In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

PERLA ISABEL GONZALEZ,

Defendant and Appellant.

Case No. S189856

Fourth Appellate District, Division One, Case No. D055698
San Bernardino County Superior Court, Case No. FVA024527
The Honorable Michael A. Knish, Commissioner

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

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ISSUES FOR REVIEW

In granting review, this Court specified the following issues: (1) Was the evidence sufficient to convict defendant of first degree murder? (2) Was the instructional error in failing to tell jurors that defendant had to personally premeditate an attempted murder in order to be guilty of first degree provocative act murder harmless beyond a reasonable doubt?

INTRODUCTION

Angry over the treatment her brother received from Roberto Canas-Fuentes (Canas), appellant recruited her boyfriend, Fernando Morales, to join her in ambushing Canas. Appellant drove them to the ambush site with a loaded rifle in her car. Morales began the ambush by assaulting Canas with fists, but Canas fought back. Morales escalated his attack by pulling a knife and cutting Canas on the cheek, but Canas upended Morales and disarmed him. Appellant, who had watched the contest, retrieved the rifle from her car and cocked it. When Morales ran to her, she gave the rifle to him. Seeing appellant's actions and fearing for his life, Canas ran to Morales, took the rifle from Morales and shot him, resulting in his death.

Appellant seeks to immunize herself from provocative act liability by claiming she was only an aider and abettor to Morales's intended deadly assault. Consistent with the usual rules governing proximate cause for provocative act liability, this Court should reject the effort to limit the proximate cause assessment by imposing appellant's artificial boundary. As the jury found, appellant intentionally acted to assist Morales in his effort to kill Canas and her acts directly, naturally and probably resulted in Morales's death.

Appellant similarly seeks to restrict the scope of harmless error review for an instruction that potentially relieved the jury of its duty to find personal premeditation and deliberation for first degree murder by

expanding the basis for finding a contested issue. This Court should reject appellant's effort by recognizing that the instructional error involving premeditation and deliberation for first degree murder is not "contested" when a defendant only asserts lack of intent to kill, the jury finds against appellant on that issue, and the evidence of premeditation and deliberation is overwhelming and unchallenged.

STATEMENT OF THE CASE

The District Attorney of San Bernardino County filed an amended information on April 10, 2007, charging appellant with attempted premeditated and deliberate murder (Pen. Code, §§ 664, 187; count 1) and murder (Pen. Code, § 187; count 2). It was alleged that appellant personally used, and personally and intentionally discharged, a firearm in the commission of the attempted murder (Pen. Code, § 12022.53, subds. (b), (c)). (1 CT 224-226.) Appellant pleaded not guilty. (1 CT 251.)

A jury trial began on May 8, 2007. (1 CT 272.) On June 13, 2007, the jury found appellant guilty of attempted premeditated and deliberate murder and first degree murder. The jury found the personal use allegation true. (2 CT 407-412.)

On February 25, 2009, the trial court sentenced appellant to state prison for 25 years to life on the murder conviction. The court imposed a concurrent life term, enhanced with the upper term of 10 years for the firearm use finding, for the attempted murder conviction. (2 CT 444-447.)

On December 9, 2010, the Court of Appeal, Fourth Appellate District, Division One, filed its then-published opinion, affirming the judgment. The court concluded, *inter alia*, that appellant's first degree murder conviction under the provocative act doctrine was supported by substantial evidence. (*People v. Perla Isabel Gonzalez*, D055698, slip opn. at pp. 11-17.) The court also concluded that the trial court erred in instructing the jury on the requirements for premeditated and deliberate first degree

murder. (*Id.*, slip opn. at pp. 25-32.) The majority concluded the error was harmless beyond a reasonable doubt. (*Id.*, slip opn. at pp. 32-35.) The concurring and dissenting justice concluded the instructional error was not harmless. (*Id.*, concurring and dissenting opn. at pp. 1-5.)

This Court granted review on those two issues on March 23, 2011.

STATEMENT OF FACTS

Roberto Canas-Fuentes (Canas) and his wife, Joan Curiel, were still married in May 2005, but were no longer living together. (2 RT 222-223.) After separating, Curiel began seeing Ricardo Gonzalez (Ricardo)[1] and they ultimately began living together, along with Curiel and Canas's child, Jolie Canas, Curiel's other children, and Curiel's mother, Rosalba Osguera-Alvarez (Osguera) at 355 South Forest Avenue in Rialto. (2 RT 223; 3 RT 405; 4 RT 704-706; 5 RT 910-912; 6 RT 1056-1057.)

Canas and Curiel shared custody of their daughter, Jolie, but because Canas and Ricardo did not get along, Canas would not pick his daughter up at Curiel's residence. Instead, he would arrange for his daughter to be brought to another location, usually by Osguera, Curiel's mother. (2 RT 223, 225; 5 RT 954.) Canas and Ricardo had argued several times on the telephone and had gotten physical on at least one occasion. Each blamed the other. (2 RT 234-235; 3 RT 350-353, 396-398, 403, 493; 4 RT 693; 5 RT 1011, 1017; 6 RT 1095, 1103.)

