defendant made the decision to kill prior to the killing, the trial court's instruction pursuant to CALCRIM No. 521 instructed the jury that it must find that defendant "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." Further still, mitigating against any concern that the jury could

find defendant guilty of first degree murder upon a mere showing of intentional killing, the trial court's instruction pursuant to CALCRIM No. 521 also instructed the jury that "a decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. . . . The test is the extent of the reflection . . . ."

We therefore find no error with respect to the trial court's instruction on the elements of first degree murder in accordance with the language of model instruction CALCRIM No. 521.

III. The Trial Court's Responses to Jury Notes

Defendant claims that the trial court erred in responding to the questions posed by the jury, thereby compounding the purported jury instruction errors discussed above. We find that the defendant has forfeited any such claims of error, because defendant consented to the trial court's responses to the jury's questions. Each time the trial court responded to one of the jury's inquiries, defense counsel acquiesced. Defendant accordingly cannot claim error for the first time on appeal with respect to any of the trial court's responses. (*People v. Davis* (2009) 46 Cal.4th 539, 616-617; *People v. Rogers* (2006) 39 Cal.4th 826, 877.)

Moreover, defendant cannot save his claims from forfeiture merely by invoking section 1138 for the general proposition that the trial court should respond in some manner to jury inquiries. In other words, a defendant still must object to preserve any claim that the trial court erred in fulfilling its obligations under section 1138. (See, e.g., *People v. Harris* (2008) 43 Cal.4th 1269, 1317 [finding waiver of challenge to trial court's response to jury note where defendant "specifically agree[d] below to the court's

handling of the jury's question"]; *People v. Marks* (2003) 31 Cal.4th 197, 237 [rejecting a defendant's contention that a court's response to a jury inquiry regarding its instructions was incorrect and stating, "if defendant favored further clarification, he needed to request it" and "[h]is failure to do so waives this claim"]; *People v. Hughes*, *supra*, 27 Cal.4th at p. 402 [rejecting a claim that the court gave an insufficient response to a jury inquiry about deadlock, stating "this claim is waived by defense counsel's agreement with the trial court that informing the jury of the consequences of a deadlock would have been improper"]; *People v. Bohana* (2000) 84 Cal.App.4th 360, 373 ["[w]here, as here, appellant consents to the trial court's response to jury questions during deliberations, any claim of error with respect thereto is waived"].)

Further, we decline defendant's request that we exercise our discretion to entertain the merits of his forfeited claims of error. In this regard, we note that defendant's substantial rights were not affected by the trial court's responses (*see* section 1259), as the trial court's explanations relating to the elements of either first or second degree murder were accurate statements of law based in whole or in part upon the applicable CALCRIM model instruction.

IV. Section 1097

Defendant argues that, as required by section 1097, the trial court failed to instruct the jury sua sponte that, if they had a reasonable doubt about which degree of murder should apply, the jury should give defendant the benefit of the doubt and convict defendant of the lesser offense, second degree murder. We find no error.

Section 1097 provides: "When it appears that the defendant has committed a public offense, or attempted to commit a public offense, and there is reasonable ground of doubt in which of two or more degrees of the crime or attempted crime he is guilty, he can be convicted of the lowest of such degrees only." In *People v. Dewberry* (1959) 51 Cal.2d 548, at page 555 (*Dewberry*), the court held: "[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury 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."

This instructional duty has been held to be satisfied by CALJIC No. 17.10, which provides: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him] [her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime." (See *People v. Barajas* (2004) 120 Cal.App.4th 787, 793-794.) We agree with that assessment and further conclude that the same objective of section 1097 was accomplished here by the trial court's instruction pursuant to CALCRIM No. 521, which informed the jury: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

Further, assuming *arguendo* that the trial court's CALCRIM No. 521 instruction did not satisfactorily convey to the jury the principle set forth in section 1097, we find that its

additional instruction pursuant to CALCRIM No. 641 certainly cured any remaining deficiency.[7] CALCRIM No. 641 explains the interplay between the jury's findings with respect to first degree murder and the lesser included offense of second degree murder and provides the jury with step-by-step instructions on how to

---

[7] In accordance with CALCRIM No. 641, the trial court instructed the jury as follows: "You will be given verdict forms for guilty of first degree murder, guilty of second degree murder, and not guilty. [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of the greater crime. [¶] To return a verdict of guilty or not guilty on a count, you must all agree on that decision. [¶] Follow these directions before you give me any completed and signed, final verdict form. You will complete and sign only one verdict form. Return the unused verdict forms to me unsigned. [¶] If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms. [¶] If all of you cannot agree whether the defendant is guilty of first degree murder, inform me only that you cannot reach an agreement and do not complete or sign any verdict forms. [¶] If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for guilty of second degree murder. Do not complete or sign any other verdict form. [¶] If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of second degree murder, inform me that you cannot reach agreement. Do not complete or sign any verdict forms. [¶] If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the not guilty verdict form. Do not complete or sign any other verdict forms."

proceed, noting specifically that if the jury agrees that defendant is not guilty of first degree murder—i.e., has a "reasonable ground of doubt" (see section 1097) as to that offense—the jury must then determine whether defendant is guilty of the lesser offense of second degree murder. Indeed, the Bench Notes accompanying CALCRIM No. 641, indicate that the instruction was designed, in part, to satisfy the requirements of *Dewberry*, and we find that the trial court's CALCRIM No. 641 instruction did so here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIN, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

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