Supreme Court No. S189856

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. PERLA ISABEL GONZALEZ, Defendant-Appellant.	Court of Appeal No. D055698 Superior Court No. FVA024527

Appeal From the Superior Court of San Bernardino County
Honorable Michael A. Knish, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

To The Honorable Ronald M. George, Chief Justice, And The Honorable Associate Justices Of The Supreme Court Of The State Of California:

Petitioner and appellant, Perla Gonzalez, seeks review in this Court following an unpublished decision of the Court of Appeal, Fourth Appellate District, Division One filed December 9, 2010, affirming petitioner's convictions for premeditated attempted murder (§§ 664/187, subd. (a)) and first degree murder (§ 187, subd. (a)). A copy of that decision is attached to this Petition as Appendix "A".

QUESTION PRESENTED

1. Whether the trial court prejudicially erred by failing to instruct the jury that petitioner must have personally acted with premeditation and deliberation to be found guilty of first degree provocative act murder?

2. In a prosecution for provocative act murder, is the trial court required to instruct the jury on principles of self-defense where there is evidence the actual perpetrator of the killing committed an independent criminal act and did not act in lawful self-defense?

3. Whether insufficient evidence supported petitioner's conviction for provocative act murder in violation of the Fourteenth Amendment to the United States Constitution?

4. Whether the trial court violated petitioner's Fifth, Sixth and Fourteenth Amendment rights to due process and a jury trial by failing to instruct the jury it could not convict petitioner of provocative act murder if the accomplice committed the acts causing his own death?

5. Whether the trial court violated petitioner's Fifth and Fourteenth Amendment rights of due process and a fair trial by refusing petitioner's request for an instruction on the lesser included offense of involuntary manslaughter?

NECESSITY FOR REVIEW

A jury convicted petitioner of first degree provocative act murder. The trial court failed to instruct the jury that they must find petitioner *personally* acted with premeditation and deliberation, required for a first degree murder conviction based on a provocative act

theory. (*People v. Concha* (2009) 47 Cal.4th 653) During deliberations, the jury requested instructions on second degree murder, and the court referred the jury to the erroneous instructions informing them they could convict petitioner of first degree murder based on a finding that her accomplice alone premeditated and deliberated the crime.

A majority of the Court of Appeal found this error was harmless beyond a reasonable doubt. In dissent, Justice Cynthia Aaron reasoned that the error was not harmless beyond a reasonable doubt because (1) the deliberating jury requested an explanation of second degree murder; (2) the court gave them the incorrect instruction, and (3) evidence of the accomplice's culpable mental state was stronger than petitioner's, increasing the likelihood that this jury, struggling with the issue of petitioner's mental state, relied on the erroneous instruction to convict petitioner of first degree murder.

In deliberations, the jury requested guidance on evaluating her mental state. The trial court misguided the jury at a critical time on a critical issue. As dissenting Justice Aaron noted, citing *People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253, there is no category of misinstruction that is more prejudicial. (See also, *People v. Beeman* (1984) 35 Cal.3d 547, 562-563 [likelihood of prejudice increased when court provides erroneous instructions to the jury during deliberations]; *People v. Miller* (2008) 164 Cal.App.4th 653 [same].)

The majority of the Court of Appeal assessed prejudice based on an evaluation of whether a "hypothetical" rational jury could find petitioner premeditated and deliberated. This standard transfers to the Court of Appeal the jury's function of deciding guilt beyond

a reasonable doubt with proper legal guidance. The question is not, as framed by the Court of Appeal, whether there is "evidence before [the appellate court] show[ing] a rational jury would have found Perla *personally* deliberated and premeditated," but whether the prosecution has proved beyond a reasonable doubt that *this* jury did not find petitioner's guilt based on an incorrect legal principle. Review should be granted to provide guidance to the courts of appeal regarding the evaluation of prejudicial error.

Review should also be granted to determine whether the prosecution must prove beyond a reasonable doubt that the alleged victim killed lawfully in self defense to find a defendant guilty of murder under the provocative act doctrine. Here, the evidence established that the alleged victim shot petitioner's accomplice three times in the back as he ran from him, and again while the accomplice was laying on the ground. The jury was not instructed that they must find the alleged victim *lawfully* killed in self-defense to find petitioner guilty of murder.

The Court of Appeal held that the provocative act doctrine is governed exclusively by principles of proximate cause, and there is no requirement that the killing be lawfully perpetrated. No reported cases squarely address this issue, but courts have stated the use of lethal force must be privileged and lawful. This Court should address the unresolved question of whether the prosecution must prove the killing was lawful to find a defendant guilty of first degree murder.

STATEMENT OF THE CASE AND FACTS

The factual and procedural history of the case stated in the Court of Appeal's opinion is sufficient for the purpose of this petition, except as otherwise noted.

I.

THE TRIAL COURT'S ERRONEOUS INSTRUCTION TO THE DELIBERATING JURY, PERMITTING THEM TO FIND PETITIONER PREMEDITATED THE MURDER BASED ON MORALES' MENTAL STATE, WAS PREJUDICIAL

Recently, in *People v. Concha, supra,* 47 Cal.4th 653, this Court held that first degree murder liability is available for provocative-act murder, but only if a properly instructed jury finds defendant personally acted wilfully, deliberately, and with premeditation.

Here, the jury was instructed it could find petitioner guilty of first degree premeditated attempted murder based on Morales' state of mind only. During deliberations, the jury sent the court a note requesting an instruction on second degree murder. (2 CT 405.) The court referred the jury to CALCRIM 560, which referred the jury back to the instruction that allowed them to find petitioner premeditated the murder based on Morales' mental state only.

A majority of the Court of Appeal concluded the court committed error, but found it harmless beyond a reasonable doubt. (Opinion, p. 32-33.) The Court reasoned that there was evidence in the record to support a rational jury's finding that petitioner premeditated the crime based on petitioner's planned assault on Canas; driving to the scene with the loaded

rifle; and handing the rifle to Morales. (Opinion, p. 33.)

This evidence also supports a second degree murder without premeditation or an assault with a firearm. Petitioner's counsel in closing argued that petitioner was not aware of Morales' plan, and even if she was aware of the plan, the plan was to beat up Canas, not kill him. (9 RT 1749-1752.) Petitioner did not make any statements during the attack and did not immediately grab the gun when the two started fighting, but only took the gun out when it appeared Canas was winning the battle. The issue of petitioner's mental state was vigorously contested at trial; it was the critical issue for a properly instructed jury to decide.

As the dissenting Justice pointed out, the question is not whether a "hypothetical" rational jury could find petitioner premeditated and deliberated, but whether *this* jury could have found petitioner's guilt based on their application of the trial court's erroneous legal instruction. The Court of Appeal majority, quoting *People v. Concha* (2010) 182 Cal.App.4th 1072, 1089, states it was required to *"review the entire record to determine whether it is clear beyond a reasonable doubt that a rational jury would have made the necessary findings of premeditation and deliberation absent the error."* [Italics in original.] (Opinion, p. 30.) This does not mean that the appellate court should operate in a vacuum and "ignore the fact that the *actual* jury specifically requested an instruction on second degree murder and that in response the court directed the jury to an instruction that misstated the critical intent element." [Italics in original.] (J. Aaron, Dissenting and Concurring Opinion, p. 4-5.)

The majority failed to take into account the juror's question and the court's incorrect response in assessing prejudice. Review should be granted to provide the courts of appeal with guidance regarding the assessment of prejudicial error.

II.

THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY THAT THE HOMICIDE OF MORALES MUST HAVE BEEN LAWFUL AND JUSTIFIED IN SELF-DEFENSE TO FIND APPELLANT GUILTY OF PROVOCATIVE-ACT MURDER

The undisputed evidence was that Canas shot the unarmed Morales three times in the back while Morales retreated. A jury could have concluded that Canas was not legally justified in killing Morales, which would have cut off petitioner's liability for the homicide. The issue of whether Canas acted justifiably should have been submitted to the jury with self-defense instructions.

The Court of Appeal held no self-defense instruction as to Canas was required because "the issue of whether the killing was lawfully justified is rooted in principles of proximate cause, not self-defense." (Opinion, p. 36.) To establish murder based on a provocative act theory, the prosecution is required to prove the killing is not an independent criminal act; if the killer has no privilege to use lethal force, then liability for provocative act murder should be cut off.

When "the defendant or his accomplice, with conscious disregard for life, intentionally commits an act that is likely to cause death, and the victim or police officer kill in *reasonable response* to such an act, the defendant is guilty of murder." [Emphasis added.] (*People v. Caldwell* (1984) 36 Cal.3d 210, 216. fn. 2; *People v. Antick, supra*, 15 Cal.3d at p. 88.) The provocative act doctrine "has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, unusually gun wielding conduct, and the police, or a victim of the underlying crime, responds with *privileged* lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander." [Emphasis added.] (*People v. Cervantes* (2001) 26 Cal.4th 860, 867.)

Under the provocative act doctrine, the inquiry should focus on "an objective view of the facts" rather than on the "crime victim's state of mind." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 593.) An essential part of such an objective inquiry must be whether the victim's response was objectively reasonable, requiring a jury determination of whether a person in the victim's situation would have responded as did the victim. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083.) The underlying premise is that the victim is acting lawfully in self-defense in perpetrating the killing as a reasonable response to a dilemma thrust upon him or her by the provocative acts of the defendant or his accomplice. If the perpetrator engages in an "independent criminal act," the accused's liability for the homicide is cut off by this superseding intervening event. (See CALCRIM 560; *People v. Cervantes,*

supra, 26 Cal.4th 860, 874.) The jury must be instructed on the relevant legal principles to determine whether the actual perpetrator engaged in an "independent criminal act" or instead was legally justified in his act of killing.

Thus, although provocative act murder is "rooted in principles of proximate causation," the jury must be guided on the principles relevant to their determination of whether the perpetrator engaged in an "independent criminal act" or whether the use of lethal force was justified and privileged. In this case, where the evidence suggests the actual perpetrator was not legally justified in shooting the accomplice three times in the back while he retreated and once as he laid on the ground, the jury should have been instructed that it must find Canas acted in self defense before they could find petitioner guilty of murder.

