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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN SCOTT CHACON, Defendant and Appellant.	B264193 (Los Angeles County Super. Ct. No. YA083691)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Modified and affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Jonathan Scott Chacon (defendant) was convicted of two counts of first degree murder (Pen. Code, § 187, subd. (a)[1]). On appeal, defendant contends that insufficient evidence supports the jury's findings that he committed the murders with premeditation and deliberation; the trial court erred because the jury instructions misled the jury that it should apply an objective, instead of a subjective, standard of reasonableness when determining whether the murders were done with premeditation and deliberation; and one of his two multiple-murder special circumstances findings must be stricken. We hold that the abstract of judgment should be corrected by striking one of the multiple-murder special circumstances findings. In all other respects, the judgment is affirmed.

BACKGROUND

A. Facts

1. Prosecution Evidence

The victims, Courtney Bergman and her mother Vicki Bergman, lived in an apartment in Redondo Beach. Defendant lived a few blocks away with his mother Patricia Chacon, her husband, defendant's sister and her son, and defendant's son Damien. Defendant and Courtney began dating when he was 19 years old and she was 15. Shortly after the relationship began, Courtney's mother reported it to the police, who arrested defendant on January 12, 2008. Defendant was convicted of unlawful sex with a minor, and was ordered not to have any contact with Courtney until her 18th birthday.

In 2010, when defendant and Courtney were not together, defendant dated Jessica Rand who gave birth to Damien. In about October 2011, Courtney met Adrien Ginekis,

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

and they began communicating about three or four times a week. Defendant would sometimes be extremely jealous if Courtney saw other men.

Defendant ended his relationship with Rand, and around the end of 2011 resumed his relationship with Courtney, who was then 18 years old. Defendant and Courtney would often "break up and get back together" again, and their relationship was marked with verbal and physical abuse. Both defendant and Courtney would "fight"—"they would both go at it"—"out of the blue" or when they were "agitated with each other." Benny Pacheco, one of defendant's friends, witnessed defendant verbally abuse Courtney, push her, and spit in her face. Pacheco saw bruises on Courtney's arms.

On the occasion defendant spit in Courtney's face, she became angry and "attack[ed] him." Pacheco once saw Courtney bite defendant.

Ottoniel Hawkins, defendant's friend, saw "a handful of times" when Courtney would slap and scratch defendant, and in response defendant would hold her wrists. He also saw Courtney "swing" unsuccessfully at defendant, and said that she and defendant "would curse a lot at each other." However, he later told the police that he never saw Courtney and defendant fight.

Pacheco said defendant attempted to start fights with random people without any reason, and started fights with friends, including Pacheco. Pacheco recalled one time he and defendant watched a movie about a killer. Several days later, defendant asked Pacheco what he would say if defendant ever killed someone, and Pacheco replied that he would just say he never knew defendant. Defendant also said he wanted to obtain a pair of gloves like the killer in the movie and kill someone.

According to Pacheco, defendant regularly carried a knife that had about a six-inch blade. Defendant had the word "death" inscribed on his arm "with a knife or something," and defendant himself, using a "branding iron," branded the word "distraught" on his chest. Pacheco saw defendant use a box cutter to carve a word on a friend's arm.

In November 2011, defendant's cell phone was located a few blocks from his residence. The phone contained a series of text messages sent by defendant to an

unidentified individual on October 31, 2011. Defendant's text messages stated that he was "destined for prison;" "can't take normal society;" "want[ed] anarchy, chaos, and mayhem;" and did not know if he could "hide [his] demon too long." Defendant bragged that he "cut some guy's neck and stabbed some other guy" and "[l]eft some other guy a bloody mess;" loved "seeing people in pain;" and acknowledged he had "death and distraught branded" on himself. In other text messages, defendant said, "I just want to kill and fuck people up;" "I feel like I'm about to break;" "[t]he beast in me is harder to control;" and "[l]ately my rage inside me has made me violent."

