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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. FRANDER SALGUERO, Defendant and Appellant.	B278429 (Los Angeles County Super. Ct. No. MA066642)

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

Maxine Weksler, 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, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

In July 2015, defendant and appellant Frander Salguero (defendant) drove to the home of his friend and occasional methamphetamine provider George Ayala (Ayala) and, once there, started a fight and stabbed Ayala. Defendant also threatened and slashed Ayala's partner, Mark Thomas (Thomas), who witnessed Ayala's stabbing. A jury convicted defendant on two counts of willful, deliberate, and premeditated attempted murder (one each for victims Ayala and Thomas), as well as assault with a deadly weapon and criminal threats charges. We consider whether substantial evidence establishes (1) defendant did not stab Ayala in unreasonable self-defense, (2) defendant's stabbing of Ayala was premeditated, and (3) defendant intended to kill Thomas. We also decide whether reversal is warranted due to asserted prosecutorial misconduct.

I. BACKGROUND

A. The Offense Conduct As Established by the Evidence at Trial

1. Events prior to July 21, 2015

Victims Ayala and Thomas met in 2013 or 2014. At some point, they began a romantic relationship. Thomas helped Ayala find and move into a triplex unit in Palmdale, California in the spring or summer of 2014. Ayala lived alone, but he and Thomas traveled back and forth between Ayala's home in Palmdale and Thomas's home in Hollywood to visit one another.

Soon after moving into the Palmdale home, Ayala purchased a used refrigerator from defendant's uncle. When Ayala called the uncle to complain that the ice maker was broken, the uncle sent defendant to Ayala's home to replace a part. Defendant said his name was "Fred."

When defendant asked Ayala to sign an invoice acknowledging receipt of the part, Ayala opened a kitchen drawer to find a pen. Defendant noticed that Ayala had lines of methamphetamine prepared inside the drawer and asked Ayala if he could have some of the drug. Ayala initially refused, but relented after further conversation.

Defendant and Ayala thereafter became friendly, and defendant returned to smoke marijuana and methamphetamine with Ayala every two-to-four weeks—always unannounced. Ayala furnished the drugs and, because he considered defendant a friend and appreciated his company, did not request or accept payment from defendant. Ayala explained that he and defendant "would just talk [their] problems out . . . and [defendant] would help [Ayala] out with certain things like food or something and [Ayala] would help [defendant] out with what's going on with him and his family that [Ayala did not] even know."

Defendant continued to visit Ayala sporadically from June 2014 until later in July 2015. Throughout this time, Ayala believed defendant to be a friend and the two never had an argument.

2. Defendant's July 21, 2015, attack on Ayala and Thomas

Ayala and Thomas were at Ayala's Palmdale home on July 21, 2015; they had plans to drive to Los Angeles that evening. Around 6:00 p.m., Ayala was outside playing with his two dogs and Thomas was inside. Defendant arrived unannounced, and after getting out of his car, said: "Hey, what's up, George? Smoke me out." Ayala was surprised because defendant was wearing pajamas and Ayala was irritated because a neighbor had

likely overheard defendant's comment about smoking. Ayala told defendant to leave and said he did not want to smoke with him any longer. Defendant appeared "upset," pointed at Ayala, and said, "take care of you [*sic*] and I will take care of you." This was the first time Ayala had declined to smoke with defendant. Thomas overheard some of the conversation from inside the house, but could only recall that Ayala told someone to leave.

Defendant left, but he returned later when Ayala was in the shower. By then, defendant had changed out of his pajamas and into a shirt, khakis, and shoes. Thomas heard defendant "pounding" on the metal security/screen door covering the solid interior front door. Thomas opened the interior door, but left the security door locked. Defendant repeatedly asked to be let into the apartment, but because Thomas did not know him, Thomas left the security door locked and said that he would get Ayala. Defendant told Thomas his name was Frander, a name that neither Ayala nor Thomas had heard before. Thomas shut and locked the interior door and told Ayala, who was still in the shower, that someone was at the door demanding to be let in.

Thomas returned to the front door and told defendant, "I let [Ayala] know, and he said he would come out of the shower but I can't let you in." Defendant continued to pound on the door, "fast and hard and strong," and yelled to be let in. Thomas again closed the interior door and told Ayala defendant was still demanding to be let in. Without drying off, Ayala got out of the shower, wrapped a towel around himself, and went to the front door. Ayala opened the interior door and, recognizing defendant, said, "Oh, it's Fred, Mark." Ayala then opened the security door, reached down to prevent his towel from slipping, and immediately felt three blows to his face. After one of defendant's

blows caused Ayala to slip and fall on the wet tile floor, Ayala stood up and the two began "just hitting each other. Blocking each other's hits. Just swinging."

The fight progressed from Ayala's living room into the kitchen, with defendant advancing and Ayala moving backward. Until they reached the kitchen, defendant and Ayala fought facing one another. Once in the kitchen, it is undisputed that defendant pulled what Ayala described as a 12-inch "chef's butterfly knife" from a knife block (the largest knife in the block) and stabbed Ayala in the abdomen, twisting the blade before he pulled it out. Defendant and Ayala were no longer face-to-face once they entered the kitchen, but the issue of whether Ayala stood directly behind defendant (such that defendant could not see him) or rather at a slight angle to defendant's back was disputed during trial, as we shall now describe in more detail.