If Canas was no longer in danger where he used lethal force, the killing would not be justified self-defense. (CALCRIM No. 3474; *People v. Martin* (1980) 101 Cal.App.3d 1000, 1010.) The jury could have determined that Canas was not acting in self-defense at the time he shot Morales. When Canas shot Morales in the back, Morales was running away from Canas. (2 RT 327-328.) Although Canas had a right of self-defense when he was first attacked by Morales and struggled over the gun with him, this does not establish that Canas acted in self-defense when he shot Morales while Morales retreated. Because Morales retreated before Canas mortally shot him in the back, the issue should have been submitted to the jury to determine whether Canas' actions were justified.

Where a trial court fails to properly instruct the jury regarding an element of the

charged crime, the court commits "'a constitutional error that deprives the defendant of due process.'" (*Conde v. Henry* (2000) 198 F.3d 734, 741, quoting *Hennessy v. Goldsmith* (9th Cir. 1991) 929 F.2d 511, 514.) Here, the trial court failed to adequately instruct the jury regarding the provocative act doctrine in violation of appellant's due process and jury trial rights. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) The error deprived petitioner of her Fifth and Fourteenth Amendment right to due process and her Sixth Amendment right to a jury trial. (*Conde v. Henry, supra*, 198 F.3d at p. 741.) .

III.

PETITIONER'S CONVICTION FOR PROVOCATIVE-ACT MURDER VIOLATES THE FOURTEENTH AMENDMENT BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION.

The Due Process Clause of the Fourteenth Amendment is violated when the evidence is insufficient to sustain a finding of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317.) Here, petitioner was convicted of murder based on her vicarious liability for the acts of her accomplice, Fernando Morales. But because Morales could not himself have been guilty of his own murder, Morales' provocative acts cannot be used to convict petitioner of murder. (*People v. Antick* (1975) 15 Cal.3d 79, 91-92, overruled on other grounds in *People v. McCoy* (2001) 25 Cal.4th 1111.) Petitioner's acts alone were not sufficiently egregious to provoke a lethal response, and her conviction for first degree murder, not supported by sufficient evidence, violates the Fourteenth Amendment.

In a prosecution for provocative-act murder, the state must prove beyond a reasonable

doubt the following two elements: (1) the defendant or his non-decedent accomplice must intentionally commit an act that involves a high degree of probability that the act will result in death; and (2) the conduct of the defendant or his non-decedent accomplice must be sufficiently provocative of a lethal response by a third party to support a finding of malice. (*People v. Caldwell* (1984) 36 Cal.3d 210, 216-217; *In re Joe R.* (1980) 27 Cal.3d 496, 504.) "To satisfy the 'mens rea' element, the defendant or his confederate must know that his act has a 'high probability' not merely a 'foreseeable possibility' of eliciting a life-threatening response from the third party." (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 57.) "To satisfy the 'actus reus' element of this crime the defendant or one of his confederates must commit an act which provokes a third party into firing the fatal shot." (*Ibid.*)

The jury did not believe petitioner discharged the gun because it found the allegation that petitioner discharged a firearm not true. (2 CT 412.) Thus, her murder liability would have to be based on her act of giving Morales the gun with the hammer pulled back.

A person who initiates a gun battle in the course of committing a felony intentionally and with a conscious disregard for life commits an act that is likely to cause death. (*People v. Antick, supra*, 15 Cal.3d at p. 91.) The defendant must initiate the gun battle or engage in a life-threatening act that proximately causes the decedent's death to be guilty of provocative-act murder as the following cases demonstrate.

In *In re Joe R., supra*, 27 Cal.3d 496, this Court reversed a provocative-act murder conviction where there was no evidence of "life-threatening acts" on the part of a minor who

aided and abetted in the crime of armed robbery. In *Joe R.*, the minor and his accomplice robbed a Taco Bell at gunpoint, and while fleeing the scene stopped to rob another victim, Anderson, who was waiting at a bus stop. Anderson was taken to a remote area where Joe hit him from behind while the accomplice held Anderson at gunpoint. Anderson managed to wrest the accomplice's gun from him and shot the accomplice while Joe fled the scene. (*Id.* at p. 501.)

On appeal, the minor argued the evidence was insufficient to sustain his murder conviction based on the provocative act doctrine. This Court held that the minor's acts of moving the victim from relative safety, his repeated threats and references to the accomplice's gun, and the minor's hitting the victim on the back of the head did not constitute provocative acts sufficient to impose liability for the murder of his accomplice. (*Id.* at pp. 506-507.)

Although the minor's punching the victim Anderson was a malicious act taken in conscious disregard for life and could have allowed the accomplice to prevail and shoot Anderson, the act did not provoke Anderson's lethal resistance and was not the proximate cause of the accomplice's death. (*In re Joe R., supra*, 27 Cal.3d at p. 507.) The court noted that none of the minor's acts initiated the deadly assault which predictably produced a lethal response from the victim. (*Ibid.*)

Here, the Court of Appeal concluded there was sufficient evidence to sustain petitioner's murder conviction because she planned the assault and handed the loaded rifle

to Morales after Canas go the better of him in the fight. (Opinion, p. 15.) Although she drove with Morales to the scene and may have been aware of a plan to beat up Morales, these were not malicious acts performed in conscious disregard for life that would provoke a lethal resistance from Canas. Further, there was no evidence petitioner intended to kill Canas during the confrontation. (Compare with *In re Aurelio R.* (1985) 167 Cal.App.3d 52 [evidence that defendant went to rival gang territory intending to kill a rival gang member sufficient to support his provocative-act murder conviction].)

Petitioner's act of handing the gun to Morales did not constitute a provocative act taken in conscious disregard for life. As in *Joe R.*, Morales had already initiated a lethal battle with Canas by stabbing Canas with a knife. "By necessity, the provocative act must occur before a victim may make a lethal response." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 584.) Canas was legally justified in using lethal force to prevent the attack by Morales before petitioner gave Morales the gun. Although handing Morales the gun would have allowed Morales to prevail and shoot Canas, the act of handing off the gun did not provoke Canas' lethal reaction; Morales caused his own death by initiating the lethal battle.

This case is close to *Joe R.* in that there was insufficient evidence that petitioner's conduct in aiding and abetting the attempted murder provoked Canas' use of lethal force against Morales. Petitioner's conviction violates the Fourteenth Amendment because it is not supported by sufficient evidence.

IV.

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY IT COULD NOT CONVICT PETITIONER BASED ONLY ON HER ACCOMPLICE'S PROVOCATIVE ACTS VIOLATED PETITIONER'S DUE PROCESS RIGHT

CALCRIM provides two instructions on the provocative act murder doctrine, CALCRIM 560 and 561. The trial court erroneously instructed the jury with CALCRIM 560, not the correct instruction, CALCRIM 561. When the prosecution proceeds under a theory that the provocative act was committed by the defendant, the court should instruct with CALCRIM No. 560. When the prosecution proceeds under the theory that provocative acts were committed by an accomplice, as in this case, CALCRIM No. 561 is recommended. (Bench Note, CALCRIM No. 560.)

A critical distinction between CALCRIM Nos. 560 and 561 relevant to this case is the language instructing the jury to find the defendant not guilty if they decide that the only provocative acts that caused the accomplice's death were committed by the accomplice. A bracketed portion of CALCRIM No. 561 provides: "[If you decide that the only provocative act that caused _____'s <insert name of deceased accomplice> death was committed by ____ <insert name of deceased accomplice>, then the defendant is not guilty of _____'s <insert name of deceased accomplice> murder.]" The Bench Notes to CALCRIM No. 561 state: "If a deceased accomplice participated in provocative acts leading to his or her own death, give the bracketed sentence that begins, "If you decide that the only provocative act that caused . . ." (CALCRIM No. 561, citing *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330;

People v. Superior Court (Shamis) (1997) 58 Cal.App.4th 833, 846; *People v. Antick, supra*, 15 Cal.3d at p. 90.)

The court's erroneous instruction allowed the jury to convict petitioner of provocative-act murder based only on the acts of Morales, the decedent. The law on provocative-act murder, however, clearly prohibits a conviction for the murder of a decedent accomplice based on provocative acts committed by the same decedent accomplice. (*Antick, supra,* 15 Cal.3d at p. 91.) Morales was the aggressor in the fight and petitioner's counsel argued at trial that he alone initiated the confrontation and provoked the lethal response. (9 RT 1741, 1749-1750, 1762-1763, 1769, 1773.)

Where a trial court fails to properly instruct the jury regarding an element of the charged crime, the court commits constitutional error that deprives the defendant of due process. (*Conde v. Henry, supra*, 198 F.3d 734, 741.) The trial court erroneously instructed the jury regarding the provocative act doctrine in violation of petitioner's due process and jury trial rights. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

The Court of Appeal held CALCRIM 560 adequately conveyed the principle that the prosecution must prove that petitioner's acts, not Morales,' proximately caused the death. (Opinion, p. 24.) Although, as the court points out, CALCRIM 560 informed the jury that the prosecution was required to prove petitioner committed a provocative act, the jury was also instructed they could find petitioner committed the provocative act based on her aiding and abetting Morales in the commission of the provocative act. (2 CT 363-371.) Thus, it

would not be inconsistent for the jury to find petitioner aided and abetted Morales in the crime of attempted murder, but that it was Morales' provocative acts only that caused Canas' death and provoked the lethal response. The omitted instruction allowed the jury to find petitioner's guilt based on Morales' acts in violation of her federal constitutional right of due process.

V.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER

Defense counsel requested the court instruct the jury on involuntary manslaughter (§ 192, subd. (b)) based on petitioner's act of brandishing the gun (§ 417). (2 RT 1597-1600.) The trial court refused to instruct the jury on the lesser included offense of involuntary manslaughter, stating that petitioner's handing the gun to Morales proved she acted with conscious disregard for life. (8 RT 1617-1618.) The Court of Appeal adopted this reasoning. (Opinion, p. 39.)

In determining whether an instruction on a lesser included offense is required, the court does not determine the credibility of the defense evidence, but only whether there was evidence which, if credited by the jury, was sufficient to raise a reasonable doubt. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) Depending on the circumstances surrounding their commission, assault or brandishing may be predicate misdemeanors for an involuntary manslaughter conviction. (*People v. Cox, supra*, 23 Cal.4th at p. 676

[assault and battery]; *People v. Hayden* (1994) 22 Cal.App.4th 48, 58 [brandishing].)