On the evening of May 21, 2005, Curiel called Canas to see about getting her mother to the hospital where Canas worked, and she dropped her mother off at the hospital. (2 RT 237-238; 6 RT 1058.) After being treated, Osguera was picked up and taken home. (2 RT 238-239.) That same evening Ricardo and Curiel argued. Ricardo suspected Curiel had

[1] Because of the involvement of appellant's brothers, Ricardo Gonzalez and Jorge Gonzalez, we refer to them by their first names.

seen Canas when Ricardo had gone on a trip to Mexico. (5 RT 914.) During the argument, Canas called and spoke to Curiel. Because he was jealous, Ricardo told Curiel to get off the phone. (5 RT 919.) Canas understood Curiel to say she did not want Ricardo in her home and he could hear the children screaming in the background, so he drove to the residence. (3 RT 391.)[2]

When Canas arrived, Curiel was leaving the house with her children. Ricardo was at the door and Canas began yelling at Ricardo to come out and fight. (2 RT 239; 3 RT 393; 5 RT 926; 6 RT 1060-1062.) As Curiel drove off with her children in her car, Ricardo got in his car and followed, and Canas got back in his car and followed Ricardo. (3 RT 394, 464-467; 4 RT 695; 5 RT 928-929; 6 RT 1063.) Fearing that Ricardo was chasing Curiel and endangering the children, Canas pulled up to Ricardo, yelled at him, then cut him off. (3 RT 394-395; 5 RT 929; 6 RT 1066.) Canas continued to follow Ricardo, who called the police, called his mother, and drove back to the residence.[3] (3 RT 395.) The police arrived and told Canas to leave, and he returned to work. (2 RT 240-241.)

During the chase, Ricardo called his mother, Beatrice Gonzalez. She, in turn, called Ricardo's brother, Jorge Gonzalez (Jorge) and told him about the chase. (3 RT 510.) Jorge was out with a female friend, and they went to the residence. (3 RT 505-506; 4 RT 635; 5 RT 938.) Soon after, appellant (Ricardo and Jorge's sister) arrived with Fernando Morales. (3 RT 506; 5 RT 935.) Appellant and Morales were living together at the

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[2] One of the previous run-ins between the men arose because, during an argument between Ricardo and Curiel, Curiel tried to strike Ricardo and when he blocked her, he also accidentally struck Josie, Canas's daughter. (2 RT 351; 5 RT 1009.)

[3] Canas also called the police while following Ricardo back to the residence. (3 RT 240; 4 RT 695-696.)

time. (3 RT 505; 5 RT 936.) Beatrice Gonzalez also arrived. (3 RT 509.) Ricardo told his family what had occurred with Canas. (3 RT 508; 4 RT 576; 5 RT 944, 1026.) Jorge had heard of prior problems between Canas and Ricardo, and told appellant that Canas was messing with their brother again. (4 RT 637.) Appellant became upset and argued with Curiel. Appellant told Curiel that if anything happened to Ricardo, "they were going to kick his [Canas's] ass." (5 RT 945, 1027; 6 RT 1067-1068.)

While the family was still at the home, Canas called. Ricardo answered one call and argued with Canas, then hung up. (4 RT 578.) Jorge answered another call. They argued and Canas said he would meet Jorge at the corner to fight. (4 RT 578, 639; 5 RT 1029.) Jorge went to the corner of Linden and Wilson with his female companion, appellant and Morales, and waited for Canas, but Canas did not show. (4 RT 578, 580, 592.) Morales had a BB rifle with him. He fired it into the road and smiled while they waited. (4 RT 582, 595.) They returned to the residence and everyone left at the same time. (4 RT 597-598; 5 RT 946.)

At some point that same evening, Canas spoke to Curiel and arranged to pick up his daughter the next morning. (2 RT 241; 6 RT 1070.)

The next morning, appellant arrived at Jorge's residence. (4 RT 598-599.) Appellant said she had been told by Curiel that Canas was going to be picking up his daughter, and she wanted Jorge to accompany her to confront and assault Canas. (4 RT 600, 603.) Jorge agreed and got in appellant's vehicle, carrying a bat he intended to use to break out the windows of Canas's car. (4 RT 601.) When Jorge got in appellant's vehicle he saw a rifle in the back. (4 RT 608, 615.)

Appellant then drove to her residence and picked up Morales. (4 RT 601.) They told Morales what was planned and Morales agreed to assist Jorge if Canas got the upper hand. (4 RT 607-608.) Appellant then drove to the Curiel-Ricardo residence to see if Canas's daughter was still there.

(4 RT 610.) Jorge went inside the residence and saw that Jolie was there. (4 RT 611; 5 RT 951.) He got back in appellant's vehicle and she drove around the corner of Linden and Wilson, and parked on Linden. (4 RT 612, 614.) After waiting for a time, they decided to leave, but appellant's car would not start. They got out and opened the hood. Jorge started back to the residence on foot to get assistance. (4 RT 617-618.)

As Jorge, appellant, and Morales left the residence, Osguera began walking Jolie to the corner to meet Canas. Raydeen Curiel, Curiel's daughter followed them. (3 RT 409, 414; 4 RT 711-712; 5 RT 828.) As they reached the corner, Osguera and Raydeen saw Jorge walking back toward their residence. (3 RT 415-416; 4 RT 618, 714-715.) They also saw appellant and Morales standing by the vehicle with its hood up. (3 RT 417.) Appellant approached Osguera and told her to leave. (4 RT 417.)

Canas was driving up Linden, on his way to pick up his daughter, when he saw Osguera, Raydeen, and Jolie. He also saw appellant and Morales standing by a car with its hood up. (2 RT 242-247.)[4] Canas stopped in the street and beckoned to Osguera, who approached and urged him to leave. (2 RT 250; 3 RT 424-425.)

