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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RICARDO QUEL, Defendant and Appellant.	B276479 (Los Angeles County Super. Ct. No. VA139632)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

James Koester, 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, Senior Assistant Attorney General, Victoria B. Wilson and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Ricardo Quel of attempted murder (Pen. Code, §§ 664, 187, subd. (a))[1] and aggravated mayhem (§ 205). The jury also found Quel acted willfully, deliberately, and with premeditation, personally used a deadly weapon, and inflicted great bodily injury on the victim, his former girlfriend, Veronica Bacenas-Flores. Quel argues that substantial evidence does not support the jury's finding the attempted murder was premeditated and deliberate and that the trial court should have instructed the jury that provocation can raise a reasonable doubt regarding premeditation and deliberation. Quel also argues the trial court prejudicially erred by excluding a hearsay statement by the victim relating to Quel's provocation defense and by failing to admonish the jury after the prosecutor in her closing argument misstated the law regarding provocation. Finally, Quel contends the cumulative effect of the trial court's errors deprived him of due process and a fair trial.

We conclude that substantial evidence supports the jury's finding that Quel attempted to murder Bacenas-Flores after deliberation and consideration and that any error in failing to instruct the jury on what Quel calls "simple" attempted murder was harmless. We also conclude any error in sustaining the prosecutor's hearsay objection and overruling counsel for Quel's objection to the prosecutor's misstatement of law was harmless, and there was no cumulative error. Therefore, we affirm.

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1 Statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Quel Dates Bacenas-Flores*

Quel met Bacenas-Flores at a fast food restaurant where she worked. They began dating and eventually moved into a two-bedroom apartment together. They rented one of the two bedrooms to another couple. Six months after they began living together, Bacenas-Flores started coming home from work 30 to 45 minutes later than usual. According to Quel, she appeared nervous and told the other couple living in the apartment Quel was a "good-for-nothing."

In early July 2015 Bacenas-Flores ended her romantic relationship with Quel, but she continued to live in the same apartment (albeit in a different room) and to have sexual relations with him. Quel was heartbroken Bacenas-Flores had broken up with him, but he was optimistic they might get back together.

B. *Quel Stabs Bacenas-Flores with a Box Cutter*

According to Bacenas-Flores, who testified at trial, on July 17, 2015, a week or two after she ended her relationship with Quel, she picked up Quel from work and they went to dinner. After dinner they went home. Bacenas-Flores was watching television in the living room later that evening when Quel told her he wanted to talk in his bedroom. The other two people living in the apartment were not home, and Bacenas-Flores agreed to talk with Quel in the living room. Quel sat on the floor beside her and said he was going to move out of the apartment so she could rent his bedroom. Quel got up from the floor and turned as if to go into his bedroom. Instead, he

returned, said he was "sorry," and began slashing her with a box cutter.

Bacenas-Flores tried to defend herself and escape, but Quel continued stabbing her, again saying he was "sorry." At one point she managed to push him away, but he "got up and grabbed the box cutter again and . . . kept at it." Bacenas-Flores yelled for help and eventually was able to escape by running out a screen door. By that time Quel had stabbed her multiple times all over her body.

Meanwhile, a neighbor, Kenny Garcia, his girlfriend, and another friend heard someone screaming for help. They rushed over to the apartment where Quel and Bacenas-Flores lived, saw Quel stabbing Bacenas-Flores, and observed blood "all over the apartment. . . . even coming out of the door." Garcia yelled at Quel to stop, and Quel said, "This is not your business. Get out of here or else I'll hurt you, too." After calling 911, Garcia went back to help Bacenas-Flores, who yelled at Garcia to break the window so she could escape. After she managed to escape through the screen door, Garcia and his friends applied towels to her wounds until paramedics arrived. Garcia said Quel continued to yell, turned the box cutter on himself, and slit his wrists.