Here, the jury could have concluded petitioner's act of brandishing the gun was dangerous to human life, but was not an act conducted with conscious disregard for life. The jury could have found that petitioner brought out the gun intending to scare Canas and end the fight, not kill Canas. The evidence supported this factual scenario. Petitioner did not bring out the gun until Canas got the better of Morales, suggesting she did not plan to kill. Because the facts support either a conscious disregard for life or just an intent to scare, the jury should have been provided with the option of convicting petitioner of involuntary manslaughter, not murder.

Due process requires that the jury be instructed on a lesser included offense if the evidence warrants such an instruction. (*Hopper v. Evans* (1982) 456 U.S. 605, 611; *People v. Avena* (1996) 13 Cal.4th 394, 424.) The trial court's failure to instruct on the requested lesser included offense deprived appellant of her federal constitutional rights of due process. (*Beck v. Alabama* (1984) 47 U.S. 625, 634 [the right to instructions on lesser included offenses is an aspect of fundamental fairness].)

VI.

CONCLUSION

For the foregoing reasons, petitioner requests this Court grant review to settle these important questions of law.

Respectfully submitted,

DATED: January 18, 2011

LAURA SCHAEFER
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

I, Laura Schaefer, counsel for petitioner certify pursuant to the California Rules of Court, that the word count for this document is 4,117 words. This document was prepared in Word Perfect with 13 point Times New Roman font, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 18th day of January, 2011, at San Diego, California.

LAURA SCHAEFER
Attorney for Petitioner
PERLA GONZALEZ

People v. Gonzalez

Proof of Service

I, the undersigned, say: I am over eighteen years of age, a resident of the County of San Diego, State of California, not a party in the within action, my business address is 934 23rd Street, San Diego, County of San Diego, State of California 92102; on this date I mailed the PETITION FOR REVIEW, addressed as follows:

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The above copies were deposited in the United States mail, first class postage prepaid, on January 18, 2011, at San Diego, California.

I certify under penalty of perjury that the foregoing is true and correct.

Executed January 18, 2011, at San Diego, California.

Darys Avalos

APPENDIX

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. PERLA ISABEL GONZALEZ, Defendant and Appellant.	D055698 (Super. Ct. No. FVA024527)

APPEAL from a judgment of the Superior Court of San Bernardino County, Michael A. Knish, Commissioner. Affirmed.

Laura G. Schaefer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzales and William M. Wood, Deputy Attorneys General, for Plaintiff and Respondent.

Roberto Canas-Fuente (Canas) killed Fernando Morales, the boyfriend of appellant Perla Isabel Gonzalez (Perla), during a fight between Morales and Canas. Morales, along with Perla, his accomplice, ambushed Canas as he was picking up his daughter at a street corner. Canas at the time did not know either Morales or Perla.

During the fight, Morales pulled out a knife with a three- to four-inch blade, thrust it at Canas and cut him in the cheek. After Canas threw Morales to the ground, Morales got up and ran to Perla, who had been standing about 10 feet away, by her car, anxiously watching the fight. From her car, Perla grabbed a rifle she had brought to assault Canas, cocked it, pointed it at Canas and then handled it to Morales. Afraid for his life, Canas ran at Morales. During the struggle for the weapon, Canas was shot three times. Although wounded, Canas gained control of the rifle and a few seconds later shot and killed Morales, as Morales ran away.

Perla was tried and convicted on a provocative act murder theory of the attempted murder of Canas and of the first degree murder of Morales. She appeals.

FACTUAL AND PROCEDURAL BACKGROUND

Because Perla challenges the sufficiency of the evidence, we describe in detail the facts surrounding the killing.[1]

A. *The People's Case*

Canas and his wife Joan Curiel were married but separated in May 2005. Curiel was living with Ricardo Gonzalez (Ricardo), Perla's brother. Also living with Curiel and Ricardo was the minor child of Curiel and Canas (daughter), Curiel's other children and Curiel's mother Rosalba Osguera-Alvarez (Osguera).

Canas and Curiel shared custody of their daughter. However, because Canas and Ricardo did not get along, Canas typically picked up his daughter at a prearranged location near Curiel's residence. Before the shooting, Canas and Ricardo had argued several times on the telephone and had at least one physical altercation outside of Curiel's home. Each blamed the other as the cause of their feud.

On the evening of May 21, 2005, Curiel called Canas, who worked as an emergency room technician, to arrange for treatment for Osguera. Curiel dropped Osguera off at the hospital where Canas worked. After Osguera returned home, Curiel and Ricardo began arguing over whether Curiel had lied to him about "partying" with Canas while Ricardo was away. During their argument, Canas called and spoke to Curiel. According to Ricardo, Canas bragged that he and Curiel had been intimate while

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1 As discussed *post*, we are required to view the evidence in the light most favorable to the judgment of conviction. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Perla's claims of error are discussed *post*, in connection with those issues.

Ricardo was in Mexico.[2] Canas understood Curiel to say she did not want Ricardo in the home and Canas could hear children screaming in the background. Concerned for his daughter, Canas immediately left work and drove to Curiel's residence.

When Canas arrived, Curiel was leaving the house with her children, including their daughter. Ricardo was not far behind. As Curiel drove off with the children, Ricardo got into his car and followed her; Canas in turn got back inside his car and followed Ricardo. Canas testified he pulled along side Ricardo, rolled down his window and yelled, "What the fuck are you thinking? The kids are in the car. Knock it off."[3] After Canas cut off Ricardo, Ricardo took off in the opposite direction of Curiel. Canas followed Ricardo to make sure Ricardo did not continue following Curiel and the children, then returned to Curiel's home and called the police. Ricardo also called the police.

Later that evening, after the police had left, Ricardo's mother Beatrice Gonzalez (Beatrice), Perla, Morales and Ricardo's brother Jorge Gonzalez (Jorge) met outside Curiel's home. Ricardo discussed what had happened with Canas earlier that evening. Beatrice argued with Curiel and told Curiel that her son did not need such problems.

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2 Curiel testified at trial that she and Ricardo did not fight that evening about whether she and Canas had been intimate while Ricardo was in Mexico, or about whether Ricardo should move out of her house.

3 Ricardo disputes Canas's version of events, and testified Canas actually came after him, banged on his car and told him, "I want to kick your ass." When Ricardo drove off, Canas got back into his car and according to Ricardo, Canas followed closely behind Ricardo and attempted to run him off the road as Ricardo drove behind Curiel.

Perla told Curiel that if anything happened to Ricardo, they were going to "kick [Canas's] ass."

As they stood outside Curiel's home, Jorge testified that Canas continued to call the house and argue with Ricardo. Finally, Jorge answered the telephone and agreed to fight Canas a short distance from Curiel's house. Jorge, his friend, Perla and Morales all drove to a nearby street corner and waited about 20 minutes for Canas to arrive. Jorge testified that Morales had a "B.B. gun" rifle in the car and that Morales shot it out the car window while they waited for Canas. When Canas failed to show, the group went back to Curiel's house and everyone left for the night.

The next morning, Perla went to Jorge's house. Perla told Jorge that Curiel had told her that Canas was going to be picking up his daughter and Perla wanted Jorge to come with her to intercept and "beat up" Canas because he was harassing Ricardo. Before Jorge left with Perla, Jorge grabbed a baseball bat. Jorge testified he intended to break Canas's car windows with the bat.

Perla and Jorge next went to pick up Morales. As Jorge walked around Perla's car, he saw a light brown rifle in the back. They all drove to Curiel's house. On the drive over, Jorge told Morales that Jorge was going to fight with Canas and break Canas's car windows with the bat. Morales agreed to help Jorge if Canas got the upper hand in the fight.

Jorge knocked on the front door of Curiel's house and asked to speak with his brother Ricardo. While he was waiting at the door, he saw Canas's daughter and knew Canas had not picked her up yet. Jorge left the house and walked back to the car, where

Perla and Morales waited. They next drove to the intersection near Curiel's house where they had waited for Canas the night before.

After waiting at the intersection for a time, they decided to leave. However, Perla's car would not start. Jorge alone started running back to Curiel's house to get help while Perla and Morales waited at the car. As Jorge ran, he passed Osguera, who was walking Canas's young daughter to the street corner to meet Canas. Another of Curiel's children (minor) followed behind Osguera and Canas's daughter.

Minor, who was 15 years old at the time of trial and 13 years old at the time of the killing, testified she passed Jorge who was quickly walking in the opposite direction, toward Curiel's home. Minor caught up with Osguera and Canas's daughter, and saw Morales, whom she knew, further down the road under the hood of the car. Minor also saw Perla. Minor testified she and Osguera were waiting for Canas to tell him to leave with his daughter because Morales and Perla were there waiting for him and minor knew that Canas and Ricardo had argued the night before. Osguera testified Perla approached her and told her to leave.

After about 10 minutes, Canas arrived at the intersection. Canas drove past Perla's broken-down car and stopped near where Osguera, his daughter and minor waited. Canas opened his driver side door and beckoned Osguera to approach. Osguera hastily approached Canas and told him to take his daughter and leave. At the same time, Morales—who Canas did not then know—approached Canas and said, "Hey, puto, I heard you had a problem." Canas initially thought Morales was joking. Canas saw Perla, who he also did not know at the time, standing near the trunk of her car, staring at him

about 10 feet away. Canas told Osguera to get his daughter in the car and leave just as Morales started throwing punches. Osguera drove off in Canas's car with his daughter.

Canas started to throw punches back at Morales. Canas next saw Morales pull a three- to four-inch knife from his waistband, raise it near his ear and point it at Canas. Morales then lunged at Canas and cut Canas on the left side of his face. Morales came at Canas again with the knife. Canas ducked, grabbed Morales's legs, lifted him up and slammed him to the ground on his back. Morales quickly got up and ran towards Perla. Canas saw Perla move to the passenger side of the car, reach inside and meet Morales near the trunk with a "rifle type weapon" in her hand. Before Perla handed the rifle to Morales, Canas saw her "cock it" by pulling back the hammer of the gun. Perla also pointed the rifle at Canas.[4]

Scared for his life, Canas ran at Morales. During the struggle, the rifle discharged multiple times and Canas suffered three gun shot wounds. Canas wrestled the rifle away from Morales, who got up and began to run away. Perla also began to run. Afraid both Morales and Perla intended to do him more harm, Canas pointed the rifle at Morales and fired. Morales buckled and fell face down on the ground.

