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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GIOVANY SANTIAGO ENRIQUEZ, Defendant and Appellant.	B275995 Los Angeles County Super. Ct. No. BA434389

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadermel, Jr., and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Giovany Santiago Enriquez of one count of attempted willful, deliberate, and premeditated murder and two counts of assault with a deadly weapon. On appeal, defendant argues: (1) insufficient evidence supports his conviction for willful, deliberate, and premeditated attempted murder; (2) the prosecutor committed prejudicial misconduct during closing argument when she argued facts not supported by the evidence and misstated the law on the heat of passion defense to attempted first degree murder; and (3) defense counsel was ineffective for failing to object to the prosecutor's misrepresentations of the evidence. We affirm.

PROCEDURAL BACKGROUND

In July 2015, the People charged defendant with the following felonies: one count of attempted willful, deliberate, and premeditated murder (Pen. Code,[1] §§ 664/187; count 1); three counts of assault with a deadly weapon (§ 245, subd. (a)(1); counts 2 through 4);[2] one count of first degree burglary (§ 459; count 5); one count of kidnapping (§ 207, subd. (a); count 6); and one count of child custody deprivation (§ 278.5, subd. (a); count 7). As to counts 1 and 2, the People alleged defendant personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)), and as to count 1, the People alleged defendant personally used a deadly and dangerous weapon—i.e., a knife—in the commission of the attempted murder. The People further

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

[2] Prior to trial, the court dismissed count 4.

alleged defendant had served a prior prison term less than five years before he committed the charged offenses (§ 667.5).

A jury convicted defendant of attempted willful, deliberate, and premeditated murder (count 1) and two counts of assault with a deadly weapon (counts 2 and 3), and it found true the personal infliction of great bodily injury (counts 1 and 2) and the personal use of a deadly weapon allegations (count 1). The jury acquitted defendant of counts 5, 6, and 7. After defendant waived his right to a jury trial on the prior prison term allegation, he admitted the truth of the allegation. The court sentenced defendant to a total term of four years plus life in prison with the possibility of parole after seven years for count 1, and a concurrent term of three years in state prison for count 3. The court stayed the sentence for count 2.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND[3]

Defendant and Christy Martinez dated for about three years before they broke up in February 2015. They had one child together and lived in San Pedro with Christy's brother, Octavio Colin-Mondragon, and Christy's mother, Imelda Martinez.[4] After he and Christy broke up, defendant moved into his own apartment in Long Beach. Around the time she broke up with defendant, Christy began dating Alejandro Varela, an auto mechanic who had worked on Imelda's car while Christy was still in a relationship with defendant.

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[3] We summarize only the facts relating to the attempted murder and assault with a deadly weapon charges.

[4] For the sake of clarity, we will refer to Christy Martinez and the members of her family by their first names.

After Christy started dating Varela, defendant told Christy that he didn't like Varela and didn't want him around their child. Defendant would sometimes follow Varela's car, and he confronted Varela on several occasions.

In early February 2015, defendant called Varela's phone asking to speak to Christy. When Varela told defendant Christy didn't want to speak to him, defendant replied, "I want to talk to her. I just want to talk to her, you mother fucker." After Varela refused to let defendant talk to Christy, defendant told Varela, "I'll be seeing you."

Around late February 2015, Christy and Varela stayed at a hotel in Wilmington. Defendant stopped by the hotel to drop off his and Christy's child. Christy met defendant outside the hotel room so defendant wouldn't see Varela. Although defendant agreed to come back to the hotel several hours later to drop off his car, he returned after only 15 or 20 minutes and knocked on the door to Christy's room. When Christy opened the door, defendant saw Varela lying on the bed with defendant's and Christy's child. Defendant walked away from the room. When Christy followed him, defendant became angry, started to cry, and told Christy, "Do you know what I want to do right now? I want to kill him." Defendant and Christy talked for about five minutes before defendant left the hotel.

Around the first week of March 2015, defendant and Varela got into a fight in front of Christy's apartment. Varela was standing near his car when defendant walked up behind Varela, told Varela to "fuck off," and hit Varela twice in the back of the head with his fist. After Varela fell to the ground, he got up and started punching defendant. As the two were fighting, defendant

threatened to kill Varela. Varela eventually put defendant into a headlock and choked him until Christy stopped the fight.