In January 2012, Christopher Quinn, Courtney's co-worker, observed bruises on Courtney's arms and legs. When Quinn asked Courtney whether her boyfriend was beating her, Courtney nodded her head, "Yes."

In early February 2012, Kristina Campese, another one of Courtney's co-workers, saw that Courtney had "fresh" bruises on her back, shoulders, and arms. Courtney was visibly upset, and was shaking. When Campese asked Courtney what was going on, Courtney replied, "Nothing new." Campese previously had discussions with Courtney about injuries Campese had seen on Courtney's body.

Courtney told Campese that defendant regularly carried a knife; threatened her with it on several occasions; was very jealous; and defendant said if she was "with another man," he would kill her. Courtney said that she had been abused and was "terrified for her life," and when Campese advised her to leave town and stay with friends, Courtney responded that defendant would kill her if she ever left him.

In the evening on February 27, 2012, Courtney, defendant, his son, and Lisa Hibbard (Courtney's friend) were at Courtney's apartment. At about 10:00 p.m., Pacheco also went to Courtney's apartment, and he testified that Vicki was not in sight. Pacheco said after his arrival, "they" drank beer and hard alcohol, and defendant and Courtney were happy and did not argue.

At about 11:00 p.m., Courtney texted Ginekis and told him she missed "kicking it" with him, and she invited him over so that he could meet defendant and "hang out" with

everyone. Ginekis did not reply to the text because he did not want to meet defendant or associate himself "with people like that."

At about midnight, defendant hinted to Pacheco that he and Hibbard should leave because defendant and Courtney wanted to have sex. Pacheco took Hibbard back to his mother's residence. The "plan" was that defendant would pick up Hibbard in the morning and give her a ride home.

After Pacheco and Hibbard left, a neighbor who lived above Courtney's apartment heard screams, cries, a "smack" noise that sounded like "hard sex," and a door slam. The sounds stopped about 2:00 a.m. At about 2:30 a.m., Ginekis received a telephone call from Courtney, but he was asleep.

At some point between 2:00 a.m. and 4:00 a.m., defendant returned home. When defendant saw his mother, Patricia, he asked her for a bandage. The next morning, Patricia reminded defendant that Damien had a doctor's appointment at noon.

That morning, defendant did not show up at Pacheco mother's residence as agreed the previous night, and Pacheco called defendant several times but received no response. Defendant also never returned home to take Damien to the doctor.

At about 10:00 a.m., Wendy Hess, Vicki's friend, drove to Courtney's apartment to give Vicki a ride. When Hess pulled into driveway, Vicki was not outside the apartment where she usually waited for a ride. Hess unsuccessfully called and texted Vicki's telephone, and knocked on the apartment door. After realizing the door was slightly ajar, she opened it and went inside the apartment. She saw Vicki's body on the floor in a pool of blood. She screamed, ran outside, and called 911. As she remained on the line with the dispatcher, Hess went back inside the apartment and determined that Vicki did not have a pulse. As she began to leave the apartment, she saw Courtney's body covered in blood on the kitchen floor.

Redondo Beach Police Department Officer Walter Sawall responded to the location. He entered the residence and observed blood throughout the apartment. Defendant's blood was found on a knife handle recovered from the kitchen sink, on a tray

in Vicki's bedroom, in the bathroom and kitchen areas, on Courtney's wallet, on the front door knobs, on defendant's shoes, and in defendant's car.

In the morning of February 28, 2012, Hawkins noticed he received several missed calls from defendant the prior night. Thereafter, Hawkins and defendant spoke by telephone, and defendant said he wanted to "hang out" with Hawkins. At about noon, defendant drove to Hawkins's residence and Hawkins saw that defendant's hands were wrapped in bandages. Hawkins, who was driving defendant's vehicle at that time with defendant as a passenger, was directed by defendant to exit the freeway and park at a location in San Diego. When they parked, defendant exited the car, said he would spend the night with someone there, and told Hawkins to drive the car back to Redondo Beach and that defendant would find a way back home the next day. After Hawkings left defendant, he drove to his girlfriend's house in Orange County. While driving to his girlfriend's house, he received a telephone call from his girlfriend who informed him the police were looking for defendant. When Hawkins arrived at his girlfriend's residence in Mission Viejo, he parked defendant's car about a block away and left it there.