Ayala testified he found himself standing directly behind defendant in the kitchen prior to the stabbing. Ayala saw defendant reach for something on the counter (the knife, as Ayala would soon realize) with his right hand at the time a frying pan fell from a hanging rack as the result of the continuing struggle. Ayala was "getting ready to hit [defendant]" with the pan, "but by that time [defendant] had done something with whatever he had and swung it backwards" with his left hand.[1] Ayala hit defendant in the head with the pan and then realized he "already had the knife inside [his] stomach." With the knife inside Ayala,

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[1] On cross-examination, Ayala was asked to explain his preliminary hearing testimony that defendant was looking at him when he thrust the knife backward. Ayala responded that "[defendant's] back was facing towards me. He grabbed the knife like this. Swung it around. Okay? That is what exactly he did."

defendant "turned around" and twisted the knife. Ayala described his sensations and defendant's expression: "I could feel everything inside me moving to the right and then [defendant] turning [the knife] and pulling it. I had everything in my hands . . . . My intestines came out. I had them in my hands. I just saw blood coming out and he just stood there with a smirk on his face like it was funny or some shit." The last thing Ayala remembered before passing out was defendant threatening Thomas: "If you call the cops, I'm gonna kill you, too."

Thomas testified Ayala was directly behind defendant when Thomas saw defendant with his left hand on the knife in Ayala's abdomen.[2] With regard to Ayala's attempt to defend himself with the frying pan, Thomas testified Ayala "grabbed the pan after he had already been stabbed."[3]

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[2] Defense counsel sought to impeach this testimony with Thomas's preliminary hearing testimony that defendant stabbed Ayala "forward" with his right hand. Thomas replied he was "more clear on the situation and how things played out than [he] was right after the incident" and reiterated that "[defendant] had to have stabbed forward in order to stab [Ayala]," but he explained that he meant "forward as in straight into [Ayala] . . . . The knife went straight into [Ayala]. It didn't go in at any kind of angle . . . ." Thomas did concede defendant "was probably to the right of [Ayala] a little," but he emphasized he was "guessing," adding "I don't recall."

[3] Defense counsel again confronted Thomas with his preliminary hearing testimony, specifically, his statement that Ayala had the pan and was "bringing the pan down" when defendant stabbed him. Thomas explained that "when [he] revisit[s] it in [his] mind over and over, the incident was that the knife was already there and [he] saw the pan coming down."

While defendant and Ayala were fighting, but before defendant stabbed Ayala, Thomas yelled he was going to call 911. Thomas continued to threaten to call 911 once he saw Ayala had been stabbed, and defendant then turned his attention to Thomas. Defendant told Thomas, "If you call the police, I'm going to kill you, too." Thomas started dialing, and defendant "came at [him]" with the knife. Defendant did not run, but he took "really large strides, fast," jumping over a sectional sofa that stood between him and Thomas as Thomas made for the front door.

Defendant continued to pursue Thomas as he ran toward an outside gate on the property. Thomas saw defendant raise the knife as Thomas struggled with the gate's latch. The knife came down "right at the same time the gate opened," and Thomas "fell basically forward through the gate and just kept running." Defendant's slashing motion with the knife as Thomas was going through the gate caused a cut on Thomas's upper chest that required six or seven stitches to close. Defendant abandoned chasing Thomas when he made it past a neighbor's house. Thomas saw defendant get into his car with the knife and drive away.

Thomas thereafter returned to Ayala, called 911, and applied pressure to Ayala's wound until help arrived. First responders soon arrived, and Ayala survived the stabbing.

B. The Defense Case at Trial

Defendant did not testify in his own defense. The only defense witness was Dr. Michael Burke, a psychiatry resident who examined defendant three days after the attack on Ayala and Thomas. Dr. Burke testified defendant was involuntarily held for mental evaluation pursuant to Welfare and Institutions

Code section 5150 after his wife reported he was "acting bizarrely." Dr. Burke examined defendant and spoke with defendant's wife by phone.

According to Dr. Burke, defendant reported experiencing auditory hallucinations, including "angels and God talking," and believed he and his family were possessed by demons. He had attempted to "drag his wife and daughter to the car by their hair" to "cleanse them in the aqueduct." Defendant tested positive for amphetamines, despite telling his wife and Dr. Burke he had not used methamphetamine in six months.

Dr. Burke diagnosed defendant as having a "psychotic disorder, not otherwise specified" and testified defendant's behavior was consistent with "methamphetamine use disorder," which impairs cognition. Dr. Burke found defendant presented a danger to others and recommended defendant continue to be held pursuant to Welfare and Institutions Code section 5150. Defendant was held for 72 hours, determined not to present an ongoing danger, and released. The police arrested defendant for the knife attack on Ayala and Thomas soon thereafter.

C. Jury Verdict and Sentencing

The jury found defendant guilty on all five charged counts: two counts of willful, deliberate, and premeditated attempted murder (Pen. Code,[4] §§ 664, 187, subd. (a)); two counts of assault with a deadly weapon (§ 245, subd. (a)(1)); and one count of criminal threats (§ 422, subd. (a)). The jury found true an allegation that, in the commission of the Ayala assault and

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[4] Undesignated statutory references that follow are to the Penal Code.

attempted murder crimes, defendant inflicted great bodily injury on Ayala.

