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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICARDO DEJESUS ESQUIVEL, Defendant and Appellant.	B237509 (Los Angeles County Super. Ct. No. BA369493)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick N. Wapner, Judge. Affirmed.

Cannon & Harris and Donna L. Harris, 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, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Ricardo DeJesus Esquivel of second degree murder with discharging a firearm causing death. (Pen. Code, §§ 187, subd. (a),

12022.53, subds. (b), (c) & (d).)[1] The trial court sentenced him to a total term of 40 years to life. He appeals from the judgment of conviction, contending that the trial court erred by informing the jury that provocation could negate the premeditation and deliberation required for first degree murder but failed to explain that provocation could also negate malice so as to reduce a murder to manslaughter. We disagree and affirm the judgment.

BACKGROUND

Prosecution Evidence

The murder victim was Sandra Marlene Lopez De Mangandi, known as Marlene. In March 2010, she and her 16-year-old son Salvador moved into a one-bedroom apartment with defendant on East 56th Street in Los Angeles. According to Salvador, Marlene lived with defendant as friends. Salvador and Marlene slept in separate beds in the bedroom and defendant slept in the living room.

Marlene worked nights at McDonald's and would return to the apartment around 3:00 or 4:00 a.m. Around 6:00 a.m. on March 23, 2010, Salvador left for school. Marlene said goodbye from her bed. When Salvador returned from school around 4:30 p.m., defendant was lying on his bed in the living room and told Salvador that Marlene was sleeping. Salvador found Marlene in the bedroom, pale and unresponsive, and called 911. While Salvador was on the phone, defendant got a salad from the refrigerator and began to eat. An autopsy later revealed that Marlene had been shot seven times (through the cheek, chin, forearm, chest, and abdomen) causing fatal injuries to her heart, aorta, brain, and lung.

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[1] All undesignated section references are to the Penal Code.

After being arrested, defendant was interviewed at the police station by Los Angeles Police Detective Julio Benavides. The interview was recorded and defendant later provided a written confession. In the interview, after waiving his rights, defendant said that he had met Marlene in April 2008 while working as a security guard at a McDonald's where Marlene also worked. They began dating and moved in together, but Marlene soon broke it off and moved in with another boyfriend. Defendant felt betrayed and heart-broken. Perhaps a year later, Marlene again moved in with defendant.

Around 6:30 a.m. on the morning of the killing, after Salvador left, defendant went into Marlene's room intending to have sex. Marlene told him to leave her alone so she could sleep. Around 9:00 a.m., when defendant again broached the subject of sex, Marlene again said that she wanted to sleep. She added that she had people who knew where he worked and lived and they would follow him and hurt or murder him if he did not leave her alone. Feeling betrayed, defendant retrieved a .40 caliber handgun from his backpack, returned to the foot of Marlene's bed, and shot her seven times. He then picked up the casings, put them with the gun in his backpack, and hid the backpack at his cousin's house. He returned to the apartment and was there when Salvador came home. Defendant directed Detective Benavides to where the backpack was hidden. The gun used in the killing was recovered.

Defense Evidence

Alexander De Leon testified that he met Marlene in 2008; they dated. In early 2009, he lived with her in an apartment. The relationship ended when Salvador moved in with them, and eventually Marlene and Salvador moved out.

DISCUSSION

Defendant contends that notes sent out by the jury during deliberations reflected confusion about how to evaluate evidence of provocation, and that the trial court's responses "left [the jury to use] provocation only in their determination of whether [defendant] committed first or second degree murder. The trial court erred by failing to instruct the jury that adequate provocation *may negate malice* to reduce murder to voluntary manslaughter." (Italics added.) We disagree.

1. *The Pattern Instructions*

Using the pattern CALCRIM instructions, the trial court instructed the jury that defendant was charged with murder and the lesser offense of manslaughter (500); defined murder with malice aforethought (520); defined premeditated and deliberate first degree murder (521); explained that provocation may reduce murder from first to second degree, and reduce murder to manslaughter (522); and explained provocation and heat of passion reducing murder to voluntary manslaughter (570).

In relevant part, the instructions informed the jury that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. . . . If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime committed was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

In explaining voluntary manslaughter, the instructions stated:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or

in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. . . . [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis."