At about 2:00 p.m., police officers visited defendant's apartment and spoke to his mother, Patricia. The officers discovered a trail of blood that led from the driveway into the alcove stairway of the apartment, and blood droplets on defendant's bed comforter and a bag in the closet. Both used and unused bandages were discovered in the bathroom. In a subsequent police interview, Patricia said defendant had, on numerous occasions, told her that "he wanted to kill" and "can't you see I'm crazy?"

On February 29, 2012, Mexican authorities apprehended defendant and transferred him to the Redondo Beach police. Defendant had bandages around his hands and stated the injuries were caused by a knife. His pants and shoes had blood on them. Defendant was transported to a hospital. Defendant suffered cuts on his hands, right wrist, and had a bruised left bicep.

Police later recovered defendant's car from the Mission Viejo location where Hawkins parked it. A tear away from a surgical glove box was found in the car, and defendant's blood was also discovered in the vehicle.

Medical examiners conducted autopsies on Vicki and Courtney. They found that Vicki suffered numerous injuries, including lacerations on her hands consistent with defensive wounds caused by her attempting to block her face or grab a knife. The fatal injury was a five-inch wound to the neck, cutting into her artery, veins, and trachea. The injuries could have been caused by a single edged knife or a serrated knife.

Paul Delhauer, the prosecution's crime scene reconstruction expert, opined that some of Vicki's wounds were offensively inflicted, while others were sustained in deflecting the knife during the course of a struggle. The number of wounds to her hands indicated that there was a great deal of movement during the altercation. Injuries to her face were unusually symmetrical and created a saw-tooth pattern wound in a crescent shape. This suggested the perpetrator pinned her down and "taunted" her by using a knife to press on her face. The fatal neck injury appeared to have been a "sawing motion" with the use of a serrated blade that created a "Z pattern" wound.

Courtney sustained injuries her head, face, neck, chest, back, and upper and lower extremities. She suffered multiple knife wounds, including a three-inch fatal wound to her neck that caused rapid blood loss because it cut into the neck muscle, major blood vessels, the jugular vein, and carotid artery. The fatal wound was "complex" because it consisted of multiple deviating wounds. Some of the injuries to her hands were consistent with defensive wounds.

The fatal injury to Courtney's neck was inflicted by a serrated knife. Based on incidental knife injuries to her neck, Courtney likely brought her head down in an effort to protect herself during the altercation. The injuries to her hands, face, and head indicate that she attempted to block and protect her face from the attacks. A bruise on her back suggested she was pinned against the kitchen counter during the assault.

Delhauer testified that the cuts to defendant's hands and forearm were characteristic of fingernail marks. Defendant's other hand-wound was consistent with an accidental self-infliction caused by the knife during a struggle.

2. Defendant's Evidence

Defendant testified in his own behalf. He testified that soon after his conviction for unlawful sex with a minor (i.e., Courtney), he entered into a relationship with Rand, who gave birth to their son Damien. Defendant and Rand eventually ended their relationship, and thereafter, in about November 2011, defendant and Courtney started dating again. Courtney then appeared to be more confident and aggressive. She became violent when she drank, but she did not often get violent with defendant. Defendant denied ever physically abusing Courtney.

On one occasion when Courtney was at defendant's apartment, she punched and bit him. Defendant attempted to restrain her by pushing her away or holding her back. During the incident, defendant threw a telephone against wall, breaking it. As a result of that incident, defendant's family banned Courtney from ever returning to the apartment.

