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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. MIGUEL R. GUTIERREZ, Defendant and Appellant.	B271223 (Los Angeles County Super. Ct. No. VA134965)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Janet Uson, 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, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Miguel Gutierrez was charged with the attempted, premeditated murder of his girlfriend, Claudia Velarde. At trial, Velarde testified that Gutierrez attacked her with a knife after she told him she was ending their relationship. Gutierrez conceded he had stabbed Velarde, but argued he acted in the heat of passion. The jury found Gutierrez guilty of attempted murder, and that the offense was premeditated.

On appeal, Gutierrez argues we must reverse his conviction because: (1) there was insufficient evidence to support the jury's findings of attempted premeditated murder; (2) the court's instructions to the jury on the lesser included offense of voluntary manslaughter were erroneous; (3) during closing argument, the prosecution violated his Fifth Amendment right to remain silent; and (4) his counsel provided ineffective assistance. We affirm.

FACTUAL BACKGROUND

A. Summary of Facts Preceding Trial

At approximately 12:30 a.m. on April 30, 2014, City of Bell police officer Lance Ferrari received a call directing him to respond to an emergency at the intersection of Otis and Gage Avenues. When Ferrari arrived at the location, he found Claudia Velarde lying in front of a car, bleeding from multiple stab wounds. Ferrari observed a substantial amount of blood in the driver seat of the vehicle. Velarde appeared to be severely injured, and was having difficulty speaking. She informed Ferrari that her boyfriend, defendant Miguel Gutierrez, had stabbed her, and that he drove a red motorcycle. A witness who had been assisting Velarde informed Ferrari he had seen a red motorcycle leaving the area. Ferrari reported the name of the

suspect and the type of vehicle he was driving to the police dispatcher.

Shortly thereafter, City of Bell police officer Rolando Carranza saw a person riding a red motorcycle in the location where Velarde had been found. Carranza turned on the emergency lights and sirens of his marked police vehicle, and began following the motorcycle in a 25 mile-per-hour (MPH) speed limit zone. The motorcycle did not stop, and accelerated to a speed of approximately 45 MPH. Carranza and a second marked vehicle pursued the motorcycle, which increased its speed to approximately 80 MPH, and ran a red light and multiple stop signs. Carranza saw the motorcycle make a left hand turn traveling at an approximate speed of 100 MPH, and then lost visual contact with the suspect.

After the motorcycle had evaded Carranza, another officer involved in the investigation saw Gutierrez walking down a street in the area of the pursuit, and detained him. Carranza took Gutierrez into custody, and walked him to the patrol car. Gutierrez was calm, spoke clearly and had no difficulty walking.

On September 8, 2014, the Los Angeles County District Attorney filed an information charging Gutierrez with one count of attempted murder (Pen. Code, § 664, 187, subd. (a));[1] one count of willfully evading a police officer (Veh. Code, § 2800.2, subd. (a); and one count of mayhem (§ 203). The information included several special allegations pertaining to the attempted murder count, asserting that: (1) the offense was willful, deliberate and premeditated (see § 664, subd. (a)); (2) Gutierrez had personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)); and

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[1] Unless otherwise noted, all further statutory citations are to the Penal.

(3) Gutierrez had personally inflicted great bodily injury under circumstances involving domestic abuse. (§ 12022.7, subd. (e).)

B. Trial

1. Witness testimony

a. Testimony of Claudia Velarde

At trial, Claudia Velarde testified she had started dating Gutierrez in February or March of 2014. Several days prior to the stabbing, Velarde and Gutierrez had begun fighting because she told him she wanted to end their relationship. On April 29, 2014, she and Gutierrez continued "fighting" through text messages, and were acting "rude" toward one another. When Velarde left work, however, Gutierrez started acting "nice" toward her, and "things seemed to settle" between them.

That evening, Velarde told Gutierrez her car needed an oil change, and he said his friend would do it for her. Velarde met Gutierrez at his friend's house, and she left her car there. She and Gutierrez then drove on his motorcycle to a restaurant. Velarde and Gutierrez shared a small bottle of wine at dinner. Velarde testified she had "at least two glasses," and believed Gutierrez "had about the same or a little bit more." Throughout the meal, Gutierrez acted kindly and affectionately toward Velarde.

Velarde and Gutierrez stayed at the restaurant for approximately 90 minutes, and then went to pick up her car. Gutierrez left his motorcycle at his friend's house, which was located a few blocks from his apartment, and asked Velarde to drive him to a liquor store because he "wanted to keep drinking." After buying one or two bottles of wine, Velarde and Gutierrez drove to his apartment. Velarde parked her car in a lot behind

Gutierrez's apartment and went inside. Velarde did not drink any more alcohol while inside the apartment; she could not recall whether Gutierrez drank more. Velarde had sex with Gutierrez, and stayed in the apartment for a "couple of hours." During this time, Gutierrez was talkative and seemed comfortable.