According to Quel, who also testified at trial, he and Bacenas-Flores were having dinner that night when she told him she was considering getting back together with him. After they returned home, he took a nap for 10 to 15 minutes, and when he came out of his bedroom he saw Bacenas-Flores with a man at the door, "and they were kissing each other passionately." Quel said that, because his head felt like it was spinning, he decided to "go out and buy some juice" to "cool off." After buying the juice,

Quel returned to the apartment, still feeling "upset." He told Bacenas-Flores he wanted to talk to her, started to cry, and asked her why she had "done that" after all he had done for her. Quel told Bacenas-Flores he had a bad headache and asked her if she had something for it. She gave him two acetaminophen pills, and two minutes later Quel "felt like something exploded in [his] head." He said he did not remember what happened next.

During her cross-examination of Quel, the prosecutor highlighted certain discrepancies between Quel's account of the stabbing and what he had told a deputy sheriff the morning after. For example, Quel told the deputy he saw Bacenas-Flores talking to a man at the door that night, but he did not mention he saw them kissing. Quel also told the deputy he begged Bacenas-Flores to take him back and, after she refused, he went to the kitchen and began crying. He then went to his bedroom to get the box cutter. Quel told the deputy that, during the attack, Bacenas-Flores begged for her life. Quel responded by telling her "it was her fault for playing with his feelings."[2]

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[2] At trial, Quel either denied or did not recall telling the deputy these facts. Counsel for Quel elicited testimony that the deputy sheriff interviewed Quel between 3:30 and 5:30 in the morning after the hospital had treated and released him for injuries to his wrists.

C. *Help Arrives*

Deputy Weneslao Agustin arrived first on the scene. He saw a lot of blood and several people helping Bacenas-Flores. Bacenas-Flores was conscious but could not answer the deputy's questions about her condition. Deputy Agustin looked inside the apartment and saw Quel holding an object in his hand. Quel yelled at Deputy Agustin and his partner to "get out of here" and pointed the object, a knife, at them. After the officers ordered Quel to drop the knife and get down on the floor, he collapsed. He was non-responsive while the officers handcuffed him.

Paramedics arrived and found Bacenas-Flores propped up against a wall with stab wounds to her head, throat, stomach, biceps, forearms, hands, thighs, calves, back, and feet. Most of her wounds were "three to six inches in length and down to the bone," and some were "six to eight inches in length." There was "a lot of blood," some of which was "dripping down from the second story balcony onto a car," and there was a "puddle of blood outside" the apartment.

The doctor who treated Bacenas-Flores at the hospital documented a total of 310 centimeters of lacerations, including large lacerations across her chest that required reconstructive surgery and a 40-centimeter complex right thigh laceration that extended to the calf. The surgery to repair Bacenas-Flores's injuries lasted six hours. The wounds caused scarring across much of her body.

D. *The Jury Convicts Quel of Attempted Murder and Finds True Several Allegations*

The People charged Quel with attempted willful, deliberate, and premeditated murder within the meaning of section 664,

subdivision (a). The People alleged Quel personally inflicted great bodily injury on Bacenas-Flores within the meaning of section 12022.7, subdivision (a). The People also charged Quel with aggravated mayhem. In connection with both counts, the People alleged Quel personally used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1).

A jury convicted Quel on both counts and found true all the enhancement allegations. The trial court sentenced Quel on his conviction for attempted murder to life imprisonment with the possibility of parole and a minimum period of confinement of 11 years. On his conviction for mayhem, the trial court imposed but stayed pursuant to section 654 a term of life imprisonment with the possibility of parole. Quel timely appealed.

DISCUSSION

A. *Substantial Evidence Supported Quel's Conviction for Attempted Premeditated Murder*

1. *Applicable Law*

"The very definition of 'premeditation' encompasses the idea that a defendant thought about or considered the act beforehand." (*People v. Pearson* (2013) 56 Cal.4th 393, 443 (*Pearson*); accord, *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1264 (*Boatman*).) "'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."'"'" (*Boatman*, at p. 1264; accord, *People v. Houston* (2012) 54 Cal.4th 1186, 1216 (*Houston*).) "Thus, "'[a]n intentional killing is premeditated and deliberate if it occurred as the result of

preexisting thought and reflection rather than unconsidered or rash impulse.'" (*Boatman*, at p. 1264; see *Pearson,* at p. 443.)