On March 9, 2015, Varela was staying at Christy's apartment. Varela's car was not parked in front of the apartment because it was "broken down." At about 1:00 a.m., defendant entered the front door to the apartment,[5] while Christy and Varela were having sex in Christy's bedroom.

Defendant, who was wearing dark clothing and a beanie, walked toward Christy's bedroom. He opened the bedroom door, walked to an adjoining bathroom, and turned on the bathroom light. He then walked toward Christy's bed and stood over Varela. Defendant said something like "you should die" or "you die, mother fucker" or "[d]ie, fucker, I hope you fucking die," before stabbing the right side of Varela's chest with a knife. Defendant then got on top of the bed and continued to stab Varela around his chest. At one point, defendant got behind Varela, pulled Varela's head back with his left hand, and tried to slash Varela's neck with the knife he was holding in his right hand.

In total, defendant stabbed Varela nine times: on the right side of the chest, underneath the armpit, on the left and right biceps, and on the head. According to Varela, defendant stabbed him in the arms and head because Varela used those body parts to prevent defendant from continuing to stab him in the chest.

Toward the beginning of the attack, Christy thought defendant was only punching Varela. When Christy tried to pull defendant away from Varela as defendant tried to slash Varela's

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[5] Christy testified that she and her family always kept the front door to the apartment unlocked.

neck, she reached for one of defendant's hands. She realized defendant was stabbing Varela when she accidentally grabbed the blade of the knife defendant was holding, cutting her fingers, the top of her hand, and her right forearm.

Octavio, Imelda, and Christy's sister, Amy, ran into the bedroom when they heard Varela cry for help. As defendant attacked Varela, Imelda heard defendant say, "die, die." After pulling defendant off of Varela, Octavio asked defendant, "Are you going to hit me, too?" Defendant replied, "Not you, only him." Defendant then ran from the apartment, and Octavio chased after him for a few blocks. Octavio saw defendant throw the knife to the ground before defendant got into his car and drove away.

The knife defendant used during the attack belonged to Christy. Varela had given Christy the knife about two weeks or a month before the attack. When asked where she stored the knife, Christy testified that she usually kept it in her purse or "just … on the floor," but she acknowledged that she "los[t] things a lot." Shortly after defendant fled the scene, a police officer found the knife in some bushes about a block from Christy's apartment.

On the night of the attack, defendant's and Christy's child was supposed to be in defendant's custody. The child was not at Christy's home and, according to Octavio, was not sitting in defendant's car when defendant fled Christy's neighborhood after the attack.

Defendant was detained as he tried to cross the border into Mexico. A few days after the attack, Christy found her and defendant's child at a foster home in Tijuana, Mexico.

DISCUSSION

1. Sufficiency of the Evidence to Support Defendant's Conviction for Attempted First Degree Murder

Defendant contends insufficient evidence supports the jury's finding that he premeditated and deliberated before attempting to kill Varela. According to defendant, his attack on Varela was nothing more than "an angry, 'unconsidered or rash impulse' … [;] an 'explosion of violence,' " which was triggered when he found Varela in bed with Christy. As we explain below, substantial evidence supports defendant's conviction for attempted first degree murder.

1.1. Applicable Law and Standard of Review

" '[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) An attempted murder is premeditated and deliberate when it occurs "as the result of preexisting thought and reflection rather than unconsidered rash impulse. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*).) "Deliberation" is the careful weighing of considerations when forming a course of action, and "premeditation" means the defendant thought over his course of action in advance. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224 (*Cole*).) " ' "The process of 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.' " ' [Citation.]" (*Ibid*.)

The California Supreme Court has identified three types of evidence that support a finding of premeditation and deliberation: (1) facts about the defendant's behavior that show he engaged in planning activity prior to the attempted murder that was aimed at, and intended to result in, the killing of the victim; (2) facts about the defendant's prior relationship, or conduct toward, the victim that would show the defendant had a motive to kill the victim; and (3) facts about the nature of the attack that would show the defendant intended to kill the victim, such as the defendant carrying out the attack in a particular and exacting manner executed according to a " 'preconceived design' " to take the victim's life. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).)