When defendant and Courtney had sex, they would engage in "sexual cutting" during foreplay, which involved rubbing a knife on the other person's skin. Because the rubbing would occasionally cause scratches or bleeding, they usually did the cutting on areas of the body that could easily be covered by their clothes. The sexual cutting began when they first started dating and continued when they resumed their relationship.

On the night of the killings, defendant and his son arrived at Courtney's apartment between 8:00 and 9:00 p.m. Courtney had already been drinking when defendant arrived. Hibbard and Pacheco were also present, and Vicki remained in her bedroom as the group socialized in the rest of the apartment.

Within a few hours after the group assembled at Courtney's apartment, Pacheco and Hibbard left. Defendant was "getting along" with Courtney and they had sex on the couch after Damien fell asleep. During sex, they engaged in "sexual cutting" by using the knife defendant typically carried with him—a single-blade folding knife that had one serrated edge. Defendant used the knife on Courtney that night, and when he was "done with it," he threw it on "the other" couch.

After they had sex, defendant and Courtney had a conversation that turned into an argument because Courtney was mad at defendant. Defendant could not recall why

Courtney was mad at him. Damien woke up, and when defendant attempted to put him back to sleep, Courtney began throwing punches at defendant. Defendant deflected the punches and kept Courtney away from him until he took Damien to Vicki's bedroom and asked Vicki to watch him.

Upon defendant's return from Vicki's bedroom, Courtney charged towards him with the knife that they used for the "sexual cutting." A struggle ensued near the kitchen as Courtney "swipe[d]" the knife at him. Defendant grabbed the knife out of her hands, and believing Courtney was trying to kill him, his "instincts [took] over." Defendant "went into straight action" and began "slicing her throat." Even though he had possession of the knife, defendant testified, "I still felt in danger. I don't know what to say. My body was just going automatic at that point." Defendant continued to slice Courtney's throat as she was going down to the ground.[2]

Defendant then heard Vicki's door open. Vicki came into the living room, saw what was happening, and according to defendant, charged towards defendant to grab his knife. Fearing that he could be killed by Vicki taking the knife from him and using it against him, defendant killed Vicki by using a "sawing motion" to cut her neck. Defendant testified that it took "a little bit of effort to go through [her] throat[]." Once Vicki fell to the floor, defendant stared at both bodies for a short while, gathered his belongings, washed his hands, took cash from Courtney's wallet, and drove home with his son.

The following morning, defendant packed a bag with the knife used in the killings, his blood-stained clothes and shoes, and went to meet Hawkins. Defendant discarded the bag in a dumpster during the stop at the apartment when he told Hawkins he was going to meet a friend. Eventually, he had Hawkins drop him off near the Mexican border, walked across the border, and went to a hotel in Rosarito Beach to "ponder" and "[w]ait for the cops to come." He was arrested within 24 hours from his arrival at the hotel.

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[2] The jury was instructed on self-defense instructed pursuant to CALCRIM No. 505 and on imperfect self-defense pursuant to CALCRIM No. 571.

On cross-examination, defendant acknowledged exchanging text messages with Courtney at around 7:00 p.m. the night of the killings. Defendant asked Courtney if she was with Ginekis. Courtney responded, "No, John. I would tell you if I was with anyone else besides [Hibbard]. Defendant then texted "Okay then." Courtney texted, "Do you believe me?," and defendant responded, "I hope so."

Defendant admitted that the text messages he sent on October 31, 2011, were to a woman named Natasha, his former high school girlfriend. According to defendant, his statements made in those text messages were intended to be a Halloween prank.

B. Procedural Background

The District Attorney of Los Angeles County filed an information charging defendant with two counts of murder in violation of section 187, subdivision (a). The District Attorney alleged in both counts that defendant personally used a deadly weapon during the commission of the crimes in violation of section 12022, subdivision (b)(1), and multiple-murder special circumstance existed pursuant to section 190.2, subdivision (a)(3).