The court sentenced defendant to 17 years to life in prison: ten years to life for the attempted murder of Ayala, and seven years to life for the attempted murder of Thomas. The court stayed the sentences it imposed for the assault with a deadly weapon and criminal threats crimes.

II. DISCUSSION

Defendant contends insufficient evidence supports the attempted murder convictions because he believed (albeit unreasonably) it was necessary to stab Ayala to defend himself and because threatening to kill Thomas *if* he called 911 and slashing him in the clavicle do not demonstrate an intent to kill. Defendant also argues that even if there is sufficient evidence the crimes were attempted murder and not manslaughter, there is still no substantial evidence the attempt to murder Ayala was willful, deliberate, and premeditated. Finally, defendant contends the prosecution committed prejudicial error by misstating the law and evidence in closing argument.

We reject defendant's contentions. There was sufficient evidence to prove defendant did not stab Ayala in self-defense because—viewing, as we must, the evidence in the light most favorable to the verdict—there was substantial evidence on which the jury could have relied to find either that Ayala was not swinging the frying pan at defendant, or that defendant did not see Ayala holding the frying pan, before defendant stabbed him. There was also substantial evidence the stabbing was willful, deliberate, and premeditated because defendant threatened to "take care of" Ayala well before the attack and later returned to

initiate a fight during which he stabbed Ayala in the abdomen and twisted the knife before removing it. Further, there is substantial evidence defendant intended to kill Thomas because the condition upon which defendant threatened to kill Thomas (if he called 911) was satisfied and Thomas suffered a relatively minor wound only because he managed a narrow escape. Finally, defendant's prosecutorial misconduct claims are in large part forfeited and uniformly meritless in any event.

A. Claim of Insufficient Evidence that Defendant's Stabbing of Ayala Was Not Imperfect Self-Defense

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . . [T]he relevant inquiry on appeal is whether, in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

The defense at trial was self-defense—specifically, "imperfect" self-defense—which would negate malice, an element of attempted murder.[5] To prove attempted murder, the People

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[5] "The doctrine of self-defense embraces two types: perfect and imperfect. [Citation.] Perfect self-defense requires that a defendant have an honest and reasonable belief in the need to defend himself or herself." (*People v. Rodarte* (2014) 223

were obligated to prove beyond a reasonable doubt that defendant did not act in imperfect self-defense. (*People v. Rios* (2000) 23 Cal.4th 450, 454 [where murder liability at issue, the People must prove absence of a belief in the need for self-defense]; *People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168; CALCRIM Nos. 505, 571.)

Defendant contends there were inconsistencies in Ayala and Thomas's testimony that made both witnesses unworthy of belief and precluded the jury from rejecting the defense's position that the prosecution failed to prove defendant stabbed Ayala in the sincere but unreasonable belief in the need to defend against a potentially fatal blow to the head with a frying pan. Specifically, defendant argues the victims' testimony is contradictory regarding (1) the relative positions and orientations

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Cal.App.4th 1158, 1168.) By contrast, "[a]n instance of imperfect self-defense occurs when a defendant acts in the actual but unreasonable belief that he or she is in imminent danger of great bodily injury or death. [Citation.] Imperfect self-defense differs from complete self-defense, which requires not only an honest but also a reasonable belief of the need to defend oneself. [Citation.] It is well established that imperfect self-defense is not an affirmative defense. [Citation.] It is instead a shorthand way of describing one form of voluntary manslaughter. [Citation.] Because imperfect self-defense reduces an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice, this form of voluntary manslaughter is considered a lesser and necessarily included offense of murder. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.)

of defendant and Ayala in the kitchen,[6] and (2) the sequence of the stabbing and Ayala's actions with the frying pan.[7]

Despite the variation in some of the details of the victims' account of the stabbing, the victims' testimony was sufficient to permit the jury to reasonably conclude defendant was not aware that Ayala intended to hit him (defendant) with the pan before

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[6] At trial, Ayala testified that he stood directly behind defendant in the kitchen, that defendant did not see him with the pan, and that defendant turned only after stabbing him. At the preliminary hearing, Ayala had testified defendant was looking at him when defendant stabbed him. When asked to explain this discrepancy on cross-examination, Ayala testified: "[Defendant]'s back was facing towards me. He grabbed the knife like this. Swung it around. Okay? That is what exactly he did." Thomas's initial testimony at trial was that Ayala stood directly behind defendant in the kitchen. At the preliminary hearing, however, Thomas had testified defendant stabbed Ayala in a "forward" motion. Thomas explained the apparent discrepancy on cross-examination, stating he had used "forward" to describe the "straight" trajectory of the knife as opposed to the direction in which defendant's arm moved relative to defendant's body. But Thomas acknowledged defendant "was probably to the right of [Ayala] a little, I'm guessing. I don't recall."