" '*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' [Citations.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) These categories are therefore not dispositive. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 (*Perez*).) When the record discloses evidence in all three categories identified in *Anderson*, the verdict generally will be sustained. (*Stitely*, *supra*, 35 Cal.4th at p. 543.) But when evidence of all three categories is not present, courts " 'require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.]" (*Cole*, *supra*, 33 Cal.4th at p. 1224.)

When a defendant challenges 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 any rational trier of fact could have found the evidence proved the elements of the crime beyond a reasonable doubt. (*People v.*

Manibusan (2013) 58 Cal.4th 40, 87.) We draw all reasonable inferences in favor of the judgment and do not resolve credibility issues or evidentiary conflicts. (*Ibid*.) We apply this standard whether direct or circumstantial evidence is involved. (*People v. Avila* (2009) 46 Cal.4th 680, 701.) If the circumstances reasonably justify the trier of fact's findings, we cannot reverse the judgment even if we believe contrary findings could have been made based on the same evidence. (*People v. Cravens* (2012) 53 Cal.4th 500, 508.) Therefore, before we may set aside the judgment, it must be clear that " ' "upon no hypothesis whatever is there sufficient evidence to support it." ' " (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

1.2. Substantial evidence supports defendant's conviction for first degree attempted murder.

All three *Anderson* factors are present in this case. As to planning activity, the jury could infer that defendant engaged in conduct prior to the March 9, 2015 attack that shows he intended to kill Varela. For example, in the weeks leading up to the attack, defendant followed Varela's car on several occasions. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1082 (*Koontz*) [defendant's act of following the victim is evidence of planning].) Defendant also threatened to kill Varela at least twice before the attack. In late February 2015, defendant told Christy he wanted to kill Varela after he saw Varela lying on a bed with defendant's child in Christy's hotel room, and defendant threatened to kill Varela about a week before the attack, when the two got into a fight outside Christy's apartment. Finally, defendant waited until 1:00 a.m. to enter Christy's apartment before he attacked Varela. Defendant had no legitimate reason to be at the apartment at that time since he no longer lived there and was not picking up or

dropping off his and Christy's child. Instead, the more logical inference the jury could have drawn from this evidence was that defendant decided to enter the apartment at a time when the inhabitants were likely to be asleep, which would have made it easier for him to attack Varela without interference.

Defendant's motive to kill Varela is obvious: defendant was jealous of, and angry toward, Varela because of Varela's relationship with Christy. Defendant had a child with Christy, and, until only a few weeks before the attack, he had been in a long-term romantic relationship with her. Defendant made it known that he was angry about Varela's and Christy's relationship, telling Christy that he didn't like Varela and threatening to kill Varela when he saw Varela and Christy together.

As to the manner of the attack, defendant's actions were controlled and calculated to end Varela's life. Defendant stood over Varela and told him he should "die," before repeatedly stabbing him in the chest and attempting to slit his throat. (See *Koontz*, *supra*, 27 Cal.4th at p. 1082 [targeting a vital area of the body supports a finding that the defendant deliberated before attempting to kill the victim].) Although defendant also stabbed Varela in the arms and cut Varela's head with the knife, he only did so because Varela used those parts of his body to deflect defendant's further attempts to stab Varela's chest. In addition, defendant only attacked Varela; he never intentionally targeted Christy, despite finding her in bed with Varela, or any member of Christy's family who helped subdue defendant. Indeed, while he was being subdued by Octavio, defendant said that he only intended to attack Varela. Based on the focused nature of defendant's attack and the statements defendant made during

and after the attack, the jury reasonably could have inferred that defendant acted according to a preconceived plan to end Varela's life, and not out of an "unconsidered or rash impulse."

Defendant argues the record does not support a finding of premeditation and deliberation for two reasons. First, he could not have known he would find Varela inside Christy's apartment on the night of the attack because Varela's car was not parked outside the apartment. Second, the lack of any evidence establishing defendant brought the knife he used to attack Varela to the apartment shows he did not operate according to a preconceived plan to kill Varela.

As to defendant's first argument, there was ample evidence that defendant knew Varela and Christy were dating. For example, defendant told Christy he wasn't happy about her relationship with Varela; he had seen Christy and Varela together on at least two occasions, once while Varela was staying in the same hotel room as Christy; he had called Varela's phone asking to speak to Christy; and he had followed Varela's car on several occasions. Based on this evidence, the jury reasonably could have inferred that defendant expected to find Varela inside Christy's apartment on the night of the attack.