"Courts have also emphasized that '"[t]he 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.'"'" (*Boatman*, *supra*, 221 Cal.App.4th at p. 1265; accord, *Houston, supra,* 54 Cal.4th at p. 1216.) "Judicial reliance on this language, however, has led to criticism that courts have 'collapsed any meaningful distinction between first and second degree murder.' [Citations.] In response, our state Supreme Court reaffirmed the significance of 'preexisting reflection, of any duration' to distinguish first degree murder (based on premeditation and deliberation) from second degree murder." (*Boatman*, at p. 1265; see *Houston,* at p. 1217; *People v. Solomon* (2010) 49 Cal.4th 792, 813 (*Solomon*).)

The Supreme Court in *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*) identified three types of evidence—evidence of planning activity, preexisting motive, and manner of killing—courts consider in determining whether the evidence supports a finding of premeditation and deliberation. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069 (*Mendoza*); *Solomon, supra,* 49 Cal.4th at p. 812.) The Supreme Court in *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."'" (*Mendoza*, at p. 1069; see *Solomon*, at p. 812.) The Supreme Court's decision in *Anderson* nevertheless provides a useful framework for

considering the sufficiency of evidence of premeditation and deliberation. (See *Mendoza*, at p. 1069; *Solomon*, at p. 812.)

"'"On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses 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."'" (*People v. Jones* (2013) 57 Cal.4th 899, 960; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 345.) "'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence.'" (*People v. Jones*, at p. 960.) "'"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment."'" (*People v. Casares* (2016) 62 Cal.4th 808, 823; see *People v. Clark* (2016) 63 Cal.4th 522, 626.)

2. *Substantial Evidence Supported the Jury's Findings of Premeditation and Deliberation*

Quel concedes "there was strong evidence of motive" but argues there was "virtually no evidence of any preparation or planning." He also contends the manner of the attempted killing, use of a "readily available box cutter that appears to have been sitting on the top of a chest of drawers, and the frenzied and indiscriminate slashing . . . is counter intuitive to any supposition that [the] attempted murder was the result of any careful weighing of the considerations."

The evidence told a different story. Even crediting Quel's testimony that he saw Bacenas-Flores kissing another man "passionately," between that moment and his attack on Bacenas-

Flores Quel (1) left the apartment, (2) went for a walk to buy juice, (3) returned to the apartment, (4) asked Bacenas-Flores to talk with him, (5) sat down and talked with her for several moments before he got up, (6) began walking to the bedroom, (7) turned around, (8) said he was "sorry," and (9) began slashing her with the box cutter. At some point between returning from purchasing juice and stabbing Bacenas-Flores, Quel also (10) asked her for and (11) took two acetaminophen pills for a headache. These facts evidence reflection, preparation, and planning. The jury could reasonably infer either that Quel formulated a plan to attack Bacenas-Flores if she did not tell him what he wanted to hear and had the box cutter with him when they sat down to talk or that Quel quickly formulated the plan when he went into the bedroom to get the box cutter after talking with Bacenas-Flores.[3] (See *People v. Watkins* (2012) 55 Cal.4th 999, 1026 [carrying a loaded gun to the position from which the defendant shot the victim was "sufficient evidence of planning"]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["[t]hat defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter'"]; see also *People v. Cook* (2006) 39 Cal.4th 566, 603 ["[p]remeditation and deliberation do not require an extended period of time, merely an opportunity for reflection"].) In addition, Quel's multiple statements that he was

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[3] Neither Quel nor Bacenas-Flores testified about the location of the box cutter immediately prior to the attack. At trial Quel denied telling a deputy sheriff he went into his bedroom to get the box cutter, but the deputy later testified Quel told her the morning after the attack that he did go into his bedroom to get the box cutter after begging Bacenas-Flores to take him back.

"sorry" indicate he knew what he was about to do (and was doing) and considered the consequences of his actions.