Around midnight, Velarde informed Gutierrez she was leaving, and did not intend to return. As she was putting her shoes on, Gutierrez told her he was going to walk her to her car, and that he was "going to bring [his] knife." Velarde told him he did not need to bring the knife, but he insisted. Velarde saw him put the knife, which had a six or seven inch blade, into his pocket. Velarde was familiar with the knife because Gutierrez brought it "everywhere."

After walking Velarde to the car, Gutierrez entered the passenger side of the vehicle, and they continued to talk. When Velarde told him she had to leave, he asked whether she was ever "going to come back." Velarde responded no, and made clear that their relationship was over. Gutierrez exited the car with a "really bummed out" look on his face. Velarde began to pull out of the parking lot, but Gutierrez stopped her and approached her window. Velarde testified that Gutierrez then asked her to take him to get his motorcycle. She refused to do so, telling him she did not want him to drive because he had been drinking. Gutierrez leaned against the driver door, and repeatedly asked Velarde if she was "going to come back." She reiterated that she did not intend to see him again. Gutierrez remained calm during their conversation.

Gutierrez then asked Velarde "Do you think I can kill you?" Velarde told him yes, explaining "You go psycho sometimes." Velarde testified that Gutierrez's question made her feel scared

because "at times when he was drunk, he would tell me 'I feel like killing somebody.'" While Gutierrez was standing at the driver-side window, Velarde heard a notification indicating she had received a text message. She turned to look at her phone, which was on the passenger seat of the vehicle, and "felt something go in her [left upper] arm." Velarde did not know what had happened, and turned back toward Gutierrez. She then saw "a knife go into her chest," and realized Gutierrez was stabbing her. She felt additional stab wounds to her chest, both arms and her left wrist. Velarde tried to grab the knife, which caused her pinky to "just go off to the side." Gutierrez remained silent during the attack, with a look of "hate" on his face.

After being stabbed several times, Velarde yelled at Gutierrez to stop, and he backed away from the vehicle. Velarde began driving, and eventually stopped her vehicle in the middle of a street. Velarde recalled that the car was "full of blood," and that she had difficulty calling 9-1-1 because her phone was also covered in blood.

Velarde testified that she had seen Gutierrez intoxicated on prior occasions, and did not believe he was drunk at the time of the attack. According to Velarde, Gutierrez appeared coherent, and was not slurring his words or having any difficulty walking.

On cross-examination, Velarde admitted she had told an officer that, prior to the attack, Gutierrez had asked her to pick up some "stuff." Velarde asserted that the "stuff" Gutierrez was referring to was her jacket, purse and other items she had left in his apartment, She denied telling the officer she had told Gutierrez she would not pick up the stuff because "you going to get crazy."

b. Additional witnesses

Officers Ferrari and Carranza testified about their role in the investigation. Officer Ferrari described finding Velarde in the street, and confirmed that she had identified Gutierrez as her assailant. Ferrari also testified that Velarde had told him Gutierrez asked her to pick up some "stuff" that night, and that she told him no because he gets "crazy." Velarde also told Ferrari that Gutierrez got angry after she had made the comment, and began stabbing her.

Officer Carranza testified about the pursuit of Gutierrez, and taking him into custody.[2] Carranza stated that although he could smell alcohol on Gutierrez's breath and body, he did not order an alcohol or drug test because he did not believe Gutierrez was "too impaired to drive." Carranza explained that Gutierrez had not exhibited any signs of drug or alcohol intoxication, and had not appeared to be impaired during the high-speed pursuit.

The trauma surgeon who treated Velarde on the day of the attack testified that Velarde had suffered eleven stab wounds, including six wounds on her left arm, two on her right arm and two on her "chest and upper abdomen area." The surgeon stated that the wounds on Velarde's chest were located near her heart and lungs, and that her left pinky had been almost completely severed from her hand. The surgeon reported that the two chest wounds were six and four centimeters in length, and "about two inches deep." The wounds to Velarde's left arm were between three and five centimeters long, and "grade three in depth,"

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[2] The officer who initially detained Gutierrez also testified at trial. The officer stated that he had seen Gutierrez walking down a street in the area where Carranza had lost sight of the motorcycle.

meaning that the injury extended below the skin and fat, into the muscle of the arm. The surgeon stated that only trace amounts of alcohol were found in Velarde's blood, clarifying that her blood alcohol level "basically equate[d] to being undetectable."