2. *Note Concerning the Difference Between First and Second Degree Murder*

On the second day of deliberations, after asking to listen to the cassette recording of defendant's interview with Detective Benavides, the jury sent out a second note: "We would like to know if there is additional explanation re: the difference between 1st and 2nd degree murder." After consulting with counsel, the court submitted a written response, which stated: "First degree murder is defined in instruction 521. The defendant must act willfully, deliberately, and with premeditation. Those words are further defined in that instruction. The People have the burden of proving beyond a reasonable doubt that the killing was first

degree murder rather than some lesser crime, including second degree murder. If the People have not met this burden, you must find the defendant not guilty of first degree murder. Second degree murder is defined in instruction 520. It is a killing that was done with either express or implied malice as they are defined in that instruction." Defense counsel did not object to the court's response.[2]

3. *Note Concerning Provocation Reducing First Degree Murder to Second Degree*

Approximately 55 minutes later, just before the evening recess, the jury informed the court that there was another question. That inquiry stated: "Instruction No. 522 states that 'provocation may reduce a murder from first degree to second degree.' We're uncertain how to read this section or when 'provocation' should be considered."

The next day, after consulting with counsel (who did not object; see fn. 2, *supra*), the court gave the following response: "Provocation may be sufficient to reduce murder to voluntary manslaughter. Please see instruction 570 for the requirements. Provocation that is not sufficient to reduce murder to voluntary manslaughter, may reduce first degree murder to second degree murder. Provocation should be considered on the question of whether the defendant acted deliberately and with premeditation as those terms are defined in instruction 521."

4. *Note Concerning Jury Split on Consideration of Provocation*

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[2] Although there is no transcript concerning the court's consultation with counsel, in a later proceeding in which the court and counsel discussed the court's proposed response to the jury's final note, discussed below, the court noted that both the prosecutor and defense counsel "signed off on the previous answers." Neither the prosecutor nor defense counsel disagreed.

In the afternoon session that same day, the jury sent out another note. It stated: "Our group is split on how to interpret the jury instructions and we'd like clarification please. Part of our group is reading instruction 521 . . . the following way: Murder one requires that we believe the defendant acted 'willfully, deliberately and with premeditation.' Provocation may reduce murder one to murder two, but we still must find that the defendant acted 'willfully, deliberately, and with premeditation.' If the defendant acted in a way that wasn't willful, deliberated and premeditated, then we must conclude that he is not guilty of murder one or murder two, and we must then consider manslaughter. [¶] The other part of the group is questioning: if we do not believe the defendant acted willfully, deliberately and with premeditation (all three) but with provocation, can it be murder two, or must we find him not guilty of murder and then only consider manslaughter?"

After consulting with counsel the next morning, the court proposed to respond as follows:

"Second degree murder does NOT require deliberation and premeditation. A person may be guilty of second degree murder if the provocation is sufficient to negate deliberation and premeditation as they are defined in instruction 521, but not sufficient to reduce the offense to voluntary manslaughter as defined in instruction 570.

"PART I

"1. Only first degree murder requires deliberation and premeditation. Second degree murder does not.

"2. If you find the defendant acted without deliberation or premeditation, but the provocation was not sufficient to reduce the killing to voluntary manslaughter, then he is guilty of second degree murder.

"PART II

"If you do not believe the defendant acted with deliberation and premeditation, then he may be guilty of either second degree murder or voluntary manslaughter, depending on your view of the sufficiency of the provocation. Please see instructions 521 and 570 and the answer to question # 3."

"[T]he answer to question # 3" to which the court referred, quoted above in section 3 of our discussion, stated: "Provocation may be sufficient to reduce murder to voluntary manslaughter. Please see instruction 570 for the requirements. Provocation that is not sufficient to reduce murder to voluntary manslaughter, may reduce first degree murder to second degree murder. Provocation should be considered on the question of whether the defendant acted deliberately and with premeditation as those terms are defined in instruction 521."

Defendant's attorney did not specifically object to the court's proposal. He suggested that "the court should add jury instruction[s] CALJIC 8.71 and 8.72." Those instructions state, in substance, that if the jury unanimously agrees beyond a reasonable doubt that the defendant committed murder, but has a reasonable doubt whether the murder is of the first or second degree, it must return a verdict of second degree, and that if the jury unanimously agrees beyond a reasonable doubt that the killing was unlawful, but has a reasonable doubt whether the killing is murder or manslaughter, then it must return a verdict of manslaughter.