The evidence of Quel's manner and method of attack also supports the jury's finding that the attempted murder was premeditated and deliberate. The number and location of stab wounds Quel inflicted on his victim and the duration of his attack support an inference of deliberation. (See *People v. Sandoval* (2015) 62 Cal.4th 394, 425 ["[t]he fact that the manner of killing is prolonged . . . supports an inference of deliberation"]; *People v. Elliot*, *supra*, 37 Cal.4th at p. 471 [three lethal knife wounds and almost 80 other stab and slash wounds supported an inference of "a preconceived design to kill"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [firing a gun at a vital area at close range supports a finding of premeditation and deliberation].) The fact that Quel continued the attack after Bacenas-Flores managed at one point to get away from him also supports the jury's finding. (See *People v. Koontz*, at p. 1081 [killing was deliberate and premeditated where the defendant "pursued [the victim] and persisted in the argument"].)

B. *The Trial Court's Failure To Instruct on "Simple" Attempted Murder Does Not Justify Reversal*

Quel contends the trial court erred by failing to instruct the jury sua sponte that evidence of provocation, even if it is insufficient to negate the malice required for attempted murder, may be sufficient to create a reasonable doubt that Quel committed the attempted murder after premeditation and deliberation. Quel argues the trial court should have instructed the jury on "simple" attempted murder in addition to instructing on willful, premeditated, and deliberate attempted murder and

the lesser included offense of attempted voluntary manslaughter. However, any error by the trial court in failing to give such an instruction (assuming the court had a sua sponte obligation to do so) was harmless, and trial counsel for Quel's failure to ask for such an instruction was not ineffective assistance.

1. *Relevant Proceedings and Applicable Law*

"'[I]n a murder trial, the court, on its own motion, must fully instruct on every theory of a lesser included offense, such as voluntary manslaughter, that is supported by the evidence. [Citation.] Hence, where the evidence warrants, a murder jury must hear that provocation or imperfect self-defense negates the malice necessary for murder and reduces the offense to voluntary manslaughter.'" (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1243 (*Speight*); see *People v. Rios* (2000) 23 Cal.4th 450, 463, fn. 10.)

The trial court instructed the jury that to convict Quel of attempted murder, it had to find that Quel "took at least one direct but ineffective step toward killing another person" and "intended to kill that person." (See CALCRIM No. 600.) The trial court further instructed the jury that a "direct step" is one that "goes beyond planning or preparation and shows that a person is putting his or her plan into effect." (*Ibid.*) Quel conceded he intended to kill Bacenas-Flores.

The trial court instructed the jurors that, if they found Quel guilty of attempted murder, they had to decide whether the People had proved the additional allegation that Quel committed the attempted murder willfully and with deliberation and premeditation. With regard to deliberation and premeditation, the court instructed: "The defendant deliberated if he carefully

weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant premeditated if he decided to kill before acting. . . . A decision to kill made rashly, impulsively, or without careful consideration or choice and its consequences is not . . . deliberate and premeditated. . . . The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved." The trial court also instructed the jury that an attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter "if the defendant attempted to kill someone because of his sudden quarrel or in the heat of passion." (CALCRIM No. 603.)

The trial court instructed the jury on sudden quarrel and heat of passion pursuant to CALCRIM No. 603 as follows:

"The defendant attempted to kill someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant took at least one direct but ineffective step toward killing a person;

"2. The defendant intended to kill that person;

"3. The defendant attempted the killing because he was provoked;

"4. The provocation would have caused an ordinary person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment;

"AND

"5. The attempted killing was a rash act done under the influence of intense emotion that obscured the defendant's reasoning or 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 a sudden quarrel or heat of passion to reduce an attempted murder to attempted 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 judgment.

"If enough time passed between the provocation and the attempted killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the defendant attempted to kill someone and was not acting 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 attempted murder."

Quel contends the trial court should also have instructed the jury "on what effect provocation may have played in creating a reasonable doubt regarding . . . premeditation and

deliberation," along the lines of CALCRIM No. 522, which provides in relevant part: "Provocation may reduce a murder from first degree to second degree. 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." Quel contends the trial court could have modified CALCRIM No. 522 and instructed the jury as follows: "Provocation may reduce an attempted murder from willful, deliberate and premeditated attempted murder to simple attempted murder. . . . The weight and significance of the provocation, if any, are for you to decide. If you conclude that the defendant committed attempted murder but was provoked, consider the provocation in deciding whether the crime was willful, deliberate and premeditated or not."[4] Quel argues the trial court had a sua sponte duty to give this instruction because "simple" attempted murder is a lesser included offense of attempted willful, deliberate, and premeditated murder. In a related argument, Quel also contends his trial counsel's failure to request this instruction constituted ineffective assistance of counsel.