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4 Osguera testified that she saw Perla pick up from her car what she thought was a stick until she realized it was a firearm, point it at Canas and fire two or three shots in his direction. We note the jury found the allegation not true that Perla *intentionally* discharged a firearm during the commission of attempted murder, as provided in Penal Code section 12022.53, subdivision (c). However, it did find true the allegation that Perla used a weapon as provided in section 12022.53, subdivision (b). Thus it is possible the jury concluded Perla fired the weapon, but not intentionally.

Canas testified he shot in the direction of Morales about five to ten seconds after he gained control of the rifle. Canas could not tell whether the shots were hitting Morales until he fell to the sidewalk. Canas fired the rifle at least three times until it ran out of ammunition.

Canas went to Morales to make sure he did not have any additional weapons on him. Canas next looked for Perla because he was afraid she still intended to harm him. Canas saw Curiel drive up in her car, start screaming and leave. Canas still did not know his attackers or why they attacked him. Canas also saw minor standing by an unoccupied car.

About a minute or two later, Canas saw Curiel drive up again. This time, however, a brown car driven by Ricardo was following closely behind Curiel. Canas saw Perla and an unidentified man, later determined to be Jorge, riding in Curiel's car. Still concerned he would be attacked, Canas spied Perla as she got out of the car and approached Morales. Perla started screaming at Canas for help. Still holding the rifle, which was out of ammunition, Canas responded, "You are kidding me; right? He just tried to kill me. You want me to help you? . . . You deal with it." Perla dragged Morales to Curiel's car, put him inside and they transported him to the hospital.

Morales died from multiple gunshot wounds. One bullet entered his right chest and lodged in the chest cavity; one bullet entered his right back side and exited his stomach; and one bullet entered to the right of his back midline, severed his spinal cord and lodged in his vertebrae.

When police arrived at the scene, they confiscated a .22 semi-automatic rifle with a magazine capacity of 14. Police found several expended .22 long-rifle shells casings and a pocket knife, with the blade closed, in the street. Police also found a baseball bat in Perla's car and a "bullet strike" in a newly constructed building near the crime scene. Inside Perla's car, police found a roll of red duct tape that matched the red "X" on the back of her car's rear license plate, ostensibly put there to obscure the plate number.

B. *Defense Case*

Beatrice, the mother of Ricardo, Jorge and Perla, testified Ricardo called her the night before the killing in an agitated state and informed her that while driving Canas had followed him in his car. Beatrice in turn called Jorge and Perla. That evening, they all met outside Curiel's home. Ricardo talked about another incident involving Canas, where Ricardo claimed Canas had struck him and then thrown him into the bushes. Perla was upset by Canas's alleged mistreatment of her brother and told Ricardo that if Canas ever struck him again, "they" would beat up Canas.

Marlen Morales, the sister of Morales, testified she was a "little" angry with Perla over the death of her brother. About four to eight days after he was killed, Marlen and her other brother went to the location of the shooting and discovered a "pointy" knife. She testified the knife had a black handle, was about 10 inches long, and was a "little dirty." She kicked the knife into a "bush area" because, she testified, she did not want her other brother to see it and suffer more. Marlen had no explanation why she neglected to tell the detective investigating her brother's murder, during an interview about eight days after his death, about this knife.

C. *Rebuttal*

Canas testified he had no weapons in his possession, including a knife, the day Morales attacked him. Canas also testified he no weapons in his car, he did not see the knife described by Marlen at the crime scene or in anyone else's possession, and the only knife he saw on the day of the killing was the one Morales had that was shorter than the one described by Marlen.

D. *Charges and Conviction*

Perla was charged with attempted premeditated and deliberate murder (Pen. Code,[5] §§ 664, 197 [count 1]) and murder (§ 187 [count 2]). It was further alleged that Perla personally used, and personally and intentionally discharged, a firearm in the commission of the attempted murder (§ 12022.53, subds. (b), (c)).

A jury found Perla guilty of attempted premeditated and deliberate murder and first degree murder. The jury also found the personal use allegation true. The trial court sentenced Perla to state prison for a term of 25 years to life on the murder conviction and a concurrent life term, enhanced with the upper term of 10 years for use of the firearm, on the attempted murder conviction.

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5 All further statutory references are to the Penal Code unless specified otherwise.

DISCUSSION

A. *Substantial Evidence*

Perla contends the evidence is insufficient to support her first degree murder conviction under the provocative act murder doctrine because none of her acts was sufficiently egregious to provide a deadly response from Canas.

1. *Standard of Review*

Our inquiry follows established principles of review. "In determining whether the evidence is sufficient to support a conviction . . . , 'the relevant question 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.] Under this standard, 'an appellate court in a criminal case . . . does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224, quoting *Jackson v. Virginia* (1979) U.S. 307, 319 [99 S.Ct. 2781].) "Rather, the reviewing court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*Ibid.*)

2. *Governing Law*

"The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first

or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander. [Citations.]" (*People v. Cervantes* (2001) 26 Cal.4th 860, 867; see also *People v. Concha* (2009) 47 Cal.4th 653, 663 (*Concha I*) [the provocative act murder doctrine is shorthand " 'for that category of intervening-act causation cases in which, during commission of a crime, the intermediary (i.e., a police officer or crime victim) is provoked by the defendant's conduct into [a response that results] in someone's death.' [Citation.]")

Under this doctrine, " '[w]hen the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felon, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life.' [Citation.]" (*People v. Cervantes*, *supra*, 26 Cal.4th at p. 868.)

"However, the defendant is liable only for those unlawful killings proximately caused by the acts of the defendant or his accomplice. ([*People v.*] *Roberts* [1992] 2 Cal.4th [271,] 320.) 'In all homicide cases in which the conduct of an intermediary is the actual cause of death, the defendant's liability will depend on whether it can be demonstrated that his own conduct *proximately caused* the victim's death . . . .' (*People v. Cervantes*[, *supra*,] 26 Cal.4th [at p.] 872.) '[I]f the eventual victim's death is not the natural and probable consequence of a defendant's act, then liability cannot attach.'

([*People v.*] *Roberts, supra,* 2 Cal.4th at p. 321.) Our prior decisions make clear that, where the defendant perpetrates an inherently dangerous felony, the victim's self-defensive killing is a natural and probable response. (See, e.g., *People v. Gilbert* (1965) 63 Cal.2d 690, 705; *People v. Caldwell* (1984) 36 Cal.3d 210, 220-222.)" (*Concha I, supra*, 47 Cal.4th at p. 661.)

A key issue regarding the application of the doctrine is whether the defendant committed a provocative act (e.g., the physical or "actus reus" element) that proximately caused (e.g., the mental or "mens rea" element) the killing. (*Concha I, supra*, 47 Cal.4th at p. 660; *People v. Briscoe* (2001) 92 Cal.App.4th. 568, 582 ["Cases often discuss these two elements [actus reus and mens rea] in terms of whether the defendant committed a *provocative act* which *proximately caused* the killing."])

To constitute a provocative act, the defendant "must commit an act that provokes a third party to fire a fatal shot." (*People v. Briscoe, supra*, 92 Cal.App.4th at p. 582.) "In cases in which the underlying crime does not involve an intent to kill . . . the mere participation in the underlying criminal offense is not sufficient to invoke the doctrine of provocative act murder." (*Id.* at pp. 582-583.) In addition, the conduct must demonstrate malice, which is properly implied when "the defendant commits an act with a high probability that it will result in death and does so with a base antisocial motive or a wanton disregard for human life." (*Id.* at p. 583.) "Unless the defendant's *conduct* is sufficiently provocative of a lethal response, it cannot support the finding of implied malice necessary for a verdict of guilt on a murder charge. [Citations.] Thus, a central inquiry in determining a defendant's criminal liability for a killing committed by a

resisting victim is whether the defendant's conduct was sufficiently provocative of lethal resistance to support a finding of implied malice. [Citations.]" (*Id.* at p. 583.)

"The prosecutor must also establish that the defendant's conduct proximately caused the killing. Courts use traditional notions of concurrent and proximate cause in order to determine whether the killing was the result of the defendant's conduct. [Citations.] To be considered the proximate cause of the victim's death, the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical. [Citations.] A defendant's provocative acts must actually provoke a victim response resulting in an accomplice's death. [Citation.]" (*People v. Briscoe*, *supra*, 92 Cal.App.4th at pp. 583-584, fn. omitted.)

"The timing of events is critical. By necessity, the provocative act must occur before a victim may make a lethal response. [Citation.] There may be more than one act constituting the proximate cause of the killing. [Citations.] If the defendant commits several acts but only one of them actually provoked a lethal response, only that act may constitute the provocative act on which culpability for provocative act murder can be based. [Citations.] When the chain of causation is somewhat attenuated, the jury decides whether murder liability attaches or not. [Citations.]" (*People v. Briscoe*, *supra*, 92 Cal.App.4th at p. 584; see also *People v. Roberts*, *supra*, 2 Cal.4th at p. 320, fn. 11 ["[T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote," and thus "[o]rdinarily the question will be for the jury, though in some instances undisputed evidence may reveal a cause so remote that a court may properly decide that no rational trier of fact could find the needed nexus."])

3. *Analysis*

Perla argues she did not engage in any acts in conscious disregard for life that would provoke a lethal response from Canas, inasmuch as she neither initiated the assault against Canas nor intended to kill him or anyone else.

The evidence in the record, as found by the jury, shows otherwise. Perla had the rifle in the car before she picked up Jorge; it was her idea to meet and assault Canas at the location where Canas intended to pick up his young daughter; Perla wanted to assault Canas because he allegedly was harassing her brother Ricardo; when Morales started fighting with Canas, Perla stayed near the car where the rifle was located; after Canas appeared to get the upper hand on Morales, Morales pulled a knife on, and cut, Canas; after Canas threw him to the ground, Morales next ran back to the car where Perla was waiting; Perla grabbed her rifle from her car, cocked it and pointed it at Canas before she handed it off to Morales, ostensibly for him to use against Canas; Canas, fearing for his life when he saw Perla hand the rifle to Morales, ran at Morales and the two struggled over the rifle; during their struggle, Canas was shot three times; and after Canas wrestled the rifle away from Morales, within a few seconds Canas shot Morales.