Morales also approached and, as Canas got out of his car, Morales said, " 'Hey, *puto,* I heard you had a problem.' " (2 RT 253; 4 RT 718.) Appellant was still standing near her vehicle. (2 RT 253.) As Osguera took Jolie around to put her in the passenger side of Canas's vehicle, Morales swung a fist at Canas. (2 RT 254-255; 4 RT 720.) Canas directed Osguera to get in the driver's seat of his car and leave, which she did. (2 RT 255; 3 RT 428-429.) Canas fought back. Morales pulled a knife with a 3-4" blade, and thrust it at Canas, cutting Canas in the cheek. (2 RT 255-261; 3

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[4] Canas had not met appellant or Morales and did not know who they were at the time. (2 RT 249.)

RT 429-431.) During the fight, Canas could see appellant pacing back and forth by her vehicle, watching the fight. (2 RT 257.)

Canas got hold of Morales's legs and threw Morales to the ground. (2 RT 262.) Morales got up and ran to appellant, who had taken the rifle out of her car and cocked it. (2 RT 263, 267-268; 3 RT 447.) Appellant pointed the rifle at Canas, then she gave it to Morales. (4 RT 720-721, 723.) Canas ran up to Morales and grabbed the rifle, and the two men struggled for control. (2 RT 272.) The rifle fired during the struggle and Canas was struck three times. (2 RT 273.)[5] Nevertheless, Canas was able to flip Morales and gain control of the rifle, which he fired at Morales as Morales began to run up the street. (2 RT 273, 275.) Morales fell at the edge of the sidewalk after being shot. (2 RT 275, 329.) Appellant had also run up the sidewalk and turned on Wilson toward the Curiel residence. (2 RT 274, 330-331.)

Canas checked Morales's pulse, then saw Curiel drive around the corner and stop. (2 RT 276-277.)[6] When Curiel yelled at Canas, who was sitting on the sidewalk and bleeding, Canas said " 'He shot me so I shot him back.' " (6 RT 1079, 1083.) Curiel drove back to her residence, picked up Jorge and appellant, then returned to the scene where Jorge and appellant put Morales in Curiel's car and they left for the hospital. (2 RT 280-285; 6 RT 1084-1088.)

Morales had three gunshot wounds that caused his death: 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

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[5] Canas was wounded in his right bicep, his left thigh, and his left hand. (2 RT 286-289.)

[6] Curiel had driven to the scene after hearing her son say Canas had been shot. (6 RT 1075.)

his back midline, severed the spinal cord and lodged in the vertebrae. (3 RT 543-555, 557.)[7]

When police arrived at the scene, they obtained the rifle from Canas, a .22 semi-automatic with a magazine capacity of 14. (5 RT 961-966; 6 RT 1148, 1152.) Police recovered six expended .22 long-rifle shell casings and a knife on the street. (4 RT 764, 769-775.) A bullet strike was located in the building on the east side of the street. (4 RT 757, 781.) The bullet strike was consistent with being fired from west to east. (4 RT 793.)[8] A roll of red duct tape was in the center console of appellant's vehicle and two pieces of red duct tape, consistent with having come from the roll, were taped in an "X" pattern on the rear license plate, obscuring the license plate number. (4 RT 789; 5 RT 980, 982, 985-986, 989; 6 RT 1165, 1196, 1201.)[9]

A. Defense

Beatrice Gonzalez, the mother of Ricardo, Jorge, and appellant, testified that she called both Jorge and appellant after being called by Ricardo and learning of the car chase. (7 RT 1295-1297, 1310.) She went to Ricardo's residence and saw Ricardo, Curiel, appellant, Morales, and Jorge. (7 RT 1297-1298.) Ricardo described a prior incident between him and Canas. Appellant was upset and said that if Canas hit Ricardo again, they would beat up Canas. (7 RT 1299-1300.)

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[7] Morales also had several superficial blunt force injuries to his shoulder, elbow, and knees. (4 RT 542.)

[8] Linden is a north-south street. Appellant's car was parked at the west curb, and Canas stopped his car in the middle of the street. (See Exh. 97.)

[9] Appellant's vehicle did not have a front license plate. (6 RT 1160.)

Marlen Morales, the sister of Fernando Morales, testified she went to the shooting scene sometime between four and eight days after the shooting and discovered a knife, which she kicked into the grass. (7 RT 1435-1442.)

B. Rebuttal

Canas testified he did not have a knife the day of the shooting and the only knife he saw was the knife Morales pulled. (8 RT 1522-1523.) David Johnson, a crime scene specialist with the San Bernardino Sheriff's Department, who identified, photographed and collected evidence at the scene (4 RT 745-793), testified that there was not a second knife at the scene. (8 RT 1528-1531.) Jorge Gonzalez testified that approximately a week-and-a-half to two weeks before the shooting, Fernando Morales showed Jorge a rifle and appellant showed Jorge a bullet for the rifle. (8 RT 1562, 1565.) Appellant told Jorge that Fernando had been offered the rifle and they purchased it for $200. (8 RT 1566.)

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S MURDER CONVICTION UNDER THE PROVOCATIVE ACT DOCTRINE

Relying on cases in which provocative act murder liability has been found where a defendant committed lethal acts, appellant contends the evidence is insufficient in her case because (1) Morales committed the lethal act that caused his death and she is not liable when he cannot be; and (2) she was simply an aider and abettor who performed no lethal act. However, appellant is attempting to draw too restrictive a boundary around the provocative act doctrine. The doctrine arose as a form of implied malice murder and nothing in its development or requirements prevents it application where, as here, appellant's acts, even as an aider and abettor, directly, naturally and probably resulted in Morales death.

"Murder includes both actus reus and mens rea elements." (*People v. Concha* (2009) 47 Cal.4th 653, 660.) To satisfy the mens rea element, the evidence must prove the defendant acted with malice aforethought. To satisfy the actus reus element, the evidence must prove that an act of the defendant or an accomplice was a proximate cause of the death. (*Ibid.*)

> In homicide cases, a "cause of death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and without which death would not occur."