With respect to defendant's second argument, the lack of direct evidence establishing he brought the knife to Christy's apartment does not preclude a finding that he engaged in planning activity. The jury reasonably could have inferred defendant possessed the knife before he entered the home. Although the knife belonged to Christy, defendant had regular access to Christy's apartment. Defendant went to the apartment several times a week to pick up and drop off his child, and Christy and her family always left the front door to the

apartment unlocked. Christy also was not sure where the knife was located before defendant attacked Varela, testifying that while she may have kept it in her purse or on the floor of the apartment, she frequently lost things. Additionally, no witnesses testified they saw defendant obtain the knife *after* he entered the apartment. Thus, defendant had ample opportunity to obtain the knife before he entered Christy's apartment on the night of the attack. In any event, even assuming defendant obtained the knife *after* he entered the apartment, such conduct would not preclude a finding of premeditation and deliberation, especially in light of the other strong evidence of planning activity, motive, and manner of attack discussed above. (See *Perez*, *supra*, 2 Cal.4th at p. 1129 [obtaining a knife while inside the victim's home "is indicative of planning activity"].)

In sum, the jury's finding that defendant premeditated and deliberated before attempting to kill Varela is supported by substantial evidence.

2. Prosecutorial Misconduct

Defendant next contends the prosecutor committed prejudicial misconduct during closing argument when she argued facts not supported by the evidence and misstated the law on the heat of passion defense to attempted first degree murder. As we explain, the prosecutor did not commit prejudicial misconduct.

2.1. Applicable Law and Standard of Review

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of

due process." ' " [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " ' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

A prosecutor enjoys wide latitude during closing argument. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) Her argument may be vigorous and incorporate appropriate epithets as long as it amounts to fair comment on the evidence, and it may include reasonable inferences drawn from the evidence. (*Ibid.*) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) " 'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' " (*People v. Brown* (2003) 31 Cal.4th 518, 553–554.) Additionally, we will not review a claim of prosecutorial misconduct if the defendant did not object to the misconduct in the trial court, unless an objection would have been futile or an admonition would not have cured the harm. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

2.2. The Prosecutor's Statements

Defendant takes exception to four statements the prosecutor made during her closing argument. The first statement occurred when she discussed the elements of the heat of passion defense to attempted first degree murder. Specifically, defendant argues the prosecutor misstated the law on heat of

passion when she tried to clarify the requirement that a defendant must have actually been provoked before attempting to kill his or her victim: "And then the defendant must have actually been under the heat of passion when he acted—okay?—suddenly taken over by extreme emotion that all judgment, all reflection, all reasoning was just simply gone." Defendant objected to the prosecutor's statement. The court overruled defendant's objection, explaining: "Well, the jurors will have the jury instructions. They'll have an opportunity to hear both counsels' interpretation. So I'm going to allow it to be—remain in the record."

The three other statements defendant challenges concern the prosecutor's representation of the facts of the case. According to defendant, none of the following statements are supported by the evidence. In the first statement, the prosecutor argued to the jury that "[Christy] did tell you that the defendant, her ex-boyfriend, came in suddenly and unexpectedly and then just started stabbing [Varela]." In the second statement, the prosecutor asserted, "[Varela] was in the room on the bed with [defendant's child], and the defendant got upset, didn't lash out at that time, didn't go and start attacking [Varela] at that time when he saw him in a hotel on the bed with Christy." And finally, in the third statement, the prosecutor argued, "So at some point he drives over [to Christy's]. He's not invited. He's not expected. He didn't announce himself or call before he was coming over. *He went over there armed with a knife because that was the night.* That was the night that he decided he was going to put thought and desire into action and finally get rid of the person he saw as the only person between him and Christy." (Challenged portion in italics.) Defendant did not object to any of these statements.

2.3. Defendant's Challenges to the Prosecutor's Statements About the Evidence

As noted above, defendant did not object to any of the prosecutor's three statements characterizing the evidence in this case. In passing, defendant argues any objection to those statements would have been futile "in light of the court ruling as to initial objection," presumably referring to the court's ruling on defendant's objection to the prosecutor's statements addressing the heat of passion defense. Defendant does not contend an admonition would have failed to cure any harm that may have stemmed from the prosecutor's factual representations that he challenges on appeal.