We conclude this evidence, which is substantial, amply supports the jury's implied finding that Perla's conduct, as opposed to that of her accomplice (see *People v. Antick* (1975) 15 Cal.3d 79, 91-92, disapproved on other grounds as stated in *People v. McCoy* (2001) 25 Cal.4th 1111, 1122), was sufficiently provocative of a lethal response from Canas. (See *People v. Briscoe*, *supra*, 92 Cal.App.4th at p. 583 [conduct that initiates a gun battle may constitute a provocative act].) "A defendant can be liable for the unlawful

killings of both the intended victim and any unintended victims. ' "[T]here is no requirement of an unlawful intent to kill *an intended victim.* The law speaks in terms of an unlawful intent to kill *a* person, not *the* person *intended to be killed*" ' [Citations.]" (*Concha I, supra*, 47 Cal.4th at p. 660.)

In addition, we note the jury also found Perla committed attempted murder of Canas and personally used a firearm in connection with the attempt. Significantly, we note Perla is *not* challenging the jury's *explicit* finding she "intended to kill" for purposes of attempted murder. Attempted murder is a provocative act sufficient to support murder liability. (See *People v. Gallegos* (1997) 54 Cal.App.4th 453, 460-461.)

Certainly, the jury was entitled to consider the inferences Perla urges in this appeal (e.g., her acts were insufficient to provoke a lethal response from Canas, and she did not intend to kill). (*People v. Roy* (1971) 18 Cal.App.3d 537, 552, disapproved on other grounds as stated in *People v. Ray* (1975) 14 Cal.3d 20, 32 ["Sufficiency of provocation and whether a defendant in fact acted under such provocation are questions of fact for the jury"], disapproved on other grounds as stated in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) Just as certain, however, the jury also was entitled to reject those inferences. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 496; see also *People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258.)

For the same reasons, we conclude there is sufficient evidence to support the jury's (implied) finding that Perla's provocative acts proximately caused the killing of Morales. That is, there is abundant evidence in the record to support the finding that Morales's death was the "natural and probable consequence" of Perla's acts of cocking the rifle *she*

brought to assault Canas. (See *Concha I, supra*, 47 Cal.4th at p. 661.) A reasonable jury could infer from such evidence that Perla's acts proximately caused the killing.

B. *Instructional Error—CALCRIM Nos. 560 and 561*

Perla next complains the trial court erred when it instructed the jury on provocative act murder using CALCRIM No. 560,[6] rather than CALCRIM No. 561.[7]

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6 CALCRIM No. 560 provides: "[The defendant is charged [in Count _____] with _____<*insert underlying crime*>.] The defendant is [also] charged [in Count _____] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.

"To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

"1. In (committing/ [or] attempting to commit) _____<*insert underlying crime*>, the defendant intentionally did a provocative act;

"2. The defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;

"3. In response to the defendant's provocative act, _____<*insert name or description of third party*> killed _____<*insert name of decedent*>;

"AND

"4. _____'s <*insert name of decedent*> death was the natural and probable consequence of the defendant's provocative act.

"A *provocative act* is an act:

"1. [That goes beyond what is necessary to accomplish the _____<*insert underlying crime*>;]

"[AND

"2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

"In order to prove that _____'s <*insert name of decedent*> death was the *natural and probable consequence* of the defendant's provocative act, the People must prove that:

"1. A reasonable person in the defendant's position would have foreseen that there was a high probability that his or her act could begin a chain of events resulting in someone's death;

"2. The defendant's act was a direct and substantial factor in causing _____'s <*insert name of decedent*> death;

"AND

"3. _____'s <*insert name of decedent*> death would not have happened if the defendant had not committed the provocative act.

"A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

"<*Multiple Provocative Acts*>

"[The People alleged that the defendant committed the following provocative acts: _____<*insert acts alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts. However, you do not all need to agree on which act.]

"<*Independent Criminal Act*>

["A defendant is not guilty of murder if the killing of _____<*insert name of decedent*> was caused solely by the independent criminal act of someone else. An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]

"<*Degree of Murder*>

"[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.

"To prove that the defendant is guilty of first degree murder, the People must prove that:

"1. As a result of the defendant's provocative act, _____<*insert name of decedent*> was killed during the commission of _____<*insert Pen. Code, § 189 felony*>;

"AND

"2. Defendant intended to commit _____<*insert Pen. Code, § 189 felony*> when (he/she) did the provocative act.

"In deciding whether the defendant intended to commit _____<*insert Pen. Code, § 189 felony*> and whether the death occurred during the commission of <*insert Pen. Code, § 189 felony*>, you should refer to the instructions I have given you on _____<*insert Pen. Code, § 189 felony*>.

"Any murder that does not meet these requirements for first degree murder is second degree murder.]

"[If you decide that the defendant committed murder, that crime is murder in the second degree.]"

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7 CALCRIM No. 561 provides: "[The defendant is charged [in Count _____] with _____<*insert underlying crime*>.] The defendant is [also] charged [in Count _____] with murder. A person can be guilty of murder under the provocative act doctrine even if someone else did the actual killing.

"To prove that the defendant is guilty of murder under the provocative act doctrine, the People must prove that:

"1. The defendant was an accomplice of _____<*insert name[s] or description[s] of alleged provocateur[s]*> in (committing/ [or] attempting to commit) _____<*insert underlying crime*>;

"2. In (committing/ [or] attempting to commit) _____<*insert underlying crime*>, _____<*insert name[s] or description[s] of alleged provocateur[s]*> intentionally did a provocative act;

"3. _____ <*insert name[s] or description[s] of alleged provocateur[s]*> knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life;

"4. In response to _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act, _____<*insert name or description of third party*> killed _____<*insert name of decedent*>;

"AND

"5. _____'s <*insert name of decedent*> death was the natural and probable consequence of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act.

"A *provocative act* is an act:

"1 [That goes beyond what is necessary to accomplish the _____<*insert underlying crime*>;]

"[AND

"2.] Whose natural and probable consequences are dangerous to human life, because there is a high probability that the act will provoke a deadly response.

"The defendant is an *accomplice* of _____<*insert name[s] or description[s] of alleged provocateur[s]*> if the defendant is subject to prosecution for the identical offense that you conclude _____<*insert name[s] or description[s] of alleged provocateur[s]*> (committed/ [or] attempted to commit). The defendant is subject to prosecution if (he/she) (committed/ [or] attempted to commit) the crime or if:

"1. (He/She) knew of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> criminal purpose to commit _____<*insert underlying crime*>;

"AND

"2. The defendant intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of _____<*insert underlying crime*>/ [or] participate in a criminal conspiracy to commit _____<*insert underlying crime*>).

"[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

"In order to prove that _____'s <*insert name of decedent*> death was the *natural and probable consequence* of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act, the People must prove that:

"1. A reasonable person in _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> position would have foreseen that there was a high probability that (his/her/their) act could begin a chain of events resulting in someone's death;

"2. _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> act was a direct and substantial factor in causing _____'s <*insert name of decedent*> death;

"AND

"3. _____'s <*insert name or description of decedent*> death would not have happened if _____<*insert name[s] or description[s] of alleged provocateur[s]*> had not committed the provocative act.

"A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused the death.

"<*Multiple Provocative Acts*>

"[The People alleged the following provocative acts: _____<*insert acts alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that:

"1. _____ <*insert name[s] or description[s] of alleged provocateur[s]*> committed at least one provocative act;

"AND

"2. At least one of the provocative acts committed by _____<*insert name[s] or description[s] of alleged provocateur[s]*> was a direct and substantial factor that caused the killing.

"However, you do not all need to agree on which provocative act has been proved.]

"<*Accomplice Deceased*>

"[If you decide that the only provocative act that caused _____'s <*insert name of deceased accomplice*> death was committed by _____<*insert name of deceased accomplice*>, then the defendant is not guilty of _____'s <*insert name of deceased accomplice*> murder.]

"<*Independent Criminal Act*>

"[A defendant is not guilty of murder if the killing of _____<*insert name or description of decedent*> was caused solely by the independent criminal act of someone other than the defendant or _____<*insert name[s] or description[s] of all alleged accomplice[s]*>. "An *independent criminal act* is a free, deliberate, and informed criminal act by a person who is not acting with the defendant.]

"<*Degree of Murder*>

"[If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.
"To prove that the defendant is guilty of first degree murder, the People must prove that:
"1. As a result of _____'s <*insert name[s] or description[s] of alleged provocateur[s]*> provocative act, _____<*insert name of decedent*> was killed while _____<*insert name[s] or description[s] of alleged provocateur[s]*> (was/were) committing _____<*insert Pen. Code, § 189 felony*>;
"AND
"2. _____<*insert name[s] or description[s] of alleged provocateur[s]*> specifically intended to commit _____<*insert Pen. Code, § 189 felony*> when (he/she/they) did the provocative act.

"In deciding whether _____<*insert name[s] or description[s] of alleged provocateur[s]*> intended to commit _____<*insert Pen. Code, § 189 felony*> and whether the death occurred during the commission of _____<*insert Pen. Code, § 189 felony*>, you should refer to the instructions I have given you on <*insert Pen. Code, § 189 felony*>.

"Any murder that does not meet these requirements for first degree murder is second degree murder.]

"[If you decide that the defendant committed murder, that crime is murder in the second degree.]"

1. *Forfeiture*

Generally, " '[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Fiu* (2008) 165 Cal.App.4th 360, 370.)

Here, the record shows trial counsel had myriad discussions regarding the jury instructions, including CALCRIM No. 560 which defense counsel referred to on several occasions as the governing instruction for provocative act murder. Moreover, before the court instructed the jury, it asked trial counsel if there were any further objections to the instructions or requests for additional instructions. Both the prosecutor and defense counsel responded no.

Although Perla's claim of instructional error was forfeited, we address the merits of that claim in light of her alternative argument that defense counsel rendered ineffective assistance by failing to request CALCRIM No. 561 in lieu of No. 560. (See *People v. Williams* (1998) 61 Cal.App.4th 649, 657 [addressing the merits of a claim, despite its forfeiture, because defendant asserted ineffective assistance of counsel].)