Following trial, the jury found defendant guilty of two counts of murder in the first degree and found the special allegations to be true. The trial court sentenced defendant to state prison for a term of life without the possibility of parole on each count plus consecutive one-year terms on the weapon enhancements.

The trial court ordered defendant to pay a $10,000 victim restitution fine, and the parties stipulated to defendant paying victim compensation and government claims board fees of $5,309.98. Defendant filed a timely notice of appeal.

DISCUSSION

A. Sufficiency of the Evidence

Defendant contends that insufficient evidence supports the jury's findings that he committed the murders with premeditation and deliberation.[3] We disagree.

1. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. Applicable Law

"In [the context of first degree murder], 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on other grounds as stated in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) "'The process of

[3] Defendant states that he is not disputing that there is sufficient evidence to support the jury's finding of malice.

premeditation and deliberation does not require any extended period of time. The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'" (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court explained: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; [and] (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for 'a reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id*. at pp. 26-27.)

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

3. Analysis

Applying the *Anderson* factors and reviewing the evidence in the light most favorable to the judgment, sufficient evidence supports the jury's findings that the murders were the result of preexisting reflection and weighing of considerations rather than a rash impulse. A jury could reasonably infer planning to kill Courtney and her mother. There is adequate evidence of defendant's physical abuse of, and threats of physical violence against, Courtney; Courtney's fear for her life; and defendant's obsession to kill. Courtney told Campese that she had been abused and was "terrified for her life." Courtney's co-workers saw bruises on her body and face and she told them she was afraid of defendant. Defendant owned a knife, used it on several occasions to threaten Courtney, and claimed to have cut and stabbed three individuals. In addition, defendant possessed the fatal knife upon arrival at the apartment and therefore the jury could reasonably infer defendant considered the possibility of homicide from the outset. (*People v. Steele* (2002) 27 Cal.4th 1230, 1250; *People v. Alcala* (1984) 36 Cal.3d 604, 626, superseded by statute on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911; *People v. Rodriguez* (1986) 42 Cal.3d 730, 758.)

The text messages on defendant's phone, and his conversations with his mother and Pacheco, are evidence that defendant was infatuated with the idea of killing someone. Defendant had the word "death" inscribed on his arm "with a knife or something;" personally branded the word "distraught" on his chest; stated in text messages that he wanted to kill someone and admitted the rage inside him made him violent; told his mother on numerous occasions that he wanted to kill someone; expressed his desire to kill to Pacheco after they watched a movie about a killer; and told Pacheco he wanted to get gloves like the killer. Though given self-defense instructions, the jury rejected his assertion that he acted in self defense.

Defendant's relationship and conduct with Courtney suggested a motive to kill based on jealousy. Courtney said that defendant had threatened her with a knife and was very jealous. Defendant told Courtney that if she ever left him or was "with another

man" he would kill her. Dating back to the beginning of September 2011, Ginekis and Courtney communicated with each other regularly, and Ginekis disliked defendant and did not want to meet him. On the night of the murders, defendant texted Courtney to ask her if she was with Ginekis. Based on this evidence, a jury could reasonably infer that defendant was extremely jealous of Ginekis and acted on that motive when he killed Courtney. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 668; *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1117; *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1613.)

Defendant contends that his jealousy does not amount to a sufficient motive to support a finding of premeditation and deliberation because it may be inferred reasonably that his jealousy led to an "explosive rage resulting in the deaths of Courtney and Vicki." We must however view the evidence in the light most favorable to the prosecution and presume every fact the jury could reasonably deduce from the evidence to support of the judgment. (*People v. Zamudio, supra,* 43 Cal.4th 327, 357; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

With respect to Vicki, in 2008, shortly after defendant began dating 15-year-old Courtney, Vicki reported the relationship to the police, causing defendant to be arrested and convicted of unlawful sex with a minor. The jury could reasonably infer defendant was motivated by revenge in killing Vicki. In addition, the jury could reasonably infer defendant killed Vicki based on a motive to eliminate her as a witness to his killing of Courtney, or based on her familial relationship to Courtney. (*People v. Elliot* (2005) 37 Cal.4th 453, 471; *People v. Perez*, *supra*, 2 Cal.4th at pp. 1126-1127; *People v. Williams* (1995) 40 Cal.App.4th 446, 455-456.)