Gutierrez did not testify in his defense, and did not call any witnesses.

2. Jury instructions and closing arguments

After the close of evidence, the trial court instructed the jury on attempted murder (CALJIC No. 8.66), deliberate, willful and attempted premeditated murder (CALJIC No 8.67) and voluntary intoxication (CALJIC No 4.21.1). Over the prosecution's objection, the trial court also instructed the jury on the lesser included offense of voluntary manslaughter (CALJIC No. 8.41) and heat of passion (CALJIC No. 8.42).

At closing argument, the prosecution argued the jury should reject any suggestion by the defense that Gutierrez's intoxication had rendered him incapable of forming the specific intent to kill Velarde. The prosecutor noted that Gutierrez had successfully evaded police officers on his motorcycle while traveling at speeds of up to 100 MPH, and that Velarde and officer Carranza had both testified he did not exhibit any signs of intoxication. The prosecution also argued the evidence showed Gutierrez had not acted in the heat of passion. Instead, the evidence showed he chose to bring his knife to the car, and made an explicit statement about killing Velarde immediately before the attack.

Although defense counsel did not dispute that Gutierrez had stabbed Velarde, he argued the evidence indicated Gutierrez had acted "under . . . the heat of passion." According to counsel, Velarde's testimony suggested she had "broken [the defendant's]

heart" by ending their relationship, which caused him to attack her. Defense counsel also argued the jury should consider his intoxication in assessing whether he had acted in an intentional and deliberate manner.

3. Verdict and sentencing

The jury found Gutierrez guilty on all counts. The jury also found that the attempted murder was willful, deliberate and premeditated, and that Gutierrez had personally used a deadly and dangerous weapon, and had personally inflicted great bodily injury under circumstances involving domestic abuse.

On the attempted murder count, the court sentenced Gutierrez to life in prison with the possibility of parole, plus three years for the great bodily injury enhancement, and one year for the deadly weapon enhancement. On the willful evasion count, the court imposed a sentence of two years in prison, to be served concurrently. On the mayhem count, the court imposed a concurrent sentence of four years in prison, but stayed the sentence pursuant to section 654.

DISCUSSION

A. Substantial Evidence Supports the Jury's Attempted Premeditated Murder Conviction

Gutierrez argues we must reverse his conviction for attempted premeditated murder because: (1) the evidence conclusively established he was intoxicated, and therefore lacked the specific intent to kill; (2) the evidence conclusively established he acted in the heat of passion, and therefore did not act with express malice; and (3) there was insufficient evidence the offense was willful, deliberate and premeditated.

1. Standard of review

When considering a challenge to the sufficiency of the evidence, "we review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value— such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] 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." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

2. The evidence supports the jury's finding that Gutierrez had acted with the specific intent to kill

Gutierrez initially argues we must reverse his attempted murder conviction because the evidence conclusively established he lacked the specific intent to kill due to his intoxication. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1119 ["evidence of

voluntary intoxication is relevant to the extent it bears upon the question whether the defendant *actually* had the requisite specific mental state required for commission of the crimes at issue"].) "[T]he effect of the alleged intoxication on [defendant's] ability to form the requisite intent" is a question of fact for the jury to resolve. (*People v. Pickens* (1969) 269 Cal.App.2d 844, 852 (*Pickens*); *People v. Coleman* (1942) 20 Cal.2d 399, 409 [the jury's finding whether the "defendant['s intoxication negated] . . . the intent to commit the crime charged . . . will not be disturbed if the facts are sufficient to support the implied finding that the defendant had the specific intent"] [overruled in part on other grounds by *People v. Wells* (1949) 33 Cal.2d 330, 355.]; *cf. People v. Smith* (1968) 259 Cal.App.2d 868, 870 [whether defendant was sufficiently "intoxicated to negate . . . the requisite specific intent" necessary to commit burglary was "a question of fact for the trier of fact to resolve"].) When reviewing the jury's resolution of a factual issue, our "sole function is to determine if any rational trier of fact could have found" as the jury did. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946 (*Lashley*) [reviewing jury finding that defendant "possessed the requisite intent to kill"].)

Gutierrez does not dispute that, but for his alleged intoxication, there was sufficient evidence to conclude he acted with the specific intent to kill. This concession is well taken. The surgeon who treated Velarde testified that she had suffered 11 stab wounds, including multiple wounds located near her heart and lungs that penetrated to a depth of two inches. She also suffered a near total amputation of her left pinky, and had multiple wounds to her left arm that penetrated to a depth of two inches. The evidence regarding the number, severity and location

of Velarde's stab wounds is clearly sufficient to support a finding that Gutierrez intended to kill Velarde.