Defendant's argument that any further objections would have been futile lacks merit. He fails to explain how the court's decision to overrule a single objection to the prosecutor's explanation of the law establishes that any subsequent objection to the prosecutor's representation of the evidence would have been futile. Defendant points to nothing in the record that shows the court would have overruled any further objections defendant made to the prosecutor's argument regardless of the merits of the objections. The fact that the court overruled one of defendant's prior objections, without more, fails to show any further objections by defendant would have been futile. (Cf. *People v. Chatman* (2006) 38 Cal.4th 344, 380 [where it was clear after the court overruled several objections that the court would allow a particular "line of questioning," further objections were futile].) Consequently, defendant has forfeited his challenge to the prosecutor's three statements to which he failed to object.

Anticipating the forfeiture rule, defendant contends defense counsel was ineffective for failing to object to the prosecutor's

statements about the evidence. To establish a claim of ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient, such that it "fell below an objective standard of reasonableness under prevailing professional norms"; and (2) that defendant was prejudiced by counsel's omission—i.e., "a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) "Counsel's failure to make a futile or unmeritorious motion or request is not ineffective assistance." (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.) In addition, it is well-established that defense counsel's failure to object or to seek an admonition rarely establishes ineffective assistance of counsel. (*People v. Collins* (2010) 49 Cal.4th 175, 233; *People v. Avena* (1996) 13 Cal.4th 394, 421 [" '[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.' "].) As we explain, defendant cannot establish a claim for ineffective assistance of counsel.

Defendant first contends the prosecutor misstated the evidence when she told the jury Christy had testified that defendant "came in suddenly and unexpectedly and then just started stabbing [Varela]." According to defendant, this statement misconstrues Christy's testimony because: (1) Christy actually testified that Varela had said something to defendant before defendant attacked Varela; and (2) Christy initially believed defendant was punching, not stabbing, Varela until she grabbed the knife when she tried to subdue defendant.

The prosecutor's statements in this case fairly reflect Christy's testimony. Christy testified that everything happened "pretty quickly," and that she was not expecting to find defendant

in her room. Although Christy believed that Varela said something to defendant before the attack, both Christy and Varela testified that defendant started attacking Varela shortly after he entered Christy's room. While Christy initially believed defendant was only punching Varela, she later realized that defendant was actually using a knife when she tried to stop defendant from continuing to attack Varela. Because the prosecutor's statement addressing Christy's testimony is consistent with the evidence at trial, the prosecutor did not err in making that statement and defense counsel was not ineffective for failing to object to it.

Defendant next argues the prosecutor erred when she told the jury that defendant saw "[Varela] was in the [hotel] room on the bed with [defendant's child], and the defendant got upset, didn't lash out at the time, didn't go and start attacking [Varela] at that time when he saw him in a hotel room on the bed with Christy." According to defendant, "[t]he record did not suggest that either Martinez or Varela were in bed at the hotel." We disagree that the prosecutor erred in suggesting that defendant saw Varela lying on the hotel bed. Christy testified that when defendant came to the door to Christy's hotel room, defendant saw Varela lying on the bed with defendant's child: "he [saw] [Varela] on the bed with the baby, and I closed the door real quick."

To the extent defendant takes issue with the last clause of the prosecutor's statement because it suggests that defendant saw Varela and Christy lying on the bed *together*, we agree that no witness testified explicitly to that effect. However, even if we were to assume the prosecutor misrepresented the evidence, defendant has not shown there is a reasonable likelihood the jury

applied the prosecutor's statement in an objectionable manner. First, the prosecutor had accurately represented Christy's testimony immediately before she misspoke, telling the jury that defendant had seen Varela lying on the bed with defendant's child. Second, the prosecutor did not draw undue attention to her misstatement, as she did not repeatedly tell the jury that defendant had seen Varela and Christy in the hotel bed together, and she did not focus on that representation when arguing defendant did not act in a heat of passion when he attacked Varela in Christy's apartment. Finally, the court properly instructed the jury that nothing the attorneys said during trial was evidence, including their remarks about the case during closing argument. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [jurors are presumed to understand and follow the court's instructions].) Because defendant has not shown he was harmed by the prosecutor's statement, he cannot establish his counsel was ineffective for failing to object to that statement.