[7] At trial, Ayala testified he had the frying pan "up in the air" to hit defendant when defendant stabbed him. Ayala's testimony at the preliminary hearing was consistent with this account. Thomas, on the other hand, testified at trial that Ayala did not "grab" the pan until after he was stabbed. At the preliminary hearing, Thomas had testified Ayala was "bringing the pan down" when defendant stabbed him. He reconciled these accounts by explaining that the discrepancy was "a matter of semantics," "it was all simultaneous," and "as [he] saw the pan coming down, [he] had also seen the knife already in [Ayala]."

defendant stabbed Ayala. "It is well settled that, under the prevailing standard of review for a sufficiency claim, we defer to the trier of fact's evaluation of credibility." (*People v. Richardson* (2008) 43 Cal.4th 959, 1030.) "[I]t is the jury, not the reviewing court, that must weigh the evidence, resolve conflicting inferences, and determine whether the prosecution established guilt beyond a reasonable doubt." (*People v. Hubbard* (2016) 63 Cal.4th 378, 392; see also *People v. Lee* (2011) 51 Cal.4th 620, 625, fn. 5 [setting forth the facts in the light most favorable to the judgment where the evidence was conflicting].)

Ayala's trial testimony was unequivocal and emphatic: he hit defendant with the pan only after defendant stabbed him and defendant could not have seen him swinging the pan. To be sure, Ayala was impeached with his preliminary hearing testimony, but that merely left the jurors with a binary choice: they could believe the testimony as they heard it at trial, or they could believe Ayala was instead truthful at a prior hearing. The jury apparently chose to believe Ayala's testimony at trial, and under the governing standard of review that requires us to view the evidence in the light most favorable to the jury's verdicts, that choice is factually dispositive on appeal.

Indeed, the only remotely contradictory evidence the jury heard throughout trial was Thomas's "guess" that defendant might have had a peripheral view of Ayala. We see no reason not to defer to the jury's decision to credit Ayala's account over Thomas's speculation. Furthermore, Thomas's testimony in this narrow respect does not establish defendant saw Ayala threatening to hit him with the frying pan *before* defendant stabbed Ayala—and Thomas testified at trial that the stabbing came first. The victims' testimony accordingly constitutes

substantial evidence supporting the jury's finding that defendant did not believe stabbing Ayala was necessary to defend himself against a blow with the frying pan.[8]

In addition, even if we viewed the evidence in the light most favorable to *defendant*, the prosecution still carried its burden to prove attempted murder (rather than manslaughter) because defendant instigated the fight and Ayala responded lawfully. Defendant resists this view, arguing Ayala unlawfully escalated the confrontation by introducing what he views as a deadly weapon, the frying pan, into a struggle that was only a fistfight at that point. The argument does not square with the record. There was no dispute at trial that defendant reached (from Ayala's perspective at that moment) for an unidentified object in the kitchen before Ayala held the pan aloft to hit defendant with it. Thus, in the midst of the fight defendant started in Ayala's home (and Ayala appeared to be losing, see *post* at footnote 9), defendant was the first to grab an object. Ayala, under the circumstances, was within his rights to resort to his own object (the pan) in response. (See *People v. Enraca* (2012) 53 Cal.4th 735, 761; *People v. Watie* (2002) 100 Cal.App.4th 866,

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[8] Defendant also suggests inappropriate remarks by the prosecution prevented the jury from properly considering how evidence of his impaired mental state affected his ability to understand the confrontation in the kitchen. Defendant's claims of prosecutorial misconduct are addressed *post*. In any event, because there was substantial evidence that would support a finding defendant was not aware that Ayala was going to hit him with the pan before the stabbing, we need not address his ability to process such information in determining whether the conviction should be affirmed.

876-877 [quoting CALJIC Nos. 5.40, 5.42: the lawful occupant of a residence "may resist force with force, increasing it in proportion to the intruder's persistence and violence"].) Because grabbing and using the pan was lawful under the circumstances, defendant can find no refuge in the doctrine of imperfect self-defense. (*People v. Seaton* (2001) 26 Cal.4th 598, 664; *People v. Frandsen* (2011) 196 Cal.App.4th 266, 272 ["as the initial aggressor and with [the victim] having acted lawfully, appellant may not rely on imperfect self-defense"].)

B. Claim of Insufficient Evidence That the Attempted Murder of Ayala Was Willful, Deliberate, and Premeditated

Defendant contends there was insufficient evidence for the jury to find his attempted murder of Ayala was willful, deliberate, and premeditated.

To support a finding that an attempted murder was willful, deliberate, and premeditated, there must be sufficient evidence that a defendant carefully weighed considerations in choosing a course of action and thought about his conduct in advance. (*People v. Cage* (2015) 62 Cal.4th 256, 276 (*Cage*).) Drawing on *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), courts look to three types of evidence in evaluating whether the defendant premeditated and deliberated: planning activity, motive, and the manner of killing. (*Cage*, *supra*, at p. 276.) But "'"these factors are not exclusive, nor are they invariably determinative." [Citation.] "'*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of

preexisting reflection rather than unconsidered rash impulse.'"' [Citation.]" (*Ibid.*)

Defendant contends there was only "weak" evidence of motive and no evidence he planned to stab Ayala or that his manner of attack suggested premeditation. We conclude there is substantial evidence defendant planned to kill Ayala, that he had a motive to do so, and that the manner in which he stabbed Ayala and twisted the knife is consistent with a premeditated intent to kill.

1. Planning

The jury could reasonably find defendant planned to kill Ayala. Defendant agrees the evidence may show he was angry that Ayala would not "smoke [him] out" on July 21, 2015, but defendant suggests he returned that evening, unarmed, planning only a nonlethal fistfight with Ayala. According to defendant, the fight suddenly escalated when Ayala swung a frying pan.