Gutierrez asserts, however, that the evidence regarding his intoxication was so overwhelming as to compel a finding that he lacked the specific intent to kill. This argument is without merit. Velarde testified that the only alcohol she could remember Gutierrez consuming that night consisted of approximately two glasses of wine at dinner, several hours before the attack. Velarde also testified she had seen Gutierrez drunk on other occasions, and did not believe he was intoxicated at the time of the attack. Officer Carranza likewise testified that although he smelled alcohol on Gutierrez's breath, the defendant did not exhibit any signs of inebriation. Moreover, the evidence showed that shortly after attacking Velarde, Gutierrez was able to evade multiple police officers while driving his motorcycle at speeds of up to 100 MPH. A jury could reasonably conclude from this evidence that Gutierrez's level of intoxication, if any, did not render him incapable of forming the specific intent to kill. (*Lashley*, *supra*, 1 Cal.App.4th at p. 945.)

Gutierrez's appellate brief does not explain why the evidence summarized above is insufficient to support the jury's finding on voluntary intoxication. Instead, his brief essentially argues there was evidence suggesting he was intoxicated at the time of the attack. The mere existence of conflicting evidence on the issue of intoxication is not sufficient to defeat the jury's finding that he possessed the requisite intent to kill at the time of the attack. (*Pickens*, *supra*, 269 Cal.App.2d at p. 852 ["In view of the conflicting evidence, the jury's resolution of the effect of the alleged intoxication on appellant's ability to form the requisite intent is conclusive on appeal"].)

3. The evidence supports the jury's finding that Gutierrez did not act in the heat of passion

Gutierrez next contends that we must reverse his attempted murder conviction because the evidence conclusively established he acted in the heat of passion, and therefore did not act with express malice. "Attempted murder requires a direct but ineffectual act towards killing a person and that the defendant harbored express malice aforethought. [Citation.] Attempted voluntary manslaughter[, in contrast,] is the unlawful killing of a person without malice." (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1241 (*Speight*).) A defendant who acts in a "sudden quarrel or heat of passion" (Pen. Code, § 192, subd. (a)) is presumed to act without malice, and thus is guilty of attempted voluntary manslaughter rather than attempted murder. (*People v. Sedeno* (1974) 10 Cal.3d 703, 719, overruled on other ground by *People v. Breverman* (1998) 19 Cal.4th 142, 165 (*Breverman*).)

"A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.] [¶] ""To satisfy the objective or 'reasonable person' element of this form of voluntary manslaughter, the accused's heat of passion must be due to 'sufficient provocation.'" [Citation.]' [Citation.] . . . . The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citations], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Moye* (2009) 47 Cal.4th 537, 549-550 (*Moye*).)

"To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation. [Citation.] '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.]' [Citation.] '"However, if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter. . . ." [Citation.]' [Citation.]" (*Moye*, *supra*, 47 Cal.4th at p. 550.)

"'It is left to the jury to say whether the evidence is sufficient to lead them to believe, or to entertain a reasonable doubt whether the offense was committed under heat of passion. . . .' 'The sufficiency of provocation to reduce a homicide from murder to manslaughter, and whether defendant did in fact act under such provocation, are questions of fact for the jury.' [Citation.]" (*People v. Wells* (1938) 10 Cal.2d 610, 623 [overruled on other ground by *People v. Holt* (1944) 25 Cal.2d 59]; see also *People v. Wright* (2015) 242 Cal.App.4th 1461, 1494 ["The existence of provocation and its extent and effect, if any, upon the mind of defendant in relation to premeditation and deliberation in forming the specific intent to kill, as well as in regard to the existence of malice [citation], constitute questions of fact for the jury"].)

At trial, Velarde testified that several days before the attack, she had told Gutierrez she intended to end their relationship, which caused them to fight. On the day before the

attack, they continued to quarrel in text messages. That evening, however, things were better. Velarde testified that they had gone to dinner, and then spent several hours at his apartment, where they had sex. Velarde eventually decided to leave, and made clear that she did not intend to return and that their relationship was over. After escorting Velarde to her car, Gutierrez tried to convince her to stay. She declined, and made clear she did not intend to see him again. Although Gutierrez looked "bummed out," he remained calm throughout their discussion. When Velarde turned to pick up her phone, Gutierrez suddenly began stabbing her with a knife. Gutierrez remained silent throughout the attack.