(*People v. Cervantes* (2001) 26 Cal.4th 860, 866, quoting CALJIC No. 3.40.) A direct connection between an injury and the alleged act, without intervening force, generally establishes proximate causation. (*Ibid.*) However, an intervening force, as in this case with the actions of Canas, does not foreclose a finding of proximate cause. (*Id.* at pp. 866-867.)

Provocative act murder is shorthand " 'for that category of intervening act causation cases in which, during commission of a crime, the intermediary (i.e., police officer or crime victim) is provoked by the defendant's conduct into [a response that results] in someone's death.' " (*People v. Concha, supra,* 47 Cal.4th at p. 663, quoting *People v. Cervantes, supra,* 26 Cal.4th at pp. 872-873, fn. 15.) The doctrine arose as a form of implied malice murder and was derived as an offshoot of the felony-murder rule. (*People v. Cervantes, supra,* 26 Cal.4th at p. 867, citing *People v. Washington* (1965) 62 Cal.2d 777, 782.)

In *Washington,* this Court held that for a defendant to be guilty under the felony murder rule, "the act of killing must be committed by the defendant or by his accomplice acting in furtherance of their common design." (*People v. Washington, supra,* 62 Cal.2d at p. 783.) Nevertheless, although the felony murder rule does not apply, it does not follow that the defendant is not guilty of murder where death is caused by a third person.

"[W]hen the defendant intends to kill or intentionally commits acts that are likely to kill with a conscious disregard for life, he is guilty of murder even though he uses another person to accomplish his objective." (*Id.* at p. 782.) Thus, for instance, defendants who initiate gun battles may be found guilty of murder if their intended victims resist and kill. Under such circumstances, "the defendant for a base, anti-social motive and with wanton disregard for human life, does an act that involves a high degree of probability that will result in death" [citation], and it is unnecessary to imply malice by invoking the felony-murder doctrine. (*Ibid.*)

The doctrine was more fully developed in *People v. Gilbert* (1965) 63 Cal.2d 690, reversed on other grounds in *Gilbert v. California* (1967) 388 U.S. 263 [87 S.Ct. 1951, 18 L.Ed.2d 1178]. (*People v. Cervantes, supra,* 26 Cal.4th at p. 868.) In *Gilbert,* this Court discussed the necessary features of a "provocative act" as well as the required causal link between a defendant's provocative act and the death of another:

> When 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 felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life. Thus, the victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.

(*People v. Gilbert, supra*, 63 Cal.2d at pp. 704-705.)

Under such circumstances, principles of vicarious liability also apply as long as the accomplice causes the death of another by an act committed in furtherance of the common design. (*Id.* at p. 705.)

The general rule is that "no criminal liability attaches to an initial remote actor for an unlawful killing that results from an independent intervening cause (i.e., a superseding cause). In contrast, when the death results from a dependent intervening cause, the chain of causation ordinarily remains unbroken and the initial actor is liable for the unlawful homicide." (*People v. Cervantes, supra,* 26 Cal.4th at pp. 868-869.) Whether the actual cause of death is independent and intervening or dependent turns on the foreseeability of the death from the defendant's act; i.e. whether it is a natural and probable consequence of the defendant's act. (*People v. Roberts* (1992) 2 Cal.4th 271, 319, 321-322.)

> The principles derived from these and related authorities have been summarized as follows. "In general, an 'independent' intervening cause will absolve a defendant of criminal liability. (1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) § 131, p. 149.) However, in order to be 'independent, the intervening cause must be 'unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause.' (*People v. Armitage* (1987) 194 Cal.App.3d 405, 420-421 [239 Cal.Rptr. 515].) On the other hand, a 'dependent' intervening cause will not relieve the defendant of criminal liability. 'A defendant may be criminally liable for a result directly caused by his act even if there is another contributing cause. If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. [Citation.] "[ ] The consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. [] The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act." [Citation.]' [Citations omitted.]

(*People v. Cervantes, supra,* 26 Cal.4th at p. 871.)

"[T]here is no bright line demarcating a legally sufficient proximate cause from one that is too remote. Ordinarily 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." (*People v. Roberts, supra,* 2 Cal.4th at p. 320, fn. 11.)[10]

The evidence shows that appellant watched as Morales physically attacked Canas, and continued to watch as Morales escalated his attack to a deadly weapon assault with a knife after Canas fought back against the initial punches by Morales. Appellant took the rifle out of her car and cocked it during the struggle between Morales and Canas. When Canas got the upper hand by throwing Morales to the ground and disarming him, and Morales ran to the car, appellant met him at the rear of the car and gave him the rifle. Canas testified that he feared for his life when he saw the rifle. (2 RT 284.) When Canas saw appellant handing the rifle to Morales, Canas decided to act, and he ran to Morales, struggled briefly over the gun during which he was shot three times, and then Canas freed the rifle from Morales, and shot him, all of which happened in a matter of 5 to 10 seconds. (2 RT 272-275, 328.)

Under the factual circumstances, there is nothing about Canas's shooting Morales that was " ' "an extraordinary or abnormal occurrence" ' ". (*People v. Cervantes, supra,* 26 Cal.4th at p. 871.) That Canas would respond with deadly force upon seeing appellant provide Morales with the means of killing him was, at minimum " ' "a possible consequence which might reasonably have been contemplated." ' " (*Ibid.*)

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[10] Although acknowledging that *Roberts* is not a true provocative act murder case, this Court stated that "whether or not a defendant's unlawful conduct is 'provocative' in the literal sense, when it proximately causes an intermediary to kill through a dependent intervening act, the defendant's liability for the homicide will be fixed in accordance with his criminal mens rea." (*People v. Cervantes, supra,* 26 Cal.4th at pp. 872-873, fn. 15.)