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[4] Quel offered a similar modification to CALJIC No. 8.73, which, like CALCRIM No. 522, addressed the effect of provocation on premeditated and deliberate murder.

2. *Any Instructional Error Was Harmless, and Quel Did Not Receive Ineffective Assistance of Counsel*

"In noncapital cases, 'the rule requiring sua sponte instructions on all lesser necessarily included offenses supported by the evidence derives exclusively from California law.' [Citation.] As such, 'in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson* . . . .'" (*People v. Beltran* (2013) 56 Cal.4th 935, 955; see *People v. Rogers* (2006) 39 Cal.4th 826, 867-868, fn. omitted ["[t]he erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson*"]; see also *People v. Moye* (2009) 47 Cal.4th 537, 556 ["'[a]pplication of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless'"].) "'[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.'" (*People v. Beltran*, *supra*, 56 Cal.4th at p. 955; see *People v. Prince* (2007) 40 Cal.4th 1179, 1267 ["'[r]eversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of'"].)

Ineffective assistance of counsel has a similar requirement of prejudice. """In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to

undermine confidence in the outcome.'"'" (*People v. Johnson* (2016) 62 Cal.4th 600, 653.) Specifically, on the prejudice element of his argument that he received ineffective assistance of counsel, Quel must show "a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 676, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.) "'[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies,'" and "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982; accord, *People v. Gana* (2015) 236 Cal.App.4th 598, 612-613.)

We need not decide whether "simple" attempted murder is a lesser included offense of attempted willful, deliberate, and premeditated murder, or whether Quel's trial counsel's failure to request an instruction on "simple" attempted murder fell below an objective standard of reasonableness, because the trial court's failure to instruct the jury on "simple" attempted murder did not prejudice Quel. The trial court essentially gave that instruction by instructing the jury to consider the truth of the People's allegation that Quel committed the crime willfully and with premeditation and deliberation only if the jury found Quel guilty of attempted murder. Thus, the jury could have found Quel guilty of attempted murder and yet concluded he did not act willfully and with premeditation and deliberation. The result, which the court's instructions authorized the jury to reach, would have been a conviction for "simple" attempted murder. In other

words, the trial court essentially gave the jury instruction Quel argues the court should have given. And even with this instruction, the jury found Quel guilty of "simple" attempted murder and found true the allegation he acted willfully, deliberately, and with premeditation. Indeed, the verdict form stated the jury found Quel guilty of attempted murder and "further" found true the allegation he committed attempted murder willfully, deliberately, and with premeditation. Thus, any error in failing to give the kind of modified CALCRIM No. 522 instruction Quel contends the trial court should have given, and any failure by Quel's trial counsel to ask for that instruction, did not cause Quel any prejudice.

C. *Any Error in Excluding the Statement by Bacenas-Flores Was Harmless*

During Quel's testimony, counsel for Quel asked him how he felt and what he did after he saw Bacenas-Flores kiss another man. Quel said he went out to buy juice and still felt "upset" when he returned to the apartment. Quel said he told Bacenas-Flores he wanted to talk to her and he started crying. Counsel for Quel asked, "And what happened next?" Quel responded, "I asked her why had she done that." When counsel for Quel asked how Bacenas-Flores responded, the prosecutor objected, asserting the question called for hearsay. The trial court sustained the objection.

Quel continued to testify, stating that he said to Bacenas-Flores, "After all that I've done for you," meaning that he "had taken her out of just renting rooms" and made it possible for her to rent an entire apartment. Quel said he then felt "a bad headache" and took two pills. He said two minutes later he felt

like something "exploded" in his head, and he did not remember what happened next.