Gutierrez contends the only rational inference to be drawn from this testimony is that Velarde's decision to end the relationship reasonably caused him to act in rash manner, and without deliberation. We disagree. A jury could reasonably conclude that the mere fact Velarde decided to end her relationship with Gutierrez, and declined his invitation to return to his apartment, was not "sufficiently provocative [to] . . . cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*Moye*, *supra*, 47 Cal.4th at p. 550; see also *People v. Watkins* (1960) 178 Cal.App.2d 41, 43 [evidence showing "defendant was suddenly thrown out of [victim's] life and . . . that the relationship was coming to an end" was insufficient to show "as a matter of law" that defendant acted in heat of passion].)

The jury could also rationally infer from the evidence that Gutierrez did not kill "while under 'the actual influence of a strong passion.' [Citation.]" (*Moye*, *supra*, 47 Cal.4th at p. 550.) As explained above, there is no evidence that Gutierrez and

Velarde were engaged in a physical or verbal dispute immediately prior to the attack. Indeed, the evidence indicated they had spent the last several hours together in a peaceful, amorous manner. When Velarde informed Gutierrez she was still ending the relationship, he looked sad, but remained calm. The jury could conclude from this evidence that Gutierrez's reason for attempting to kill Velarde was not obscured or disturbed by passion so as to cause him to act without deliberation and reflection.

As with his arguments pertaining to voluntary intoxication, Gutierrez does not actually explain why the trial evidence was insufficient to support a finding that he did not act under the heat of passion. Instead, he asserts that the fact he had been fighting with Velarde in the days prior to the attack, and was "bummed out" after she ended their relationship, supports a finding that he acted under heat of passion. Even if such evidence might be sufficient to support a finding that he did act under the heat of passion, it certainly does not compel such a finding.

4. Substantial evidence supports the jury's finding that the attempted murder was premeditated

Velarde also argues that even if there was "sufficient evidence of attempted murder, there was insufficient evidence of willfulness, deliberation and premeditation." According to Gutierrez, the jury's finding on premeditation must be reversed because the prosecution failed to present any evidence he "planned to kill Velarde," or that he had any "preexisting motive" to do so.

"'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.]

"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation . . . 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 . . . .' [Citations.]'" [Citation.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) Whether a murder (or in this case, attempted murder) was willful, deliberate and premeditated is "purely a question of fact . . . for the jury." (*People v. Chew Sing Wing* (1891) 88 Cal. 268, 271; *In re E.R.* (2010) 189 Cal.App.4th 466, 470 ["Whether a murder . . . was premeditated . . . is a question of fact, not one of law"].)

In *People v. Anderson* (1968) 70 Cal.2d 15, our Supreme Court "identified three types of evidence—evidence of planning activity, preexisting motive, and manner of killing—that assist in reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. [Citation.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069 (*Mendoza*).) '"'"*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.]' [Citation.]" (*Ibid.*) Instead, the decision "identifies categories of evidence relevant to premeditation and deliberation that [are] "typically" . . . sufficient to sustain convictions for first degree murder. [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 517 (*Thomas*).) Using the *Anderson* analysis as a guide, we examine the evidence of premeditation in this case

Contrary to Gutierrez's contention, the prosecution did provide "evidence suggestive of planning activity." (*Thomas*, *supra*, 2 Cal.4th at p. 517.) Velarde testified that after she told Gutierrez she intended to leave his apartment, he said he wanted to walk her to the car, and that he was going to bring his knife. Although Velarde said he did not need the knife, he insisted on brining it with him. (See *People v. Lee* (2011) 51 Cal.4th 620, 636 [fact that "defendant brought a [weapon] with him" indicative of planning].) Velarde also testified that shortly before the attack began, Gutierrez said to her: ""Do you think I can kill you?" Velarde further testified that this comment frightened her because she had previously heard Gutierrez express a desire to "kill somebody." The jury could rationally infer that Gutierrez's statement, combined with his decision to escort Velarde to her car with a knife, was indicative of a deliberate and premeditated plan to murder her.

The manner in which Gutierrez carried out the attempted murder is also indicative of premeditation. First, Gutierrez stabbed Velarde 11 times, resulting in multiple wounds near her heart and lungs that penetrated to a depth of two inches. Another wound resulted in a near total amputation of her left pinky. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1253 ["With regard to method, the clustered stab wounds support an inference of a deliberate killing"]; *People v. Silva* (2001) 25 Cal.4th 345, 369 ["The manner of killing—multiple [gunshot] wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant—is entirely consistent with a premeditated and deliberate murder"].) Second, the evidence showed Gutierrez attacked Velarde after she had turned away from him. The jury could reasonably infer from this evidence that Gutierrez

intentionally waited until Velarde was in a defenseless posture, thereby showing deliberation and premeditation. Third, Velarde testified that Gutierrez was calm before the attack, and remained silent as he stabbed her multiple times. Based on the "calm and exacting" nature of Gutierrez's actions, the jury could rationally infer his conduct "was the result of preexisting thought and reflection rather than an unconsidered rash impulse." (*Lee, supra*, 51 Cal.4th at p. 637.)