Defendant's account, however, is not the only reasonable view of the evidence. For reasons we have already discussed, the jury was entitled to conclude on the evidence presented that the fight escalated as a result of defendant's grabbing the kitchen knife, switching it to his left hand, and stabbing Ayala—all of which occurred (or so the jury could reasonably find) before Ayala hit defendant with the pan. The space of time necessary to select the largest knife in the block and transfer it from one hand to the other is sufficient to form a preconceived plan to kill. (*People v. Salazar* (2016) 63 Cal.4th 214, 245 [observing the process of premeditation and deliberation does not require any extended period of time and citing with approval the result in *People v. Mayfield* (1997) 14 Cal.4th 668: "'[W]here defendant wrested the

gun from and fatally shot an officer during a brief altercation, the jury could reasonably conclude that "before shooting [the officer] defendant had made a cold and calculated decision to take [the officer's] life after weighing considerations for and against""]; *Cage*, *supra*, 62 Cal.4th at p. 276 [""""Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."""].) Regardless, there was also evidence defendant was determined to kill Ayala before defendant returned to Ayala's home.

When Ayala refused to smoke with defendant, defendant threatened to "take care of" Ayala and drove off for up to several hours (long enough, in any case, to change from pajamas into street clothes). When he returned to Ayala's home, he pounded on the door and started beating Ayala without any discussion or provocation once Ayala opened the interior door. After stabbing Ayala, defendant's only concern was to attack the sole witness and flee. A jury could reasonably infer that defendant initiated the fight intending to kill Ayala by whatever most opportune means, and that stabbing Ayala was merely a more expedient alteration of a plan to beat him to death.

Defendant counters that the CALJIC No. 8.67 instruction on premeditation given in this case "fails to distinguish the extent of time requisite for careful consideration and mature deliberation from the length of time it takes to form an intent to kill and/or the length of time between forming that intent and the actual killing." In other words, defendant takes the position that a premeditated killing necessarily requires a longer period of reflection than the period associated with a rash or impulsive killing. Our Supreme Court has rejected this argument, explaining it "completely misses the mark" because "a killing

resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse." (*People v. Solomon* (2010) 49 Cal.4th 792, 812-813.) We reject the argument too.

2. *Motive*

Applying *Anderson*, we consider not simply whether defendant had *any* motive to attack Ayala, but whether there was evidence of motive that would "support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [Citation] . . . ." (*Anderson*, *supra*, 70 Cal.2d at p. 27.)

Here, the jury heard evidence that Ayala, who had reliably shared drugs with defendant on friendly terms over the course of a year, refused to "smoke [defendant] out" for the first time on the day of the attack. Defendant responded that he would "take care of" Ayala and drove off. When defendant returned, Thomas answered the door. When Ayala eventually opened the security door to let defendant inside, defendant immediately attacked him. From these facts, the jury could reasonably infer defendant was upset Ayala refused him drugs on the day of the attack. This motive supports an inference that defendant reflected upon and decided to kill Ayala before he returned to Ayala's home, and certainly supports a conclusion that defendant committed a premeditated stabbing when fighting with Ayala.

Defendant nonetheless argues there was no evidence that he decided to kill Ayala until the fight reached the kitchen, and that any motive for this decision must be distinct from his motive in initiating the fistfight with Ayala. We have already explained

why we reject the premise that the jury could not reasonably have found that defendant planned to kill Ayala with his fists before the fight reached the kitchen.[9] However, even if the evidence showed defendant had given no thought to killing Ayala until the moment he decided to reach for the knife, defendant's suggestion that his motive for escalating the fight must be distinct from his motive for initiating the fight is baseless. Defendant cites no authority for this proposition, and it has no basis in experience. The jury could reasonably find the intensity of defendant's anger, which motivated a deliberate decision to kill Ayala, reached its climax in the kitchen even if there was no new reason for that anger.

3. *Manner*

The jury could also reasonably conclude "the *manner* of [attempted] killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts [relating to planning or motive]." (*Anderson*, *supra*, 70 Cal.2d at p. 27.) Defendant argues he did not attack Ayala in a "particular and exacting" manner because he stabbed Ayala only once and, because Ayala stood behind him, defendant "did not see precisely where [the knife] would strike." Neither of these assertions undermines the jury's premeditation finding, and defendant

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[9] Although Ayala put up a fight, the record suggests defendant had the upper hand during the encounter. Ayala testified that defendant was "taller" and "stockier," and the fight proceeded from the front door into the kitchen with defendant advancing and Ayala moving backward.

ignores additional facts that do support a conclusion that the attempted killing was premeditated.

First, even if defendant could not see Ayala when he thrust the knife backward, his thrust was aimed in a direction and carried such force that he could anticipate its effect. Second, the jury could reasonably find defendant stabbed Ayala only once because it is undisputed defendant turned to face Ayala after impact and saw he had inflicted a devastating wound. Third, and perhaps most importantly, defendant does not account for Ayala's testimony that, after stabbing him, defendant turned to look at him, twisted the knife, and "just stood there with a smirk on his face like it was funny . . . ." The jury could reasonably find such conduct was not rash or impulsive and was instead consistent with the then-apparent success of a preconceived intent to kill.