Morales had already escalated a physical confrontation into a deadly assault by the time appellant retrieved the rifle and readied it to shoot. In light of the circumstances leading to Canas's deadly response, the evidence amply supports the jury's finding that appellant's act was the proximate cause of Morales's death and fully supports the murder conviction.

Appellant argues that Morales's provocative acts cannot be the sole basis for the murder conviction (ABOM 17-22), which is true so far as it goes. In *People v. Antick* (1975) 15 Cal.3d 79, the defendant was 30 feet away when the police confronted his accomplice and the accomplice started an exchange of gunfire. (*Id.* at p. 83.) The defendant "did not participate in the immediate events which preceded his accomplice's death." (*Id.* at p. 90.)

> In *People v. Antick, supra,* 15 Cal.3d 79, we merely said that "neither the felony-murder doctrine nor the theory of vicarious liability may be used to hold a defendant guilty of murder solely because of the acts on an accomplice, if the accomplice himself could not have been found guilty of the same offense for such conduct."

(*People v. McCoy* (2001) 25 Cal.4th 1111, 1119.)

The accomplice in *Antick* caused his own death by initiating the gun battle. Since the accomplice could not be criminally liable for causing his own death, neither could the defendant. (*People v. Antick, supra,* 15 Cal.3d at p. 91.) Considering whether appellant's acts were the proximate cause of Morales's death in light of the surrounding circumstances, including Morales actions, is not the same as imposing liability for Morales's death based on Morales's actions being the sole proximate cause of his death.

Even if Morales's acts were viewed as a proximate cause of his death, appellant cannot escape murder liability where her acts were also a proximate cause of the death. (*People v. Caldwell* (1984) 36 Cal.3d 210, 219-220.) In *Caldwell*, this Court concluded that the jury could reasonably

find that the joint actions of the decedent—aiming at deputies and ignoring orders to put his gun down—and the defendants—dangerous getaway driving and aiming a shotgun—provoked the deadly response despite the "lull in the action" between the defendants' actions and the gunfire that killed the decedent. (*Id.* at pp. 219-220.) In this case, there was no "lull in the action" between appellant's acts and Morales's death. If anything, appellant's acts and Morales's acts combined to make a deadly combination that Canas had no choice but to react to, as he testified.

Additionally, as in *Caldwell*, the jury could have reasonably determined that the actions of appellant and Morales "reflected a common determination" to kill Canas and the acts were "interdependent." (*People v. Caldwell, supra,* 36 Cal.3d at p. 220.) The jury's guilt finding on the attempted murder charge and true finding on the firearm use enhancement demonstrate its conclusion that appellant and Morales acted together in order to kill Canas.

As part of interdependent acts, appellant's acts were a cause-in-fact of Morales's death, and need only be a substantial factor to be a proximate case. (*People v. Caldwell, supra,* 36 Cal.3d at p. 220.) A cause-in-fact is not a substantial factor only if the part it played was infinitesimal or theoretical. (*Ibid.*) The settled view is that when co-felons are acting in concert, "an individual's contribution to the resulting death need not be minutely determined." (*Id.* at p. 221.) Appellant's acts in retrieving, cocking, and providing the rifle to Morales cannot be viewed as only having an infinitesimal or theoretical role in causing Canas's deadly response. Thus, even viewing Morales's acts as a proximate cause does not relieve appellant of liability because the evidence supports the conclusion that Morales's acts were not the sole proximate cause.

Appellant's efforts to minimize her acts in retrieving, cocking, and providing the rifle to Morales after Morales had attacked and used a knife against Canas are unpersuasive.

She likens her case to *Cervantes, supra*. However, unlike the defendant in *Cervantes*, who "was not the initial aggressor in the incident that gave rise to the provocative act" (*People v. Cervantes, supra,* 26 Cal.4th at p. 872, fn omitted), appellant was the instigator of the confrontation, she took a loaded rifle to that confrontation, and she gave it to Morales when his other efforts failed. Also unlike in *Cervantes*, Canas was not only present when appellant's provocative acts occurred, he was the target of appellant's provocative acts and identified them as the cause of his actions in rushing, fighting, disarming and finally killing Morales. Thus, the "critical fact" placing this case within the parameters of other provocative act murder cases is that Canas was responding to appellant's provocative acts when he killed Morales. (*People v. Cervantes, supra,* 26 Cal.4th at pp. 872-873.)

Appellant says her acts were not egregious enough since her acts only aided Morales in the intended killing of Canas rather than actually perpetrating the attempted murder herself. She sees a "common thread" running through provocative act cases: a violent life-threatening act that provokes the lethal response. (AOB 27.) There are several problems with appellant's assertion.

This Court has clearly described provocative act murder as a form of murder resting upon "traditional terms of proximate cause and malice." (*People v. Cervantes, supra,* 26 Cal.4th at p. 868, citing *People v. Gilbert, supra,* 63 Cal.2d 690.) The basic principle of proximate cause was articulated over a century earlier and is followed in this, and other states. (*People v. Cervantes, supra,* 26 Cal.4th at pp. 869-871.) Although recognizing that the doctrine "has traditionally been invoked in cases in

which the perpetrator of the underlying crime instigates a gun battle . . ." (*id.* at p. 867), this Court did not impose a particular factual requirement for the doctrine to apply. Instead, this Court relied on the principles of proximate causation to circumscribe the doctrine's applicability. Indeed, this Court rejected any " 'bright line demarcating a legally sufficient proximate cause from one that is too remote.' " (*Id.* at p. 871, quoting *People v. Roberts, supra,* 2 Cal.4th at p. 320, fn. 11.) Thus, appellant's apparent suggestion that a particular act of violence should limit the reach of the provocative act doctrine is unsupported in the development of the doctrine and the proximate causation element upon which it is based.