The manner of killing further supports a finding of premeditation and deliberation. Both victims suffered a large number of knife wounds and bruises, and they were both killed with a serrated knife—defendant using it to saw into Vicki's neck, and creating a V-shape wound on Courtney's neck. There is evidence that defendant pinned down and "taunted" Vicki as he killed her, and the injuries suffered by both victims reflect a defensive struggle. The prosecutor's crime scene reconstruction expert testified that defendant's injuries were characteristic of being caused by fingernails. Based on this

evidence, a jury could reasonably infer that the murders were the result of sufficiently prolonged attack that were the product of reflection instead of impulsive decisions. (*People v. Lee*, *supra*, 51 Cal.4th at p. 636-637; *People v. Elliot*, *supra*, 37 Cal.4th at p. 471; *People v. Bolden* (2002) 29 Cal.4th 515, 561.)

Additionally, defendant did not call the police after the killings, but instead fled to Mexico the following day. The jury could find this demonstrates a consciousness of guilt (*People v. Abilez* (2007) 41 Cal.4th 472, 521-522; *People v. Garceau* (1993) 6 Cal.4th 140, 179-180; *People v. Miranda* (1987) 44 Cal.3d 57, 83-84), and is inconsistent with a rash or impulsive decision to kill Courtney and Vicki. There was sufficient evidence supporting the jury's findings that defendant committed the murders with premeditation and deliberation.

B. Instructional Error

Defendant contends that the trial court prejudicially erred because the combined effect of the jury instructions regarding provocation (CALCRIM No. 522) and voluntary manslaughter (CALCRIM No. 570) misled the jury that it should apply an objective, instead of a subjective, standard of reasonableness when determining whether the murders were done with premeditation and deliberation. The trial court did not err.

1. Standard of Review

"We review defendant's claims of instructional error de novo. [Citations.]" (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

2. Applicable Law

"In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) The trial court has a duty to instruct accurately on the elements of a crime (*People v. Hughes* (2002) 27 Cal.4th 287, 383) and when the trial court chooses to

instruct on a particular legal point, it must do so correctly (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015). "'The relevant inquiry [when instructional error is claimed] is whether, "in the context of the instructions as a whole and the trial record, there is a reasonable likelihood that the jury was misled to defendant's prejudice." [Citation.] Also, """we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given."""" [Citations.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 991.)

3. Facts

The jury was instructed with CALCRIM No. 521 as follows: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately and with premeditation. [¶] The defendant acted willfully if he intended to kill. [¶] The defendant acted deliberately if he carefully weighed the considerations for and against his choice and knowing the consequences decided to kill. [¶] The defendant acted with premeditation if he decided to kill before completing the acts that caused death. [¶] . . . [¶]. The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder, and the murder is second degree murder [¶] Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide."

The jury was also instructed with CALCRIM No. 522 that "[p]rovocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter."