In the alternative, defense counsel orally suggested supplementing the court's response with the following italicized language: "If you find the defendant acted without deliberation or premeditation, but the provocation was not sufficient to reduce the killing to voluntary manslaughter, then he is guilty of second degree

murder. *If the provocation was sufficient to reduce the killing to voluntary manslaughter, then he is not guilty of second degree murder*."

The court elected to give its suggested response without change. It read the response to the jury, and also provided the response in writing. The court also informed the jury that if the response "still doesn't help, then you've got to let me know. . . . I have yet another possible alternative way of doing this."

The jurors retired to deliberate. Eleven minutes later, they returned with a guilty verdict for second degree murder.

5. *Defendant Forfeited the Claim of Error Made on Appeal*

Defendant contends that the court's final explanation was erroneous because "[b]y telling the jurors provocation should be considered on the issues of premeditation and deliberation, the trial court also implicitly told the jury that provocation did not apply to the evaluation of malice. The trial court erred by failing to instruct the jury that provocation may negate malice to reduce an unlawful killing to manslaughter."

Defendant has forfeited the contention. "A defendant may forfeit an objection to the court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response. [Citations.] . . . 'Tacit approval' of the court's response, or lack of response, may be found where the court makes clear its intended response and defense counsel, with ample opportunity to object, fails to do so. [Citation.] At its furthest reach the rule has been held to justify a forfeiture where defense counsel sat mute while the court provided a response later challenged on appeal. [Citation.] . . . Waiver has also been found where the court responds to an inquiry with a correct and germane statement of the law, and the

defense proposes no further clarification. [Citation.]" (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048.)

Here, before responding to each jury question, the court provided defense counsel and the prosecutor with its proposed response. Defense counsel never objected to any of the responses. As to the final response, defense counsel proposed two alternative suggestions: adding CALJIC Nos. 871 and 872, or adding to the court's response a statement that defendant was not guilty of second degree murder if the provocation was sufficient to reduce the killing to voluntary manslaughter. Neither of these suggestions involved the defect claimed on appeal – the purported need to state that adequate provocation *may negate malice* to reduce murder to voluntary manslaughter. Therefore, defense counsel tacitly approved the court's response to the extent it did not include such an advisement, and the issue is forfeited on appeal.

6. *The Claim Fails on the Merits*

In any event, we are not persuaded by defendant's contention. The crux of defendant's argument is that a reasonable juror would have been confused into believing that provocation could only be used to negate premeditation and deliberation so as to reduce murder from the first to second degree, and would not have understood how provocation could reduce murder to voluntary manslaughter. Defendant specifically faults the trial court for not expressly telling the jury that "adequate provocation *may negate malice* to reduce murder to voluntary manslaughter." (Italics added.)

Of course, in determining how a reasonable juror would understand the court's instructions and responses regarding provocation and manslaughter, "'"we consider the specific language under challenge and, if necessary, the charge in its

entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly." [Citation.]' [Citation.]" (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 317.) Moreover, "[t]he jury's request for further clarification triggered section 1138. The statute provides in part: 'After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given. . . .' (§ 1138.) 'This means the trial "court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]" [Citation.]'" (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1179.)

Here, no reasonable juror could have been confused by the court's responses. The responses were legally correct, and defendant does not contend otherwise. The specific language used by the court consistently informed the jury that provocation could reduce murder to manslaughter, depending on the jury's evaluation of the sufficiency of the evidence of provocation. Moreover, in its response to the jury's final note, the court referred to the jury to CALCRIM No. 570 to determine whether defendant was guilty of murder or manslaughter ("Provocation may be sufficient to reduce murder to voluntary manslaughter. Please see instruction 570 for the requirements"). CALCRIM 570 is a clear, common sense explanation of how provocation reduces murder to manslaughter (e.g., "[a]s a result of provocation, the defendant acted rashly and under the

influence of intense emotion that obscured his reasoning or judgment" and "[t]he provocation would have caused a person of average disposition to act rashly and without deliberation, that is, from passion rather than from judgment"). We fail to see how an instruction in the legalistic terms advocated by defendant – "adequate provocation may negate malice to reduce murder to voluntary manslaughter" – would have provided any clearer guidance on how to evaluate evidence of provocation in relation to reducing murder to manslaughter than the guidance provided by the court in CALCRIM No. 570 and its responses to the jury's notes. In short, the court's responses to the jury's inquires, including its referring the jury back to CALCRIM No. 570, were perfectly proper.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.