2. *No Instructional Error*

Perla contends the trial court erred by instructing the jury on provocative act murder under CALCRIM No. 560, rather than CALCRIM No. 561, which she claims is the recommended instruction when the provocative acts are committed by an accomplice. Perla contends there is a "critical distinction" between the two instructions based on the language of No. 561, which instructs the jury to find the defendant not guilty if it decides

the provocative acts that caused the accomplice's death were committed only by the accomplice, and not the defendant.[8] Thus, she contends the alleged instructional error permitted the jury to convict her of murder based solely on the provocative acts of Morales, contrary to the law of provocative act murder.

"In reviewing a claim of error in jury instructions in a criminal case, this court must first consider the jury instructions as a whole to determine whether error has been committed. [Citations.] We may not judge a single jury instruction in artificial isolation, but must view it in the context of the charge and the entire trial record." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1330-1331; see also *People v. Guiton* (1993) 4 Cal.4th 1116, 1130 [in examining the question of prejudice from instructional error, an appellate court should look to the entire record, including the evidence and arguments of counsel].)

"An appellate court cannot set aside a judgment on the basis of instructional error unless, after an examination of the entire record, the court concludes that the error has resulted in a miscarriage of justice. [Citation.] A miscarriage of justice occurs only when it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the error. [Citations]" (*People v. Moore*, *supra*, 44 Cal.App.4th at

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8 The portion of CALCRIM NO. 561 relevant to this analysis provides: "*<Accomplice Deceased>*

"[If you decide that the only provocative act that caused _____'s *<insert name of deceased accomplice>* death was committed by _____*<insert name of deceased accomplice>*, then the defendant is not guilty of 's _____*<insert name of deceased accomplice>* murder.]"

p. 1331; see also *People v. Kelly* (1992) 1 Cal.4th 495, 525 [when a defendant claims that a jury instruction misstated the law, a reviewing court considers the charge in its entirety to determine whether there is a reasonable likelihood that the jury misunderstood the applicable law].) We independently review the legal adequacy of a jury instruction. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

Here, we note CALCRIM No. 560 instructed the jury that Perla could not be guilty of provocative act murder unless the prosecution proved, among other elements, that "*defendant* [e.g., Perla] intentionally did a provocative act"; that "*defendant* knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life"; that "in response to the *defendant's* provocative act," Canas killed Morales; and that Morales's death "was the natural and probable consequence of the *defendant's* provocative act." (Italics added.)

Reviewing the instructions as a whole (see *People v. Moore*, *supra*, 44 Cal.App.4th at pp. 1330-1331), we independently conclude the jury was properly instructed that Perla could not be guilty of provocative act murder unless the prosecution proved it was *her acts*, as opposed to those of Morales, that proximately caused his death. In other words, the instruction did not permit the jury to find Perla guilty of provocative act murder based solely on the provocative acts of Morales, as she contends.

Our conclusion is further supported by counsel's argument to the jury. (See *People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.) The prosecutor argued that Perla was guilty of murder because *her* act of pulling out the rifle and handing it to Morales was dangerous and caused his death because Morales and Perla had "ambushed" Canas and

because Perla "introduced a rifle into the equation" in what had become a life and death struggle between the two men.

Defense counsel likewise argued to the jury that it was to focus on *Perla's* conduct—or lack thereof—in finding her not guilty of Morales's murder. Indeed, the defense argued that it was the independent acts of Morales and/or Canas (e.g., an independent intervening cause) that led to Morales's death, and that Perla's act of taking out the rifle and handing it to Morales was insufficient to convict her of murder under the provocative act murder doctrine.

Based on the instructional language given the jury and counsels' closing argument, we conclude that even if the trial court erred when it gave CALCRIM No. 560 and not CALCRIM No. 561, it is not reasonably probable that the jury misunderstood the applicable law and would have reached a result more favorable to Perla absent the error. (See *People v. Kelly*, *supra*, 1 Cal.4th at p. 525; *People v. Moore*, *supra*, 44 Cal.App.4th at p. 1331.)

C. *Instructional Error—Premeditation and Deliberation*[9]

In its instruction on provocative act murder under CALCRIM No. 560, the trial court told the jury: "If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree. [¶] To prove that the defendant is guilty of first degree murder, the People must prove that: [¶] One, as a result of the defendant's provocative act, Fernando Morales was killed during the commission of attempted

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9 We note the People have not raised forfeiture as an issue in connection with this claim of error. (See *People v. Hart*, *supra*, 20 Cal.4th at p. 622.)

willful, deliberate, and premeditated murder; and [¶] Two, defendant intended to commit attempted willful, deliberate, and premeditated murder when she did the provocative act. [¶] *In deciding whether the defendant intended to commit attempted willful, deliberate, and premeditated murder and whether the death occurred during the commission of attempted, willful, deliberate murder, you should refer to the instructions I have given you on attempted willful, deliberate, and premeditated murder.*" (Italics added.)

Pursuant to CALCRIM No. 601, the trial court also instructed the jury on the requirements for determining whether the attempted murder was premeditated and deliberate: "If you find the defendant guilty of attempted murder under Count 1, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully and with deliberation and premeditation. [¶] The defendant Perla Gonzalez acted willfully if she intended to kill when she acted. The defendant Perla Gonzalez deliberated if she carefully weighed the considerations for and against her choice and, knowing the consequences, decided to kill. The defendant Perla Gonzalez premeditated if she decided to kill before acting. [¶] The attempted murder was done willfully and with deliberation and premeditation *if either the defendant or Fernando Morales or both of them acted with that state of mind.*" (Italics added.)

Perla contends the trial court committed prejudicial error by instructing the jury on the above italicized portion of CALCRIM No. 601 because it permitted the jury to find her guilty of first degree murder without determining whether she *personally* acted deliberately and with premeditation.

Our Supreme Court recently addressed this exact issue involving a nearly identical jury instruction in *Concha I*, *supra*, 47 Cal.4th at p. 666. There, the court resolved once and for all that a defendant could be guilty of murder in the first degree under a provocative act murder theory if the defendant *personally* acted with deliberation and premeditation during the attempted murder. (*Id.* at p. 658.) In *Concha I* the trial court referred the jury to the instruction on attempt, which appropriately allows a defendant to be held vicariously liable for the mens rea of an accomplice. (See *id.* at p. 665 ["[F]or murder, a defendant cannot be held vicariously liable for the mens rea of an accomplice" but the "same is not true for an attempted murder that is willful, deliberate, and premeditated" in which case a "defendant may be vicariously liable for the premeditated and deliberate component of the means rea of an accomplice."])

However, our Supreme Court in *Concha I* concluded the trial court erred when instructing the jury on first degree murder, as opposed to attempted murder, "by not providing an instruction that explained that for a defendant to be found guilty of *first degree murder*, [the defendant] *personally* has to have acted willfully, deliberately, and with premeditation when [the defendant] committed the attempted murder." (*Concha I*, *supra*, 47 Cal.4th at p. 666.) The court thus remanded the matter to the court to determine whether the instructional error prejudiced defendants with respect to their first degree murder conviction.

On remand, the court in *People v. Concha* (2010) 182 Cal.App.4th 1072, 1075 (*Concha II*), review denied June 9, 2010, held the instructional error harmless beyond a reasonable doubt because a rational jury would have found based on the evidence that

each defendant deliberated and premeditated the attempted murder of the victim, who in defending himself killed one of the accomplices.

We note the court in *Concha II* considered at length the proper test to be used on appeal where the jury has not been instructed on an element of the offense. Before selecting the harmless error standard, the court thoroughly reviewed California and United States Supreme Court decisions involving instructional errors of omission and misdescription of offenses. (*Concha II, supra*, 182 Cal.App.4th at pp. 1085-1087.) In particular, the *Concha II* court examined the reasoning of the majority in *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827], where the United States Supreme Court noted the harmless error test strikes the appropriate balance between protecting the defendant, on the one hand, and maintaining public respect and confidence in the court system, on the other hand.

Citing Justice Baxter's concurring opinion in *People v. Cross* (2008) 45 Cal.4th 58, 71, the court in *Concha II* further elaborated that the harmless error test does not depend on proof that the jury *actually* rested its verdict on the proper ground, but on proof beyond a reasonable doubt that a rational jury would have found guilt even absent the error. (*Concha II, supra,* 182 Cal.App.4th at p. 1087.) The test may require a detailed examination of the record and the evidence produced by the defendant. (*Ibid.*) When, for example, the defendant does not contest the omitted element and fails to raise sufficient evidence to support a contrary finding, the error should be deemed harmless. (*Ibid.*)

Like the court in *Concha II*, we recognize a minority view exists that concludes that where there is an omission or misdirection to the jury as to an element of the offense, using the harmless error test improperly allows the reviewing court to reweigh the evidence. However, that view is still a minority view. (See *Concha II*, *supra*, 182 Cal.App.4th at p. 1086, fn. 9.) We are bound to follow the clear direction of the California Supreme Court and the United States Supreme Court.

Finally, we note that while the jury in the case before us asked a question during deliberations about Perla's mental state, we conclude that fact alone does not alter application of the harmless error standard. We agree the question was an important one on the issue of whether further instruction was needed. The court's answer to the jury question constitutes the instructional error. If we were to take a further step and conclude the jury question alone requires reversal of this issue, we would be applying a per se reversible error standard, which is contrary to substantial controlling authority. We are unwilling to take that step.

Briefly, in *Concha II* the victim drove up to his business late at night, and parked his car in an alley. Before he got out of his car, the victim was met by two men who threatened him and attempted to rob him. Two other men stood watch nearby. The victim briefly fought with his four attackers in the alley and then began running down a street. The four men followed the victim for a quarter of a mile. As the victim ran, he called out for help and tried to use his mobile phone. His attackers caught up with him as he tried to scale a fence, and began to stab the victim in the back. The victim remembered he had a small pocket knife, he pulled it out, faced his four attackers and

began to stab them out of fear for his own life. The victim again ran from his attackers to the front door of a nearby house, where he cried out for help and banged on the door. Eventually the occupants of the house opened the door, saw the victim bleeding profusely from multiple cuts and called the police. (*Concha II, supra*, 182 Cal.App.4th at pp. 1076-1077.)