Finally, the prosecution showed some evidence of a preexisting motive. Velarde testified that several days before the attack, she informed Gutierrez she intended to end the relationship, which caused him to become angry. Although they continued to fight about the issue on the day of the attack, that evening Gutierrez began acting affectionately toward her. When Velarde announced she was leaving his apartment and ending the relationship, he pleaded with her to stay. She remained adamant, however, that she was leaving and did not intend to see him again. Immediately thereafter, he attacked her. A jury could rationally infer from this evidence that before the attack, Gutierrez had decided he would try to convince Velarde to stay in the relationship, and would kill her if she refused.

In his appellate brief, Gutierrez essentially argues that the evidence discussed above does not necessarily show the attempted murder was premeditated. He asserts, for example, that "[p]utting the knife in his pocket did not establish a plan to kill because this was normal behavior for [him]; [h]e always had the knife in his vest." Similarly, he contends the manner of the stabbing does not establish premeditation because "there was no evidence that any single wound would have been fatal; the wounds to the chest did not injure the heart or lungs [and] . . .

most of the wounds were not concentrated in an area of a vital organ." Finally, he argues his statement "Do you think I can kill you" does not show deliberation or premeditation because Velarde testified that she did not think he was serious enough to carry through with the threat.

When reviewing a challenge to the sufficiency of the evidence, our role is simply to determine whether "the circumstances reasonably justify the jury's findings." (*Mendoza*, *supra*, 52 Cal.4th at p. 1069.) "[A] reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626.) In this case, applying the factors set forth in *Anderson*, we conclude substantial evidence supports the jury's finding that the attempted murder was deliberate, willful and premeditated.

B. Any Instructional Error Related to Heat of Passion Was Harmless

Gutierrez argues the trial court committed instructional error by failing to inform the jury "that the prosecution was required to provide beyond a reasonable doubt that [he] did not act in the heat of passion." Gutierrez contends that by failing to provide the jury with this information, the court effectively "lessened the prosecution's burden of proof."

1. Summary of relevant jury instructions

The trial court instructed the jury on the elements of attempted murder (CALJIC No. 8.66), explaining that the prosecution had the burden to prove Gutierrez took an ineffectual act toward killing another person, and did so with "express malice aforethought, namely a specific intent to kill. . . ." The

trial court also instructed the jury on willful, deliberate and attempted premeditated murder (CALJIC No. 8.67). The instruction defined each of those terms, and additionally provided: "If you find that the attempted murder was preceded and accompanied by a clear, deliberate intent to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is attempt to commit willful, deliberate, and premeditated murder. [¶] . . . [¶] The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true."

Gutierrez requested that the court also instruct the jury on voluntary manslaughter (CALJIC No. 8.41), and heat of passion (CALJIC No. 8.42). The requested instructions clarified that attempted voluntary manslaughter was a "lesser included offense" of attempted murder, and consisted of an ineffectual attempt to kill "without malice aforethought." The instructions further provided that "There is no malice aforethought if the attempted killing occurred upon a sudden quarrel or heat of passion. . . ." The prosecution opposed the request, asserting there was insufficient evidence that Gutierrez acted in the heat of passion. The court overruled the prosecution's objection, and granted the requested manslaughter instructions.

Gutierrez did not request, nor did the court provide, instruction under CALJIC No. 8.50, which further clarifies the difference between murder and manslaughter: ""The distinction between murder . . . and manslaughter is that murder . . . requires malice while manslaughter does not. [¶] When the act causing the death, though unlawful, is done [] in the heat of

passion or is excited by a sudden quarrel that amounts to adequate provocation, [] . . . the offense is manslaughter. . . . [¶] To establish that a killing is murder . . . and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [] in the heat of passion or upon a sudden quarrel . . . ."

2. Any error in failing to instruct the jury under CALJIC No. 8.50 was harmless

Under California law, the trial court has a "sua sponte [duty] to instruct fully on all lesser necessarily included offenses supported by the evidence." (*Breverman, supra,* 19 Cal.4th at pp. 148-149.) Thus, in a murder prosecution, if there is "substantial evidence to support a heat of passion theory of voluntary manslaughter, . . . the . . . trial court [must] instruct[] on this theory." (*Ibid.*; see also *People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

Gutierrez argues the trial court impliedly acknowledged there was sufficient evidence to require voluntary manslaughter instructions when it agreed to provide CALJIC Nos. 8.41 and 8.42. Gutierrez further contends that having acknowledged the need for voluntary manslaughter instructions, the court had a duty to provide the language set forth in CALJIC No. 8.50 directing that the prosecution had to "prove beyond a reasonable doubt that he did not act in the heat of passion."