Counsel for Quel later sought again to introduce Bacenas-Flores's response to Quel's question why she had kissed another man. Counsel for Quel told the trial court he expected Quel to say that Bacenas-Flores denied it, a response that "further inflamed [him] by her lying to his face about it." Counsel for Quel argued Bacenas-Flores's response was not hearsay because it was not offered for its truth, but to show "the effect of that statement on [Quel] and, therefore, provoking him into certain actions." "In essence," counsel argued, "when [Quel] believes that she was committing this act in front of [him], and then . . . he believes that he's lied to, it's his belief that's really important, that further peaks his ire." The trial court excluded the proffered testimony.

The People appear to concede the statement counsel for Quel attempted to elicit from Quel—that Bacenas-Flores denied kissing another man—was not hearsay because it was not offered for its truth. The People argue, however, there is no reasonable probability the result of the trial would have been different had the trial court admitted the statement. The People note that other evidence admitted during the trial demonstrated Quel was upset and heartbroken, and his "ire" was already "peaked." The People also contend overwhelming evidence supports the jury's finding that Quel did not act in the heat of passion when he attempted to kill Bacenas-Flores.

We agree that, even if the trial court erred in excluding Quel's statement suggesting Bacenas-Flores may have lied to him about kissing another man, the error was harmless. (See *People v. Richardson* (2008) 43 Cal.4th 959, 1001 ["the erroneous admission or exclusion of evidence does not require reversal

except where the error or errors caused a miscarriage of justice"]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [harmless error standard applies to the erroneous exclusion of hearsay evidence].) Quel argues "the timing of [Quel's] asking Bacenas[-Flores] why she had done this to him and his immediate response in viciously attacking her suggests that her response, whatever it may have been, was a substantial factor in triggering the assault." But Quel did not attack Bacenas-Flores "immediately" after she responded to his question. Quel testified that, after he made a comment about all he had done for Bacenas-Flores, he felt a headache coming on, asked (according to his post-arrest interview) Bacenas-Flores for pills, and took two of them before feeling his head "explode" two minutes later. Only then did he begin attacking Bacenas-Flores. This testimony shows that Bacenas-Flores's alleged denial did not "trigger" the assault and that Quel's passions had "cooled off" enough for him to regain judgment, at least about his health, prior to the attack. (See *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1139 [malice required for attempted murder is not negated by the heat of passion "'[i]f sufficient time has elapsed for one's passions to "cool off" and for judgment to be restored"']; accord, *People v. Beltran*, *supra*, 56 Cal.4th at p. 951; see also 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 239, p. 1064 ["[i]f in fact the defendant's passions did cool, as shown by such circumstantial evidence as rational conversation, transaction of other business, or preparation for the killing, the manslaughter statute obviously is not available"].)

Moreover, counsel for Quel did not argue at trial that Quel's heat-of-passion theory was based, even in part, on Bacenas-Flores's denial she kissed another man. Counsel for

Quel did not ask Bacenas-Flores whether she told Quel she did not kiss another man, nor did counsel ask Quel whether he was upset because he thought Bacenas-Flores lied to him. Instead, trial counsel for Quel argued the "triggering" event occurred when Quel saw Bacenas-Flores kiss another man.[5]

D. *The Prosecutor's Misstatement of Law Was Harmless*

During her rebuttal argument, the prosecutor attempted to explain the law of provocation by quoting from the relevant jury instruction, CALCRIM No. 603. She said, "The heat of passion would have you believe – and I'm going to quote it so I don't mess it up – that a person – 'the provocation would cause a person of average disposition to act rashly and without due deliberation, from passion rather than judgment.' That it was 'done under the influence of intense emotion that it would obscure the defendant's reasoning and judgment.'" The prosecutor then applied the facts of the case to this standard and asked the jury rhetorically, "Is it an average disposition that seeing a kiss from someone who you're dating for six months and living with for over six months is enough to make you want to get a box cutter and slice her to

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[5] In his closing argument, counsel for Quel stated: "[T]hat same evening, after taking [Bacenas-Flores] out to dinner, she told him, hey, you know, I would like to get back together with you, as if that was the plan, and then he walks in later that evening and sees her with another man, kissing that man. And he told you, hey, look, I lost it. I got upset. I felt all this emotion, I couldn't control it. I went out, I tried to calm myself down. I came back and I confronted her and kneeled down to talk to her and then he says he doesn't remember what happened from there."

bits?" Counsel for Quel objected, arguing that the prosecutor misstated the law, and the trial court overruled the objection.