For example, in *People v. Lima* (2004) 118 Cal.App.4th 259, the appellate court found the provocative act theory of murder applicable to the defendant's [a]ttempting to escape the scene of a robbery by initiation a high-speed and reckless charge, where the defendant ran red lights and stop signs, collided with one vehicle and almost collided with several others." (*Id.* at p. 265.) During the chase, a pursuing police vehicle collided with another vehicle and the driver of that vehicle died as a result. (*Id.* at p. 264.) The defendant in *Lima* argued, like appellant argues here, that his reckless driving was insufficient for provocative act murder liability because he had not used lethal force with lethal intent. (*Id.* at p. 265.)While recognizing that "provocative act murder has traditionally involved cases where the defendant instigates a gun battle," the appellate court held that "it is not by definition limited to such factual situations. Neither its elements nor any case law interpreting this doctrine support such a limitation." (*Id.* at p. 268.)

In *Lima,* the defendant's actions showed "a conscious disregard for the obvious danger to human life," thereby supporting findings of both implied malice and a provocative act. (*People v. Lima, supra,* 118 Cal.App.4th at p. 267.) In this case, appellant's act of providing a loaded

and cocked rifle to an assailant who had already escalated a physical confrontation into a deadly assault also amply supported a finding of implied malice and a provocative act. Of course, here, the jury also found that appellant intended that Canas be killed, thereby showing express malice as well as a provocative act.

Moreover, appellant provides no convincing reason for imposing the requirement she advocates. An aider and abettor's liability may attach for a wide variety of conduct (see CALCRIM No. 401).[11] This Court has held that conduct which provokes an intervening cause that is a normal and reasonably foreseeable result of that conduct is sufficient to support provocative act liability. (*People v. Cervantes, supra,* 26 Cal.4th at p. 871.) The consequence of a defendant's conduct need not be strongly probable or actually foreseen; it is enough that the consequence is possible and reasonably foreseeable. (*Ibid.*) Considered under those established parameters, appellant's conduct more than adequately fits. She was present and standing in Canas's field of view when Morales initiated his attack, then escalated it into a deadly assault with a knife. Indeed, when Canas and Morales were engaged, appellant retrieved the rifle from her car and cocked it, thereby readying it to kill. It was the rifle that quite understandably caused Canas to be in fear for his life and when Morales failed in his knife assault and ran to appellant, she gave him the rifle she had readied to fire. Cocking and giving the rifle to the person who had already demonstrated

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[11] As given in this case, CALCRIM No. 401 provides in pertinent part:

> Someone *aids and abets* a crime if he or she knows the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

(2 CT 364.)

his intention to kill Canas resulted in Canas acting to protect his own life by killing Morales. There was nothing so remote about Canas's response that " 'no rational trier of fact could find the needed nexus.' " (*Id.* at pp. 871-872, quoting *People v. Roberts, supra,* 2 Cal.4th at p. 320, fn. 11.)

Appellant seeks to have this Court place a boundary around the provocative act doctrine that is not supported by the development of the doctrine or the principles upon which it was founded. Her act of inserting a loaded and cocked firearm into an already volatile and deadly confrontation was substantial evidence supported the jury finding that her acts were a proximate cause Morales's death. This Court should reaffirm the principles governing the provocative act doctrine, and apply them to affirm the judgment.

II. THE INSTRUCTIONAL ERROR ON FIRST DEGREE MURDER WAS HARMLESS BEYOND A REASONABLE DOUBT WHERE THE JURY WAS REQUIRED TO, AND DID FIND PREMEDITATION AND DELIBERATION, AND THE EVIDENCE WAS OVERWHELMING AND UNCONTESTED THAT APPELLANT PREMEDITATED AND DELIBERATED

Appellant contends the Court of Appeal misapplied the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. In conformance with proper instructions, the jury found appellant intended to kill when she committed the acts that provoked Canas to kill Morales. The jury also found that she, Morales, or both of them, decided to kill as a result of premeditation and deliberation. In this case, where the jury made those findings and the evidence of premeditation and deliberation on appellant's part was overwhelming and uncontested, the trial court's instructional error on the murder count was harmless beyond a reasonable doubt.

In its instruction on provocative act murder pursuant to 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 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 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, and premeditated murder, you should refer to the instructions I have given you on attempted willful, deliberate, and premeditated murder.

(8 RT 1676-1677.)

The trial court had earlier instructed the jury pursuant to CALCRIM No. 601 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.

(9 RT 1653-1654.)

Under vicarious liability for attempted murder, "although each defendant must have the intent to kill, a defendant may be vicariously liable for premeditated and deliberate component of the mens rea of an

accomplice." (*People v. Concha, supra,* 47 Cal.4th at p. 665.) The principles of vicarious liability are expressed in the third paragraph of CALCRIM No. 601. However, the same is not true under accomplice liability for murder. If murder liability is established, the degree is determined under Penal Code section 189. (*Id.* at p. 661.) As relevant here, Penal Code section 189 defines first degree murder as "any other kind of willful, deliberate, and premeditated killing . . . ." First degree murder liability is properly found "if the charged defendant personally acted willfully, deliberately, and with premeditation." (*Id.* at p. 662.)