Finally, defendant contends the prosecutor's statement to the jury that defendant came to Christy's apartment "armed with a knife" on the night of the attack lacks any evidentiary support. We disagree. As we discussed above, there was sufficient circumstantial evidence from which the prosecutor could reasonably argue defendant was armed with the knife when he entered the apartment. The prosecutor was therefore entitled to argue that such an inference could be drawn from that evidence. Consequently, defendant cannot show his counsel was ineffective for failing to object to the prosecutor's statement that defendant was armed with a knife when he entered Christy's apartment on the night of the attack.

2.4. Defendant's Challenge to the Prosecutor's Explanation of the Law of Provocation

Defendant also contends the prosecutor misstated the law on the heat of passion defense to attempted first degree murder. Defendant has failed to show the prosecutor committed prejudicial misconduct.

Defendant first claims the prosecutor erred when she told the jury that the provocation must have caused defendant to "suddenly" be overtaken by extreme emotion before he attacked Varela. According to defendant, the defense of heat of passion would apply even if the provocation had caused him to brood over a long period of time before attacking Varela. In his opinion, the prosecutor's statement improperly undermined his argument that any evidence showing he may have "stew[ed]" after finding Christy and Varela in the same hotel several weeks before he attacked Varela with a knife supported his heat of passion defense.

Voluntary manslaughter is an unlawful killing without malice "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 201 (*Barton*).)

To qualify as a "heat of passion" crime, "the [attempted] killing must be 'upon a sudden quarrel or heat of passion' (§ 192); that is, '*suddenly* as a response to the provocation, and not belatedly as revenge or punishment.' " (*People v. Daniels* (1991) 52 Cal.3d 815, 868, italics added (*Daniels*).) Accordingly, if " 'sufficient time has elapsed for the passions of an ordinarily reasonable person to cool,' " the attempted killing is attempted murder, not attempted voluntary manslaughter. (*Ibid.*) Put another way, " '[t]he assailant must act under the smart of that sudden quarrel or heat of passion.' " (*People v. Hach* (2009) 176 Cal.App.4th 1450, 1459.)

In light of the foregoing, the prosecutor properly told the jury that defendant must have been "suddenly" overtaken by extreme emotion before he attacked Varela. Although it is true, as defendant points out, that the provocation may occur over a short or long period of time, there was nothing erroneous about telling the jury that once the defendant was provoked, his attack on Varela must have occurred "suddenly" as a response to that provocation. (See *Daniels*, *supra*, 52 Cal.3d at p. 868 [the attempted murder must occur " 'suddenly as a response to the provocation, and not belatedly as revenge or punishment' "].)

The prosecutor also did not err when she told the jury that the extreme emotion defendant was confronted with must have caused him to lose "all judgment, all reflection, [and] all reasoning" before he attacked Varela. As noted above, a heat of passion defense applies when, at the time of the attempted killing, the defendant's reason was so obscured by passion or emotion that an ordinarily reasonable person in the defendant's position would have acted "rashly and without deliberation and reflection, and from such passion rather than from judgment.'

[Citations.]" (*Barton*, *supra*, 12 Cal.4th at p. 201.) Although the prosecutor did not use the exact phrasing that appears in CALCRIM No. 603, she correctly stated the law on heat of passion—i.e., that the defendant must have acted rashly and from passion, and without deliberation, reflection, or judgment.

In any event, even if we were to assume the prosecutor erred in explaining the law of provocation, that error was harmless. Before and after making the challenged statement, the prosecutor correctly explained all of the elements of heat of passion. The court also instructed the jury on heat of passion as it applies to a charge of attempted first degree murder using CALCRIM No. 603. The court followed CALCRIM No. 603 verbatim, striking only certain gender-specific pronouns, and it included the optional language instructing the jury that the heat of passion defense does not apply if there was a sufficient period of time for a reasonable person to "cool off" between the provocation and the attempted killing. Defendant did not object to any portion of the court's instruction, and, in his opening brief, acknowledges the court's instruction was correct. Without any indication that the jury misapplied the law based on the prosecutor's statements, we presume the jury followed the court's instructions. (See *People v. Osband* (1996) 13 Cal.4th 622, 717 ["When argument runs counter to instructions given [to] a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former … ."].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

DHANIDINA, J.

GOODMAN, J.*

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