According to the defendants, because the parties and the jury were unaware of the *personal* willful, deliberate, and premeditation requirement as to the first degree murder count, the jury could not have made, and did not make, the requisite finding to support that conviction, nor could the court do so on remand. The court rejected this argument, and reasoned: "Defendants, however, misperceive the harmless error standard applicable to a case such as this one, in which the instructional error did not require the jury to make a finding on an essential element of the offense—a willful, deliberate and premeditated killing. As discussed above, based on the authorities, we do not have to determine if the verdicts reflect that the jury actually determined that both defendants deliberated and premeditated the attempted murder. *Rather, we may review the entire record to determine whether it is clear beyond a reasonable doubt that a rational jury would have made the necessary findings of premeditation and deliberation absent the error.*" (*Concha II, supra*, 182 Cal.App.4th at p. 1089, italics added.)

The court then reviewed the evidence in the record and concluded from it that a "rational jury would have found that each defendant deliberated and premeditated the attempted murder of [the victim]." (*Concha II, supra*, 182 Cal.App.4th at p. 1089.) Specifically, the court found that two defendants confronted the victim in the alley,

demanded money and twice threatened to kill him. After the victim resisted his four attackers, they fought with him in the alley, and then chased him for a quarter of a mile with beer bottles, which they used to beat and stab the victim. The court noted the assault against the victim was sufficiently severe that the victim received multiple stab wounds to his head and body, requiring 60 stitches to close. (*Ibid.*)

The court in *Concha II* also noted that the jury returned guilty verdicts on the attempted murder counts, which required the jury to find that each defendant intended to kill the victim, or shared in the other's intent to kill, and that the jury found true each defendant personally committed a provocative act during the attempted murder of the victim and one of the defendants personally used a deadly weapon—a beer bottle—during the attempted murder. (*Concha II*, *supra*, 182 Cal.App.4th at p. 1090.)

In response to the argument of defendants that the evidence at trial was controverted regarding their lack of premeditation and deliberation, the court found the evidence submitted by defendants "dealt with their participation in the murder and their intent to kill, and the jury found against them on those points. [Defendants] did not contest the facts that go specifically to premeditation and deliberation—the confrontation in the alley, the chase, the cornering of [the victim] and the repeated stab wounds with a deadly weapon. Premeditation and deliberation was submitted to the jury on the attempted murder counts; thus defendants had the opportunity to address those elements. The facts supporting premeditation and deliberation are uncontradicted once the intent element was established. Although the jury verdict is deficient in that there was not a finding of premeditation and deliberation as to each defendant, the jury did nevertheless

render a verdict of first degree murder against both defendants. Based on the evidence, the jury verdict would have been the same absent the error." (*Concha II*, *supra*, 182 Cal.App.4th at p. 1090.)

We conclude *Concha I* and *Concha II* are instructive here.[10] Like the trial court in *Concha I*, the trial court here instructed the jury on premeditation and deliberation for first degree murder by referring the jury to the instruction on first degree *attempted* murder, which as *Concha I* teaches, was error because unlike attempted murder, for murder a "defendant cannot be held vicariously liable for the mens rea of an accomplice."[11] (*Concha I*, *supra*, 47 Cal.4th at p. 665.) Nonetheless, like the court in *Concha II*, we conclude the trial court's instructional "error" was harmless beyond a reasonable doubt because the evidence before us shows a rational jury would have found Perla *personally* deliberated and premeditated the attempted murder of Canas.

Indeed, the evidence of Perla's premeditation and deliberation in the attempted murder of Canas is equally as strong, if not stronger, than the evidence of attempt against

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10 That there were two defendants in *Concha I* and *II*, whereas there is only one defendant here—Perla, makes absolutely no difference in our analysis because just like Morales in the case at bar, one of the accomplices in *Concha I* and *II* also died (e.g., a murder occurred). If the court in *Concha II* had ruled the jury could have found the dead accomplice alone premeditated and deliberated the attempt and ignored the conduct of the other three accomplices, the court there could not have reached the conclusion it did—that the jury instruction, while deficient, resulted in harmless error.

11 We note that defense counsel participated in a myriad of discussions regarding jury instructions and never requested additional instruction on Perla's personal intent to murder the victim. Nor did defense counsel argue the jury was required to make specific findings as to her intent to murder the victim. We understand of course that the state of the law during this trial would have led counsel to accept the trial court's version of the law, as instructed, inasmuch as *Concha I* was decided after the trial was concluded.

the defendants in *Concha I* and *II*. In addition, we note such evidence against Perla was uncontroverted, in contrast to the evidence of her intent to kill, which the jury found in convicting her of first degree attempted murder. Perla has not challenged that finding on appeal.

The record contains uncontroverted evidence showing Perla *personally* premeditated and deliberated the attempted murder of Canas: *Perla* had been outside Curiel's house the night before Morales was killed because of a dispute between Canas and her brother Ricardo; *Perla* planned the assault on Canas the following day; *Perla* called Curiel on the morning of the killing and learned that Canas intended to pick up his daughter at a predetermined location; *Perla* first drove Morales and Jorge to Curiel's house to make sure Canas's daughter was still at home and had not been picked up by Canas; *Perla* and her accomplices discussed how the assault against Canas would take place; *Perla* drove to the intersection where Canas was to pick up his daughter, parked the car and waited for Canas; *Perla brought a loaded rifle to the assault*; *Perla* stood about 10 feet away from where Canas and her boyfriend fought, by her car where *her* loaded rifle was located; *Perla* did not attempt to break up the fight between the two men; *Perla* grabbed her loaded rifle from the car after Canas successfully fought off Morales's knife attack; *Perla* grabbed her rifle on her own accord; *Perla* cocked her rifle with her left hand and pointed it at Canas; and *Perla* next handed the rifle, which was ready to fire, to Morales, as Morales ran toward her after the assault had turned deadly.

Our dissenting colleague largely ignores most of this evidence in arguing that the "extent of Perla's *participation* in the attempted murder of Canas appears to have been

limited to her handing the firearm to Morales." (Conc. & dis. opn, p. 3, italics added.) We note, however, the issue is not merely Perla's *participation* in the attempted murder of Canas, but rather whether she *personally* premeditated and deliberated in connection with that attempt. In any event, Perla clearly did more than merely hand the rifle to Morales, as it was *Perla's* idea, among other things, to assault Canas in the first place; it was *Perla's* rifle; it was *Perla's* decision to bring the *loaded* rifle to the assault; and it was *Perla's* decision to pull out the rifle from her car, when the assault had turned deadly, cock it and hand it to Morales to use against Canas.

Unlike our dissenting colleague, we conclude such evidence amply proves the reflection in advance and weighing of considerations sufficient to establish beyond a reasonable doubt that a rational jury would have found *Perla*, as opposed to her accomplice, *personally* premeditated and deliberated the attempted murder of Canas. (See *Concha II*, *supra*, 182 Cal.App.4th at pp. 1075, 1090.)

Lastly, we also disagree with our dissenting colleague that the trial court "directed the jury to an instruction that *grossly* misstated the law regarding a key distinction between first and second degree murder." (Conc. & dis. opn., p. 4, italics added.) As we already have noted the trial court here relied on CALCRIM Nos. 560 and 601 as they *then* existed, before *Concha I* was decided by our Supreme Court. Although *Concha I* concluded these instructions were improper as we discussed *ante*, we do not agree it was a gross misstatement of the law, nor do we agree that this error took on additional significance because the trial court repeated what was then a proper instruction a second

time during deliberations in response to a jury question. For these reasons, we conclude the instructional error by the trial court was harmless.

D. *Instructional Error—Lawful Killing for Provocative Act Murder*[12]

Perla next contends the jury should have been told the provocative act theory of murder could not properly apply if Canas used lethal force solely to prevent an escape, rather than in response to a provocative act. Because this principle exonerates, the argument runs, it therefore constitutes a defense, and either the trial court had a sua sponte duty to give an appropriate instruction delineating it for the jury, or defense counsel rendered Perla ineffective assistance for failing to request such an instruction.

The trial court's instruction to the jury included the following paragraph from CALCRIM No. 560: "A defendant is not guilty of the murder of Fernando Morales—or I am sorry—if the killing of Fernando Morales was caused solely by the independent criminal act of someone else. An independent criminal act is a free, deliberate, and informed criminal act by a person who is not acting with the defendant."

During closing argument, counsel reinforced the need for the jury to evaluate "self-defense" in assessing whether Canas's killing of Morales was criminal and, thus, an independent act undermining the provocative act murder doctrine. The prosecutor argued that Canas had the right to defend himself in light of the deadly attack by Morales.

Defense counsel, however, contended that Canas had no right to shoot Morales in the back as he was running away and even contended that one shot was fired while

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12 See footnote 9, *post*.

Morales was lying on the ground. Defense counsel also contended that Canas's shooting of Morales was not self-defense and, because it was not, "[t]hat's an independent act." As such, defense counsel contended, "[t]hat [independent act] is something that gets in between, and you cannot then justify putting Fernando Morales's[s] . . . death on [Perla]."

In reply, the prosecutor argued that for Canas to be acting in self-defense, there was no requirement that he only fire one shot or shoot at a particular area of the body. The prosecutor also told the jury that Canas had the right to defend himself and that Canas was not an intervening criminal act because he committed no crime by defending himself.

We have found no case to support Perla's argument that the trial court erred when it failed to give sua sponte an instruction on self-defense as it pertains to the victim Canas and whether he was legally justified in shooting Morales as Morales ran away.[13] This is because the issue of whether the killing was lawfully justified is rooted in principles of proximate cause, and not self-defense. (See *Concha I*, *supra*, 47 Cal.4th at pp. 660-661; *People v. Cervantes*, *supra*, 26 Cal.4th at p. 866.) Indeed, our Supreme Court in *Concha I* recently confirmed that principles of proximate cause govern in determining whether a killing is attributable to the (provocative) act of defendant: "[T]he defendant is liable only for those unlawful killings proximately caused by the acts of the defendant or his accomplice. [Citation.] 'In all homicide cases in which the conduct of an

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13 Perla cites *People v. Keys* (1944) 62 Cal.App.2d 903, 916, as her only support the trial court erred when it failed to give the self-defense instruction. However, *People v. Keys* has absolutely nothing to do with provocative act murder, and thus is inapposite here.

intermediary is the actual cause of death, the defendant's liability will depend on whether it can be demonstrated that his own conduct *proximately caused* the victim's death . . . .' [Citation.] '[I]f the eventual victim's death is not the natural and probable consequence of a defendant's act, then liability cannot attach.' [Citation.] " (*People v. Concha*, *supra*, 47 Cal.4th at p. 661.)