In *Concha*, the trial court gave CALCRIM No. 601 as to the attempted murder charge and "inadequately instructed the jury" on first degree murder because "the instructions failed to require that the jury resolve whether each defendant acted willfully, deliberately, and with premeditation . . . ." (*People v. Concha, supra,* 47 Cal.4th at p. 666.)[12]

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[12] In its instruction on provocative act murder, the trial court instructed 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: [¶] 1. [Decedent] was killed during an attempt to commit murder OR [¶] 2. The defendant or an accomplice intended to commit robbery or murder when he did the provocative act. [¶] In deciding whether the defendant or accomplice intended to commit robbery or murder and whether the death occurred during the attempted robbery or murder, you should refer to the instructions I have given you on those crimes. [¶] Any murder that does not meet these requirements for first degree murder, is second degree murder."

(*People v. Concha* (2010) 182 Cal.App.4th 1072, 1081.)

In *Neder v. United States* (1999) 527 U.S. 1 [119 S.Ct. 1827, 114 L.Ed.2d 35], the Supreme Court concluded that the failure to instruct on an element of an offense is subject to harmless error review under *Chapman v. California, supra,* 386 U.S. 18. (*Neder v. United States, supra,* 527 U.S. at pp. 7-15.) The test for harmless-error analysis under *Chapman* is, "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " (*Id.* at p. 15.) In *Neder*, the Court looked at "other cases decided under *Chapman* for the proper mode of analysis." (*Id.* at p. 18.) Considering erroneous admission and exclusion of evidence under the Fifth and Sixth Amendments, the Court stated, "We think, therefore, that the harmless-error inquiry must be essentially the same: Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States, supra,* 527 U.S. at p. 18.)[13]

In *Neder*, the trial judge failed to instruct the jury on the materiality element of the several fraud and tax charges and, in fact, instructed the jury as to some of the charges that materiality was not a question for the jury to decide despite being referenced in the indictment. (*Neder v. United States, supra,* 527 U.S. at p. 6.) The Supreme Court found, based on the evidence, that "no jury could reasonably find that Neder's failure to report substantial amounts of income on his tax returns was not 'a material matter.' " (*Id.* at p. 16, fn. omitted.) The Court said the materiality element was "incontrovertibly establish[ed]" and Neder never argued otherwise. (*Ibid.*) The court said that when an omitted element is "uncontested and supported by overwhelming evidence, such that the jury verdict would have been the

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[13] Contrary to appellant's claim, the Court of Appeal in this case articulated the standard for harmless error review in complete conformance with *Neder*. (*People v. Perla Isabel Gonzalez, supra,* slip opn. at p. 28.)

same absent the error, the erroneous instruction is properly found to be harmless. We think it beyond cavil here that the error 'did not contribute to the verdict obtained.' " (*Id.* at p. 17, quoting *Chapman v. California, supra,* 386 U.S. at p. 24.)

The Court concluded "that where an omitted element is supported by uncontroverted evidence," finding the error harmless appropriately balances society's interests. (*Neder v. United States, supra,* 527 U.S. at p. 18.) Harmless error review "will often require a reviewing court conduct a thorough examination of the record." (*Ibid.*) Harmless error will not be found, "for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." (*Ibid.*)

Appellant contends her case does not come within the harmless error parameters outlined in *Neder*. However, she errs both in her reading of *Neder* and the record. Appellant says she contested her mental state, but, in fact, while she contested whether she intended to kill, she never disputed or presented any evidence that she did not premeditate and deliberate. The evidence was undisputed that appellant made a premeditated and deliberate decision regarding the rifle. When the jury found that appellant acted with the intent to kill, premeditation and deliberation was a foregone conclusion.

The defense disputed two issues in this case: whether appellant acted with the intent to kill; and whether Canas's killing of Morales was an independent, illegal act. Throughout his closing argument, defense counsel repeatedly asserted that lack of intent to kill was a reasonable interpretation of the evidence. (See 9 RT 1738-1739, 1742, 1744-1748, 1755-1757, 1761, 1764-1765, 1769.) He called it "the crucial point." (9 RT 1739.) At one point in his argument, defense counsel made a passing reference that the evidence did not show premeditation and deliberation, but that was in the context to asserting lack of intent to kill. (9 RT 1767.)

Moreover, defense counsel did not contest or dispute the essential facts underlying premeditation and deliberation. He agreed that appellant watched for 5 to 10 minutes as Morales first attacked Canas with fists, then escalated the assault by pulling his knife and cutting Canas. He agreed she also saw that Canas got the better of Morales at both levels and she retrieved her loaded rifle, made it ready to fire and gave it to Morales with the intent to assist Morales who was in danger. (9 RT 1742, 1751, 1765.) In short, defense counsel conceded that appellant made a premeditated and deliberate decision regarding her rifle, but asserted that decision was not to kill.

The jury made relevant findings that are not impacted by the instructional error. In its harmless error analysis, the appellate court in *People v. Concha, supra,* 182 Cal.App.4th 1072, concluded that the jury found that the defendant intended to kill or shared in that intent, the defendant personally committed a provocative act, and at least one of the assailants had premeditated and deliberated the intent to kill. (*Id.* at pp. 1089-1090.) Similar factual findings were made in this case.

In returning a guilty verdict on the attempted murder count, the jury resolved the disputed issue of intent by finding that appellant intended to kill when she committed the provocative act. The jury found appellant personally used the rifle in the commission of the attempted murder. The jury also found that the attempted murder was premeditated and deliberate and reached that conclusion by relying on appellant's intent to kill, Morales's intent to kill, or both of their intents to kill.