In light of the *Anderson* framework, there was sufficient evidence for the jury to find that defendant, angry that Ayala refused to share drugs with him, formed a preconceived plan to "take care of" Ayala and acted in a manner consistent with that motive and plan.[10]

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[10] Defendant's extended comparison to the "weak evidence of motive and no evidence of planning or an exacting method of killing to ensure death" in *People v. Boatman* (2013) 221 Cal.App.4th 1253 is not helpful. The defendant in *Boatman* took a gun from his girlfriend's hands, spontaneously (and perhaps accidentally) shot her in the face from 12 inches away, and immediately directed his brother to call the police while trying to resuscitate her. (*Id.* at pp. 1258-1261.) Unlike defendant, Boatman did not threaten to "take care of" his girlfriend, did not arrive at the site of the shooting and immediately attack his girlfriend, and did not attempt to exacerbate his girlfriend's wound. Nor did Boatman threaten or attack witnesses; in fact,

C. Claim of Insufficient Evidence for the Attempted Murder of Thomas

As the court instructed the jury, attempted murder requires a finding that defendant harbored a specific intent to kill another human being unlawfully. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890; *People v. Sanchez* (2016) 63 Cal.4th 411, 457.) Defendant maintains his conviction for attempting to murder Thomas must be reversed because there is insufficient evidence he (defendant) had the specific intent to kill Thomas rather than to "scare and/or injure" him. Defendant suggests that a finding of an intent to kill is precluded by the "conditional" threat to Thomas (i.e., "if you call the cops, I'm gonna kill you, too") and the fact that the wound to Thomas's clavicle was "not remotely life-threatening." In our view, the facts established at trial amount to well more than substantial evidence that defendant specifically intended to kill Thomas.

Although defendant is correct that both Ayala and Thomas testified that defendant threatened to kill Thomas only "if" he called the police, defendant does not reckon with the key fact: this condition was satisfied. Thomas's testimony leaves no doubt that defendant attacked because he was calling the police: "I said I'm calling. And I just started dialing, and then he came at me." The jury was of course entitled to conclude Thomas intended to make good on his threat.

Defendant's suggestion that he attacked Thomas because he merely wanted to *delay* Thomas's calling the police is implausible. Defendant had every reason to believe that Thomas

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unlike defendant, Boatman invited them to call the police while he attempted to render aid to his girlfriend.

would call the police as soon as defendant left the house. Defendant does not articulate what sort of nonlethal injury he purportedly hoped to inflict with a knife that would have merely prevented Thomas from calling 911 immediately upon his departure. But even assuming this account were plausible, we would still uphold the jury's finding because the jury could reasonably conclude defendant intended to kill Thomas to prevent him from calling the police or testifying against him.[11] (*People v. Bean* (1988) 46 Cal.3d 919, 933 [""If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment""].)

Finally, defendant's emphasis on the relatively minor wound he inflicted on Thomas wholly ignores the circumstances of Thomas's escape—but for which the jury could reasonably conclude defendant would have killed Thomas. Defendant, blocked by a sofa that he ultimately hurdled, chased Thomas out of the house. As Thomas struggled to open a gate, he saw defendant closing in with the knife raised. Defendant's knife "c[a]me down right at the same time the gate opened" and

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[11] Defendant's suggestion that this motive is unreasonable because defendant "did not know if [Ayala's] injury was fatal" and Thomas "presumably would not have been able [to] provide adequate identifying information to the police" is not persuasive. First, defendant evidently believed that he had fatally wounded Ayala when he threatened to "kill Thomas, *too*." Second, the jury could reasonably find defendant feared Thomas would be able to describe him to police (particularly after Ayala said "Oh, it's Fred, Mark" after seeing defendant at the front door).

Thomas "fell basically forward through the gate and just kept running." The jury could reasonably find that, far from exercising restraint in slashing Thomas's clavicle, defendant intended to kill Thomas and was only thwarted because Thomas made it out of the house slightly faster than defendant did.

D. Prosecutorial Misconduct Claims

During closing argument, "'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].' [Citation.] Improper comments violate the federal Constitution when they constitute a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. [Citation.] Improper comments falling short of this test nevertheless constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish misconduct, defendant need not show that the prosecutor acted in bad faith. [Citation.] However, she does need to 'show that, "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner."]' [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).)

The general rule is that "'[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and

request an admonition.'" (*People v. Williams* (2013) 56 Cal.4th 630, 671; accord, *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081 [purpose of the requirement is to encourage defendants to bring errors to the attention of the trial court so they may be corrected].) This forfeiture rule does not apply where an objection would have been futile or if an admonition would have been ineffective. (*People v. Arias* (1996) 13 Cal.4th 92, 159.)

Here, defendant argues three aspects of the prosecution's closing argument were improper and prejudicial: (1) examples used by the prosecution to illustrate the meaning of deliberate and premeditated for purposes of the attempted murder charges, (2) comments regarding the evidence offered to show mental impairment and its consistency with a self-defense theory, and (3) remarks about defendant's character based on facts not in evidence. For the reasons discussed below, we hold defendant forfeited his arguments regarding the first two aspects. However, we address and reject all three arguments on the merits to avoid any need to analyze whether defense counsel's failure to object at trial was ineffective assistance of counsel.