"We evaluate claims of instructional error "'in the context of the overall charge'" to the jury." (*People v. Williams* (1997) 16 Cal.4th 635, 675.) Instructional error is deemed "harmless when the reviewing court can determine beyond a reasonable doubt,

based on jury findings that may be inferred from other instructions, that the instructional error did not contribute to the verdict." (*People v. Garcia* (2001) 25 Cal.4th 744, 761.)

In this case, the jury's finding that the attempted murder was willful, deliberate and premeditated demonstrates that any error the court may have committed in failing to instruct the jury under CALJIC No 8.50 was harmless. As explained above, the court instructed the jury that to return a true finding on the premeditation allegation, it had to conclude Gutierrez's intent to kill was "formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation," and that such a finding was subject to the "reasonable doubt" standard. The jury having been instructed in such a manner, and having found true the special allegation regarding premeditation, we must presume it found beyond a reasonable doubt that Gutierrez did not act in the heat of passion. Accordingly, any error in failing to instruct the jury that the prosecution had the burden to prove beyond a reasonable doubt Gutierrez did not act in the heat of passion under CALJIC No. 8.50 was necessarily harmless.

Our conclusion is in accord with *Speight, supra,* 227 Cal.App.4th 1229, which found harmless error under identical circumstances. The defendant in *Speight* was charged with willful, deliberate and premeditated murder. As in this case, the trial court instructed the jury on willful, deliberate and premeditated murder (CALJIC Nos. 8.66 and 8.67) and voluntary manslaughter (CALJIC No. 8.41), but did not instruct the jury under CALJIC No. 8.50. On appeal, the defendant argued the court had "erred in failing to instruct the jury sua sponte the

prosecution had the burden to prove beyond a reasonable doubt that [he] did not act in the heat of passion." (*Id*. at p. 1240-1241.)

On review, the court initially found the failure to provide such an instruction was error. The court explained that: (1) there was "sufficient evidence from which the jury could reasonably conclude [defendant] . . . acted in the heat of passion," thereby requiring the trial court to instruct the jury on voluntary manslaughter (*Speight, supra*, 227 Cal.App.4th at p. 1244); and (2) the court "fell short in its duty" by "failing to instruct the jury sua sponte with CALJIC No. 8.50, that the prosecution was required to prove beyond a reasonable doubt that Speight did not act in the heat of passion." (*Id*. at p. 1245.)

The court concluded, however, that the jury's finding the murder had been premeditated rendered the instructional error "harmless even under the heightened federal constitutional standard articulated in *Chapman v. California* (1967) 386 U.S. 18." (*Speight, supra*, 227 Cal.App.4th at p. 1244.) The court explained that because the trial court had instructed the jury under CALJIC No 8.67, the defendant "could not have been prejudiced by the trial court's failure to instruct the jury with CALJIC No. 8.50 because 'the jury necessarily resolved the factual question adversely' to him when it found him guilty of attempted [premeditated] murder." (*Id*. at p. 1246.)

In *People v. Wharton* (1991) 53 Cal.3d 522, our Supreme Court applied similar harmless error analysis in the context of an instructional error involving heat of passion. The defendant in *Wharton* argued the trial court had erred by failing to instruct the jury that the provocation necessary "to reduce murder to manslaughter . . . may occur over a period of time," and "need not occur instantaneously." (*Id*. at p. 569.) The Court agreed the

instruction should have been given, but found the error harmless based on the jury's finding of first degree murder: "[A]lthough the jury was not directly instructed that provocation could occur over a 'considerable period of time,' the jury was instructed that a killing is first degree murder if it is 'the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not upon sudden heat of passion.' [Citation.] By finding defendant was guilty of first degree murder, the jury necessarily found defendant premeditated and deliberated the killing. This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion . . . and clearly demonstrates that defendant was not prejudiced by the failure to give his requested instruction." (*Id*. at p. 572.)

The same analysis applies here. Having been instructed under CALJIC No. 8.67 and concluding the attempted murder was premeditated, the jury necessarily found beyond a reasonable doubt that Gutierrez did not act under heat of passion.