The evidence of premeditation and deliberation on appellant's part was overwhelming, while the evidence as to Morales was weak, at best. As the majority in the Court of Appeal aptly observed, appellant was the driving force behind the events leading to the deadly confrontation. (*People v. Perla Isabel Gonzalez*, slip opn. at p. 33.) She was motivated to

punish Canas for his treatment of her brother; after learning of Canas's plan to pick up his daughter, appellant planned the assault on Canas and recruited her confederates; appellant had the loaded rifle in her car that morning when she began to carrying her plan; appellant drove to the ambush site and waited for Canas's arrival after verifying that Canas had not yet picked up his daughter; appellant stayed by her car where her rifle was located as Morales attempted to carry out her intended punishment of Canas; appellant watched as Canas bested Morales, first with fists, then disarmed Morales after he pulled a knife and cut Canas; and appellant retrieved her loaded rifle, cocked it and gave it to Morales after he was unable to overcome Canas's resistance, thereby provoking Canas's deadly response.

In responding to a narrower view of the evidence by the dissent, the majority aptly observed:

> [Appellant] did more than merely hand the rifle to Morales, as it was [appellant's] idea, among other things, to assault Canas in the first place; it was [appellant's] rifle; it was [appellant's] decision to bring the *loaded* rifle to the assault; and it was [appellant's] decision to pull out the rifle from her car, when the assault turned deadly, cock it and hand it to Morales to use against Canas.

(*People v. Perla Isabel Gonzalez*, slip opn. at p. 34, italics in orig.)

To those observations, it can be added that by making the rifle ready to kill and giving it to Morales to kill Canas, appellant was demonstrating that she would do what it took to ensure that her original goal of punishing Canas was fulfilled. Rather than breaking off the confrontation unfulfilled, appellant demonstrated her determination to make sure Canas was punished even if it meant he would have to be killed. Those facts demonstrated an overwhelming and uncontested basis in the evidence for premeditation and deliberation.

In finding that the attempted murder was premeditated and deliberate, the jury necessarily found that either appellant or Morales, or both, acted with an intent to kill that was premeditated and deliberate. As described, there was abundant circumstantial evidence that appellant acted upon premeditated deliberation. On the other hand, none of the evidence provided any significant support to an inference that Morales reached a premeditated and deliberate intent to kill. There is no evidence Morales knew appellant had the loaded rifle in her car when she picked him up that morning. The discussions between Jorge and Morales involved a physical beating. Morales began his assault of Canas by attempting to punch him. It was only when Canas avoided the punches and retaliated that Morales escalated to deadly force, and it was only after Canas bested Morales despite his use of a knife that Morales ran to retrieve the rifle, which appellant had readied to fire. The facts surrounding Morales show a classic case of a rash, impulsive decision, brought on by the heat of battle and the humiliation of defeat.

There was no evidence that appellant's decision was rash and impulsive. Indeed, in his argument, defense counsel maintained that appellant saw Morales in need of assistance and retrieved her riddle to assist him. Nothing in that argument suggested her decision was rash and impulsive; it only suggested that she did not intend to kill, which was the crucial issue for the defense. This Court has observed that, "analyzing evidence, and determining the facts, are functions peculiarly within the expertise of juries." (*People v. Guiton* (1993) 4 Cal.4th 1161, 1126.) "In analyzing the prejudicial effect of error, however, an appellate court does not assume an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that the jury has acted reasonably, unless the record indicates otherwise." (*Ibid.*) Faced with uncontested

evidence overwhelmingly demonstrating that appellant reached a premeditated and deliberate intent to kill and evidence strongly supporting the conclusion that Morales intended to kill as a result of a rash impulse, a reasonable jury would not opt to base its finding on Morales rather than appellant.[14]

The jury found against appellant on the issue of intent to kill, and the evidence of premeditation and deliberation was both uncontested and overwhelming. The instructional error was harmless beyond a reasonable doubt.

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[14] Contrary to appellant's claim, the jury's question asking where the second degree murder instruction was located did not indicate it was focused on this issue. (See 2 CT 405.) The definition of second degree murder in the instructions was one sentence at the end of CALCRIM No. 560, the lengthy instruction on provocative act murder. (2 CT 377-379.) The jury's question shows nothing more than it missed that sentence in its review of the instructions.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court find that appellant's murder conviction is supported by the evidence and that the trial court's instructional error was harmless beyond a reasonable doubt.

Dated: August 10, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Answering Brief on the Merits uses a 13 point Times New Roman font and contains 8,557 words.

Dated: August 10, 2011

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **PEOPLE v. PERLA ISABEL GONZALEZ** Case No.: **S189856**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 11, 2011, I served the attached **RESPONDENT'S ANSWERING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows

Laura G. Schaefer Boyce & Schaefer 934 23rd Street San Diego, CA 92102-1914 *Attorney for Perla Isabel Gonzalez* *2 Copies*	Tressa S. Kentner, Court Executive Officer San Bernardino County Superior Court Appellate Division Deliver to: Hon. Michael A. Knish, Commissioner 401 N. Arrowhead Avenue San Bernardino, CA 92415-0063
Cameron Page, Supervising Deputy District Attorney San Bernardino County District Attorney's Office Appellate Services Unit 412 W. Hospitality Lane, First Floor San Bernardino, CA 92415-0042	Court of Appeal Fourth Appellate District, Division 1 750 "B" Street, Ste. 300 San Diego, CA 92101

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on August 11, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 11, 2011, at San Diego, California.

Terri Garza
Declarant

Terri Garza
Signature

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