The jury was also instructed with CALCRIM No. 570 as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] One, the defendant was provoked; [¶] Two, as a result of the provocation, the defendant act rarionally and under the influence of intense emotion that obscured his reasoning or judgment; [¶] and Three, the provocation would have caused a person of average disposition to act rationally and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. It is not enough that the defendant simply was provoked. [¶] The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. [¶] In deciding whether the provocation was sufficient, consider whether a person of average disposition in the same situation and knowing the same facts would have reacted from passion rather than from judgment. If enough time has passed between the provocation and the killing for a person of average disposition to cool off and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

4. Analysis

When the instructions are considered as a whole, it is not reasonably likely the jury misunderstood them in the manner suggested by defendant. The first degree murder

instruction (CALCRIM No. 521) described the requirements of the crime of conviction in terms of defendant's subjective thought process in reaching the decision to kill. Pursuant to CALCRIM No. 521, the jury was instructed that to convict defendant of first degree murder it must find defendant "intended to kill," "carefully weighed the considerations for and against his choice," and "knowing the consequences" "decided to kill before completing the act that caused death." These requirements focused the jury on defendant's subjective state of mind.

CALCRIM NO. 521 itself stated that provocation could reduce first-degree murder to second-degree murder. Consistent with this, the jury was instructed pursuant to CALCRIM No. 522 that if it concluded defendant "committed murder but was provoked, [it must] consider the provocation in deciding whether the crime was first or second degree." The natural reading of these instructions is that if defendant's subjective state of mind of premeditation and deliberation required for first degree murder in CALCRIM 521 was negated by being provoked, then the jury must convict defendant of second degree murder. A reasonable jury applying the jury instructions would not conclude that it could find provocation that negated defendant's required subjective state of mind, but nonetheless convict defendant of first degree murder.

In *People v. Jones* (2014) 223 Cal.App.4th 995, the defendant argued the "pattern instructions [i.e., CALCRIM Nos. 520, 521, 522, and 570] were likely to have misled the jury into concluding that the objective test applies both for reduction of first to second degree murder as well as from murder to manslaughter." (*Id.* at p. 1001.) The court rejected this argument, stating that the instructions "accurately inform the jury what is required for first degree murder, and that if the defendant's action was in fact the result of provocation, that level of crime was not committed." (*Ibid.*) The court also said, "CALCRIM Nos. 521 and 522, taken together, informed jurors that 'provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation.' [Citation.] As the jury also was instructed, a reduction of murder to voluntary manslaughter requires more. It is here, and only here, that the jury is instructed that provocation alone is not enough for the reduction; the provocation

must be sufficient to cause a person of average disposition in the same situation, knowing the same facts, to have reacted from passion rather than judgment." (*Ibid*.)

That is, if the jury found defendant was subjectively provoked, thereby negating the first degree murder mental state requirements of premeditation and deliberation, the remaining question would be whether the killing constituted second degree murder or voluntary manslaughter. Pursuant to CALCRIM No. 570, for the jury to reduce murder to manslaughter, the provocation must be objectively reasonable [i.e., "the provocation [must] cause[] a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment"].

Thus, CALCRIM Nos. 521, 522 and 570, taken together, instructed the jury that provocation could negate the subjective mental state of premeditation and deliberation require for first degree murder, but in order to reduce murder to manslaughter, the provocation must be objectively reasonable. There was no reasonable likelihood the jury misunderstood or misapplied the instructions. (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1334; *People v. Rogers* (2006) 39 Cal.4th 826, 877-880.)

C. One of the Findings of Multiple-Murder Special Circumstances

Defendant contends, and the Attorney General agrees, one of the two multiple-murder special circumstances findings must be stricken. We accept the Attorney General's concession.

Defendant convicted of two counts of first degree murder, and the jury made true findings on two multiple-murder special circumstances (§ 190.2, subd. (a)(3)[4]). Only one multiple-murder special circumstance may be found true. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422; *People v. Marshall* (1996) 13 Cal.4th 799, 855; *People v. Diaz*

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[4] Section 190.2, subdivision (a) states, "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found . . . to be true: [¶] . . . [¶] (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree."

(1992) 3 Cal.4th 495, 565.) One of the multiple-murder special circumstances findings must be stricken. (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 363; *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 422.)

DISPOSITION

The abstract of judgment should be corrected by striking one of the multiple-murder special circumstances findings. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

TURNER, P.J.

KRIEGLER, J.

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