Thus, the trial court here did not err when it failed *sua sponte* to instruct on self-defense as it pertained to Canas and whether he was legally justified in shooting Morales just seconds after Canas, who himself was shot three times, wrestled the rifle away from Morales. Defense counsel also did not render ineffective assistance by neglecting to ask for such an instruction, and instead properly focused his argument on proximate cause in arguing that Canas was an independent intervening cause, absolving Perla of liability for the murder of Morales, which the jury rejected.[14]

E. *Instructional Error—Failing to Instruct on Involuntary Manslaughter*

Finally, Perla contends the trial court erred when it failed to instruct the jury on involuntary manslaughter as a lesser included offense of murder. Defense counsel requested the jury be instructed on "all lesser-included offenses to both Counts 1 and 2," including involuntary manslaughter based on Perla's act of brandishing the gun. (See generally § 417.)

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14 However, assuming arguendo the trial court erred when it failed to instruct the jury that Canas had to be acting in lawful self-defense when he fired the rifle in the direction of, or at, Morales after he wrestled it away from Morales, we conclude that error was harmless because it was not "reasonably probable" Perla would have obtained a more favorable outcome had the alleged instructional error not occurred. (See *People v. Breverman* (1998) 19 Cal.4th 142, 178.)

The trial court refused to instruct on involuntary manslaughter, ruling: "Here is the problem I have [with involuntary manslaughter]. I think I said it before. I don't know how you get around this. . . . [T]he problem is with provocative act murder, provocative act provides if it's proven that she intentionally—I think all the evidence is she took the gun out . . . I am assuming that that evidence is correct; maybe it isn't. But if the evidence—most of the evidence in this case has suggested that Ms. Gonzalez took the gun out of the car and at some point handed it to Fernando Morales. [¶] Provocative act gives—as long as that's intentional—and I don't see any evidence it wasn't, getting the gun out and giving it to him in that situation . . . . [¶] The argument on voluntary [manslaughter] is that self-defense—or imperfect self-defense or heat of passion might negate the intent and therefore it would mean that it wasn't an intentional provocative act. But here I can't see how it wasn't intentional."

It is axiomatic that a " 'trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.' [Citation.]" (*People v. Lacefield* (2007) 157 Cal.App.4th 249, 256; see also *People v. Moye* (2009) 47 Cal.4th 537, 548.) "On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support . . . . [¶] . . . . 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed. [Citations.]" (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.)

Although involuntary manslaughter includes a killing that "occurs during the commission of a " 'noninherently dangerous felony,' " " 'the killing *must* be

unintentional' " and without malice. (*People v. Dixon* (1995) 32 Cal.App.4th 1547, 1556.) Where the evidence unmistakably shows an intentional killing, no instruction on involuntary manslaughter is required. (*Id.* at pp. 1556-1557 [no involuntary manslaughter instruction required when the defendant fired five or six shots at victim, twice hitting the victim in the back]; *People v. Hendricks* (1988) 44 Cal.3d 635, 643 [no involuntary manslaughter instruction required when, although the defendant denied intent to kill, he shot victims six times and five times respectively at point-blank range].)

Here, the evidence shows Perla grabbed the rifle, cocked it and handed it to Morales after Morales had pulled a knife on, and cut, Canas, during a fight instigated by Morales and Perla, his accomplice, that had turned deadly. Based on such evidence, the jury determined Perla intentionally did a provocative act, she knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life. On this record, we conclude the trial court did not err in refusing to instruct on involuntary manslaughter.

DISPOSITION

The judgment of conviction is affirmed.

Benke

BENKE, Acting P. J.

I CONCUR:

IRION, J.

Aaron, J., concurring and dissenting:

I concur with the majority opinion, with the exception of section C (maj. opn., p. 25), because I disagree with the majority's conclusion that this court may deem the trial court's instructional error on the intent element of provocative act murder harmless beyond a reasonable doubt.

The majority concludes that the trial court erred in instructing the jury with respect to premeditation and deliberation in relation to the charge of provocative act murder, but further concludes that the error was harmless beyond a reasonable doubt because, in its view, "the evidence before us shows a rational jury would have found Perla *personally* deliberated and premeditated the attempted murder of Canas." (Maj. opn., p. 32.)

During deliberations, the jury in this case sent a note to the trial court requesting an instruction on second degree murder. The jury note reads, "Is #39 for second degree murder?[1] We need an explanation of 2nd degree murder." In response, the court replied, "No," and referred the jury to CALCRIM 560, which in turn, referred the jury to the instruction on attempted murder. That instruction informed the jury that it could find that Perla acted with premeditation and deliberation "if *either* [Perla] or Fernando Morales or both of them acted with that state of mind." (Italics added.) This was a significant misstatement of law because, in fact, in order to find Perla guilty of first degree provocative act murder, the jury was required to find that she *personally* acted with premeditation and deliberation. (See *People v. Concha* (2009) 47 Cal.4th 653, 665

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1 Instruction 39 was CALCRIM 570, "Voluntary Manslaughter: Heat of Passion — Lesser Included Offense."

(*Concha I*) ["[A] defendant charged with murder or attempted murder can be held vicariously liable for the actus reus of an accomplice, but, for murder, a defendant cannot be held vicariously liable for the mens rea of an accomplice"], citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

In *People v. Concha* (2010) 182 Cal.App.4th 1072 (*Concha II*), on which the majority heavily relies, the Court of Appeal concluded that the error in failing to instruct the jury that it must find that the defendant *personally* acted willfully, deliberately, and with premeditation in order to find a defendant guilty of first degree murder, was harmless because "[t]he evidence was such that beyond a reasonable doubt a rational jury would have found that each defendant deliberated and premeditated . . . ." (*Id.* at p. 1089.) The *Concha II* court reached this conclusion on the ground that there was no basis to distinguish between the conduct of the four defendants, since, as the court noted, it was undisputed that all four defendants "chased [the victim] for a quarter mile with deadly weapons, and participated in one fashion or another in the repeated and brutal stabbing and beating of [the victim] after cornering him . . . ." (*Id.* at p. 1090.) Here, in contrast, there is a significant distinction between the conduct of Perla and that of her accomplice, Morales. While the jury found that Perla *used* a firearm, under Penal Code section 12022.53, subdivision (b), it also found that she *did not* intentionally *discharge* a firearm during the commission of the attempted murder, under Penal Code section 12022.53, subdivision (c). Based on these findings, one can reasonably infer that the jury

concluded that Perla handed the gun to Morales, but also concluded that she did not shoot Canas.[2]

The majority's contention that "the evidence of Perla's premeditation and deliberation in the attempted murder of Canas is equally as strong, if not stronger than the evidence of attempt against the defendants in *Concha I and II*" (maj. opn., pp. 32-33), is simply not supported by the evidence. In *Concha*, it was clear that all of the defendants actively participated in the beating and stabbing of the victim; in this case, in contrast, the extent of Perla's participation in the attempted murder of Canas appears to have been limited to her handing the firearm to Morales. Given that Morales fired at Canas multiple times, there was no real question that Morales premeditated and deliberated the shooting. Because Morales shot Canas and Perla did not, in this case, unlike in *Concha II*, there was clearly a factual basis upon which a rational jury could have found that Morales premeditated and deliberated the shooting, but that Perla did not. There is thus a real possibility that the instructional error in this case led the jury to find that Perla premeditated and deliberated based not on a finding that she *personally* premeditated and deliberated, but rather, on a finding that *Morales* did.

Another critical factor that distinguishes the error in this case from the error in *Concha* is the context in which the instructional error occurred. After having heard all of

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2 The majority speculates that because the jury found that Perla used a weapon, under Penal Code section 12022.53, subdivision (b), "it is possible the jury concluded Perla fired the weapon, but not intentionally." (Maj. opn., p. 7, fn. 4.) It is far more likely that the jury's finding that Perla used a weapon is based on the undisputed fact that she took the firearm out of her car and handed it to Morales.

the evidence, arguments, and jury instructions, and having deliberated for some period of time, the jury in this case specifically requested an instruction on second degree murder. In response, the court directed the jury to an instruction that grossly misstated the law regarding a key distinction between first and second degree murder. Thus, the error in this case was not, as the majority suggests, simply failing to instruct on an element of the offense or providing the jury with an erroneous instruction on the mental state required to find the defendant guilty, but rather, providing that erroneous instruction to a deliberating jury that had asked for guidance on this specific issue. The majority inexplicably fails to address the impact of the trial court's erroneous response to the jury's pointed question in its harmless error analysis, other than to state, "If we were to . . . conclude the jury question alone requires reversal of this case, we would be applying a per se reversible error standard, which is contrary to substantial controlling authority."[3] (Maj. opn., p. 29.)

Instead, in assessing whether the instructional error was harmless beyond a reasonable doubt, the majority limits its inquiry to the abstract question of whether a hypothetical "rational jury" would have found that Perla premeditated and deliberated.

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3 In making this assertion, the majority constructs a classic straw man argument. I am not suggesting that "the jury instruction alone" requires reversal, nor that a trial court's providing an erroneous instruction to a deliberating jury would, in every instance, require reversal. Rather, I have concluded that the instructional error requires reversal *in this case*, because (1) the jury specifically requested that the trial court provide an instruction on second degree murder; (2) in response, the court provided the jury with an incorrect instruction; *and* (3) under the facts of this case, the error in the instruction may have led the jury to find Perla guilty of first degree murder based on a finding that *Morales* premeditated and deliberated, and *not* on a finding that Perla personally premeditated and deliberated.

However, in assessing the impact of the error, one cannot ignore the fact that the *actual* jury specifically requested an instruction on second degree murder and that in response, the court directed the jury to an instruction that misstated the critical intent element.

This court has recognized that, "there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253.) During its deliberations, the jury in this case sent the court a note requesting a specific instruction, and in response, the court provided an instruction that was legally incorrect. In view of the circumstances in this case, the jury's request for an instruction on second degree murder was clearly a rational one. The fact that in response, the trial court directed the jury to an instruction that was incorrect as to a critical distinction between first degree murder and second degree murder, i.e., premeditation and deliberation, and that effectively invited the jury to find Perla guilty of first degree murder if it found that *Morales* premeditated and deliberated, precludes a determination that the instructional error was harmless beyond a reasonable doubt.

AARON, J.