C. Gutierrez Forfeited His Claims Under California v. Griffin (1965) 380 U.S. 609

Gutierrez next contends the prosecutor violated his Fifth Amendment right to remain silent by making a series of comments during closing argument that alluded to his decision not to testify at trial. (See generally *California v. Griffin* (1965) 380 U.S. 609; *People v. Vargas* (1973) 9 Cal.3d 470, 475 ["Under the rule in [*Griffin*] error is committed whenever the prosecutor or the court comments upon defendant's failure to testify"].) In support, Gutierrez cites the prosecutor's assertions that: (1) there

was no evidence Gutierrez drank any alcohol after leaving the restaurant; (2) the fact Gutierrez did not speak during his attack on Velarde was indicative of deliberateness and premeditation; (3) Gutierrez may have driven his motorcycle back to the area where the attack occurred to "finish the job"; and (4) Gutierrez may have chosen the manner and location of the murder attempt to avoid detection. Gutierrez contends these statements violated his right to remain silent because he was the only witness who could have refuted them. (See e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 371-372 ["it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf . . . . , [or] for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide"].) The Attorney General, however, asserts these statements amounted to nothing more than permissible "'comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses.'" (*Vargas*, *supra*, 9 Cal.3d at p. 475 ["although *Griffin* prohibits reference to a defendant's failure to take the stand in his own defense, that rule 'does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses'"].)

At trial, Gutierrez did not object to any of the prosecutor's comments as *Griffin* error (or any other ground), nor did he request the court admonish the jury he had a right not to testify and the jury could not consider his assertion of that right as evidence of his guilt. "A defendant cannot complain on appeal of error by a prosecutor unless he or she made an assignment of

error on the same ground in a timely fashion in the trial court and requested the jury be admonished to disregard the impropriety. [Citations.] This procedural requirement has been applied repeatedly to cases involving claims of *Griffin* error." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1006 (*Mesa*) [citing *People v. Turner* (2004) 34 Cal.4th 406, 421; *People v. Medina* (1995) 11 Cal.4th 694, 756 and *People v. Mincey* (1992) 2 Cal.4th 408, 446].) "The only exception is for cases in which a timely objection would have been futile or ineffective to cure the harm." (*Mesa*, *supra*, 144 Cal.App.4th at p. 1007; see also *People v. Green* (1980) 27 Cal.3d 1, 34, overruled on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225 ["the initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected"].) Gutierrez has not shown why a timely objection would have been futile or ineffective. Accordingly, he has forfeited his claims.[3]

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[3] In his appellate brief, Gutierrez argues any objection to these statements on Fifth Amendment grounds would have been futile because the court had previously overruled an objection to another comment the prosecutor made during closing argument. In the portion of the record Gutierrez cites, the prosecutor asserted that the evidence suggested the defendant cared about his motorcycle more "than anything else." Defense counsel objected to the statement on the basis of "improper argument." When asked to clarify the nature of his objection, defense counsel explained: "So in the police report it indicates that when [Gutierrez] was picked up he was asked how [the victim] was doing. The People chose not to introduce that statement, which is their prerogative, but to argue in closing that he only cared about

D. Gutierrez's Claims for Ineffective Assistance of Counsel Cannot Be Resolved on Direct Appeal

Finally, Gutierrez raises two claims for ineffective assistance of counsel. First, he contends his trial counsel failed "to seek curative measures for the failure of the police to take a blood sample when appellant was arrested." Gutierrez contends a "blood sample would have demonstrated the presence and level of alcohol and drugs in [his] system, and thus provide physical evidence of [his] voluntary intoxication defense." Second, Gutierrez contends his trial counsel failed to object to several misstatements of law and improper arguments the prosecutor allegedly made during closing argument.[4]

"On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or

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the bike [and not] about the victim when [the prosecutor] knows there is evidence out there that is inconsistent with that is inappropriate." We fail to see how the court's decision to overrule this objection, which was not based on the right to remain silent, shows that a Fifth Amendment objection to different comments made during closing argument would have been futile.

4 The prosecutor's alleged misconduct included: (1) making a "misleading" football analogy that "lessened the People's burden of proof by suggesting that willful, premeditated and deliberated attempted murder is the result of a quick, common decision"; (2) incorrectly stating the legal test the jury must use to assess whether a defendant acted under the heat of passion; (3) asserting Gutierrez had "conceded the intent to kill in proposing [he] acted in the heat of passion"; and (4) alluding to defendant's decision not to testify.

omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Hung Thanh Mai* (2013) 57 Cal.4th 986, 1009.) Gutierrez has not shown that any of these factors apply to either of his ineffective assistance claims. His claims are therefore more appropriate for resolution in a habeas proceeding.[5]

DISPOSITION

The judgment is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J. BENSINGER, J.*

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[5] On November 28, 2016, Gonzalez, through appointed appellate counsel, filed a petition for habeas corpus in this court that raises ineffective assistance claims that were not raised in this appeal. We deny the petition by separate order.

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