1. Deliberate and premeditated

a. background

During closing argument, the prosecution attempted to illustrate "how things that we do in everyday life are willful, deliberate and premeditated":

"So before we even talk about actions, let me just talk to you about conversations. So a lot of times we see people and we talk to people and we read them and we adjust the way we talk in an instant. So in my job I talk to all kinds of people, and when I talk to people, if it's a victim, I talk to the person in a different

way. If that person is just a witness or a doctor, we adjust our ways.

"So let me give you an example of a child. You have all been in the situation where a child comes up to you and asks you a hard question. Maybe it's about death or sex or something; right? And that moment you adjust how you think and you change the way that you answer that question based on who the kid is, what the context is. You might sugar coat something. You might, if it's appropriate, tell them the truth about the matter. But that action, that instant thought of recognizing the consequences of what I tell this person is willful, deliberate and premeditated.

"Why is it willful? Because you do it on purpose. You do it on purpose.

"Why is it deliberate? Because you do it for a reason. You do it for a reason. You do it so that you can either, you know, keep the child away from the hard thoughts of the world or you maybe put that for another day. Put it over for another day when the child grows older and more able to understand stuff.

"And it's premeditated because at that moment you make that decision to do that for a purpose. You know, so that you don't have to go over this conversation right now or some other reason. Those decisions happen at an instant.

"Now, I will just take that example to actions. We do it all the time when we are driving. For example, when we are changing lanes or whatever. We are driving and we see a pedestrian across the street. We can swerve. We can stop. We make these decisions as people in—quick. In a quick way. And we do these things every day while we drive that impacts other

people's lives. We impact the safety of others. We impact the safety of ourselves and our family and our car.

"So I know these are legal terms but in the context of real life, we do all kinds of things that are willful, deliberate and premeditated."

b. analysis

Defendant did not object to these statements at trial, and there is no reason to believe an objection would have been futile or ineffective.[12] The issue is therefore forfeited.

Regardless, the challenged remarks by the prosecution do not constitute misconduct. Defendant posits the prosecution's illustration "mis[led] the jury to believe that merely deciding to do an act was the same as deliberating and premeditating . . . ." We acknowledge that the prosecution's driving example—and particularly his reference to a "swerve," with its possible connotation of thoughtless reflex—is an imprecise illustration of premeditated conduct. But the example must be understood in the overall context of the prosecution's argument concerning premeditation. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159 ["The court must consider the challenged statements in the context of the argument as a whole to make its determination"].) In context, the prosecution repeatedly returned to the point that both examples were meant to emphasize consideration of reasons and consequences: We might tell white lies to children to avoid

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[12] We specifically see no basis to conclude, as defendant does, that the above-quoted remarks by the prosecutor, either alone or in tandem with the other challenged remarks, "fell into the category of flagrant misconduct" that no admonition could possibly ameliorate.

upsetting them, and in stopping or swerving to avoid a pedestrian, we balance concerns for the safety of others against the safety of ourselves and our families. Before presenting these examples, the prosecution explained "willful, deliberate, premeditated . . . means . . . you actually know what it means to kill somebody. So you can, for example, find someone guilty of attempted murder but it wasn't done in a fashion where you know the consequences of that death."[13]

In this context, we do not agree with defendant's claim that the prosecution suggested or the jury believed that every decision is necessarily deliberate and premeditated. In determining how jurors likely understood the prosecution's arguments, we do ""'not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" [Citations.]" (*Cortez*, *supra*, 63 Cal.4th at p. 131.)

Moreover, "it is significant that the trial court properly defined the [relevant standard] in both its oral jury instructions and the written instructions it gave the jury to consult during deliberations." (*Cortez*, *supra*, 63 Cal.4th at p. 131.) The court recited and gave to the jury CALJIC No. 8.67, which correctly distinguishes deliberate and premeditated action from unconsidered and rash impulse. Both the prosecution and the defense invoked the jury instructions. (See *id.* at p. 132 [noting

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[13] The prosecution also acknowledged that "[t]his allegation, it's a harder argument for [Ayala] because [defendant] didn't go there with a knife. . . . The argument is easier for [Thomas] because after doing all that to [Ayala], [defendant] wanted to do the same thing to [Thomas]."

significance of defense counsel and prosecution referring to jury instructions in closing arguments].) Defense counsel specifically urged the jury to "look at those . . . instructions very carefully" and warned that "willful and premeditated murder . . . [is] not as simple as counsel would have you believe." Thus, even if the prosecution's explanation of the premeditation concept was at the margins inartful, we see "no reasonable likelihood the jury construed or applied the prosecution's challenged remarks in an objectionable fashion." (*Id.* at pp. 133-134.)

2. Mental impairment and self-defense

a. background

The prosecution also argued defendant's theory that he stabbed Ayala to defend himself from a blow with the frying pan was not consistent with the theory that he was suffering a psychotic episode:

"[Ayala] was already stabbed by the time he was reaching for the pan. But for the sake of argument let's say that is an issue. He grabs the pan and the defendant, . . . sees that pan and reacts in a certain way that's reasonable. Well, if you are saying that [defendant] was insane, crazy, whatever, couldn't evaluate the whole entire situation that day in a reasonable manner, then what does it matter what he saw that day; right? Because the whole situation is something that he can't evaluate. You can't have it both ways.