"[T]he law of provocation focuses on 'emotion reasonableness' (i.e., 'whether "the defendant's *emotional* outrage or *passion* was reasonable"'), not on 'act reasonableness' (i.e., 'whether "a reasonable person in the defendant's shoes would have responded or *acted* as violently as the defendant did."'" (*People v. Wright* (2015) 242 Cal.App.4th 1461, 1481-1482 (*Wright*); see *People v. Beltran*, *supra*, 56 Cal.4th at p. 939 ["[t]he proper standard focuses upon whether the person of average disposition would be induced to react from passion and not from judgment"].) Therefore, a jury must "assess the emotional profile of the defendant and its connection to the reasonableness of her reaction to the provocation rather than whether it was reasonable for her to kill under the circumstances." (*Wright*, at p. 1482.) "As the *Beltran* court explained, the California test for sufficient provocation, properly understood, has never been whether the victim's provocation would cause an ordinary person of average disposition to kill. [Citation.] 'Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to *kill* focuses on the wrong thing. The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply *react,* without reflection. . . . [T]he anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would *act* in a certain way: to kill. Instead, the question is

whether the average person would *react* in a certain way: with his reason and judgment obscured.'" (*Wright*, at p. 1482, quoting *Beltran,* at p. 949.) "'[P]rovocation is sufficient [when] . . . it eclipses reflection. A person in this state simply reacts from emotion due to the provocation, without due deliberation or judgment. *If an ordinary person of average disposition, under the same circumstances, would also react in this manner, the provocation is adequate*.'" (*Wright*, at p. 1482, quoting *Beltran*, at p. 950.)

The prosecutor's rhetorical question whether a person of average disposition would "get a box cutter and slice [a person] to bits" misstated the law of provocation. (See *People v. Forrest*, *supra*, 7 Cal.App.5th at p. 1085 [prosecutor misstated the law of provocation by telling the jury "provocation is sufficient to reduce a murder to manslaughter only if 'a reasonable person would have done' what appellant did, that is, shoot his wife in the head"].) The prosecutor's misstatement and the trial court's error in overruling counsel for Quel's objection, however, were harmless. The trial court correctly instructed the jury on provocation pursuant to CALCRIM No. 603. The trial court also instructed the jury pursuant to CALCRIM No. 200 to follow the court's instructions if any of the arguments by the attorneys conflicted with the jury instructions given. "In the absence of any evidence of confusion on the part of the jury, '[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions.'" (*People v. Forrest*, *supra*, 7 Cal.App.5th at p. 1083; see *People v. Centeno*, *supra*, 60 Cal.4th at p. 676 ["'[w]hen argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former,

for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade"""].)

E. *There Was No Cumulative Prejudice*

Quel argues the combined effect of the "interconnected" trial errors regarding premeditation and deliberation deprived him of due process and a fair trial. Overwhelming evidence, however, supports the jury's finding that Quel attempted to kill Bacenas-Flores with premeditation and deliberation. Indeed, the evidence that Quel left the apartment to buy juice after he claimed he saw Bacenas-Flores kiss another man and that, when he returned, he asked her for medicine for a headache after supposedly confronting her about kissing the man demonstrate that Quel was not acting under the direct and immediate influence of provocation at the time he attacked Bacenas-Flores. (See *Beltran, supra,* 56 Cal.4th at p. 950 ["provocation is sufficient [when] it eclipses reflection"]; *People v. Millbrook*, *supra*, 222 Cal.App.4th at p. 1137.) Therefore, the cumulative effect of any errors at trial was harmless. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [where "each error or possible error [is] harmless when considered separately . . . we likewise conclude that their cumulative effect does not warrant reversal"]; *People v. Jennings* (2010) 50 Cal.4th 616, 691 [where there was no prejudice even assuming error, the cumulative effect of any possible errors did not warrant reversal "[i]n light of the extensive and overwhelming evidence of defendant's guilt"].)

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

BENSINGER, J.*

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