"If you want to argue self-defense, then you have to argue that the person there was fighting and then reacted in a reasonable way. That's why both of those arguments doesn't hold water because—that self-defense argument doesn't hold water

because [defendant] was already in the act of stabbing before that threat arose.

"And, second, a knife—a knife is not a reasonable response for a fist fight or even a pan. He can run away, turn around and push him. He can get his own pan. That is not a reasonable action."

The prosecution also argued that defendant's conduct after the stabbing was inconsistent with the theory that he was suffering a psychotic episode:

"But I do need to talk to you about the demon defense; right? The demon defense; right? What the demon defense does is it hurts the specific intent crimes. The specific intent crimes requires me to show through the argument that I just made that he knew what he was doing. . . . When he's seen this doctor for a little bit, that means he could not—he can't take responsibility for any of the specific intent crimes. He still could be guilty of the general criminal intent crimes no matter what the assault with a deadly weapon. Let's embrace this. If you believe this, you will let him walk on this and that is why I need to embrace it.

"So here are the possible things when you could—when you really believe in demons. Let's put aside the fact this doctor saw him four days later and didn't give him treatment.

"And what he was telling the doctor was lies. Right? Let's put that to the side. If you really believe in demons, if you really believe in demons and you just killed two demons, you just fought two demons, what would you do? You would go home and tell, hey, wife, I just fought two demons. I just killed them; right? Because this is what a demon is; right? [¶] . . . [¶]

"If you really believe you fought a demon, you are telling people I have just killed a demon that day, the next day, and you

know what? This guy is crazy. We have to take him to the hospital on that specific day. No. He doesn't do that. He doesn't say on that day or even inside of that house. He is not acting like he is fighting demons.

"What is the next thing that happened? What is the next thing that happened? You are crazy. You think that you fought a demon and then you come to. Right? You come to; right? You become cognizant and come back to reality and you are driving your Prius on this long drive. Wait. Why do I have a knife with me? Why do I have a bloody knife with me? Right? What would a normal person do who has had a history of maybe going to a psychiatrist once? Something must have happened. I should report myself. I should go seek help. I should go check myself into the hospital; right? If that was the situation, instead of getting rid of the knife. Right?

"What's the third possible thing that could happen? You are crazy and you just do crazy things. You are just crazy. You are stabbing the house—inside the house. You don't know which direction to run when you run out of that home. You are yelling. You are screaming. You don't know how to drive. You don't know where to park. Where did the police find him? In his house. Where is his car? Parked in front of his house."

b. analysis

Defendant did not object to these statements at trial, and there is no evidence that an objection would have been futile or ineffective. Again, the issue is forfeited, but we additionally hold there was no misconduct.

Defendant contends the prosecution's remarks suggested he maintained he was utterly delusional, as opposed merely to

having disorganized, impulsive, and paranoid thoughts. In essence, defendant argues the prosecution reduced the many and complicated possibilities about defendant's mental faculties on July 21, 2015, to a strawman dichotomy between a delusional belief in demons and perfect rationality. We are not persuaded that the prosecution's attempt to refute the notion that defendant was delusional was inappropriate given the emphasis on defendant's delusional beliefs in Dr. Burke's testimony. The jury was instructed, pursuant to CALJIC No. 3.32, regarding evidence of mental disease received for limited purpose. The prosecution acknowledged the distinction between this and an insanity defense, explaining that "[t]he defense in this case is something very specific. The law gives defendants abilities to plead not guilty by reason of insanity . . . . That is not the situation here. They are not using that." The prosecution stayed within the bounds of permissible argument. (*Berger v. United States* (1935) 295 U.S. 78, 88 [a prosecutor "may strike hard blows . . . [but] is not at liberty to strike foul ones"].)

3. Facts not in evidence

The prosecution also cast doubt on defendant's wife's comments to Dr. Burke by suggesting that defendant had reason to deceive his wife: "The other thing that [defense counsel] brought up is the wife. Right? The wife. And the way—excuse me. . . . But the way he gets in those statements from the wife is this: The doctor a year ago called the wife on the phone. They didn't even see each other face to face. And that wife—whoever it was on the other line—told the doctor some information and that doctor wrote it down on a piece of record—on a piece of paper. And today in court he comes up to the stand and he reads that

explanation to you. That's not the truth. That's an explanation that was made up three or four days on that day. Maybe the wife was being lied to because [defendant] wasn't telling his wife that he was using meth during that time frame. Maybe [defendant] was avoiding some difficult conversations. Right? He was avoiding explaining why, as a person working as a refrigerator repairman, that has a family, isn't spending more time to find a job. Isn't spending more time taking care of his kids or doing work at home. But instead visiting . . . Ayala every 2 weeks, 20 times over 8 months. Right?

"Maybe there is some hard conversations there. More complexity. Why the wife on that day, back when she was talking to the doctor, didn't have a full picture about what's going on. . . ."

Defense counsel objected. The court overruled the objection, but admonished the jury: "Folks, just so you know, whatever the attorneys say on either side is not evidence. It is argument."

"It is well settled that it is misconduct for a prosecutor to base argument on facts not in evidence. [Citation.]" (*People v. Mendoza* (2016) 62 Cal.4th 856, 906.) However, a prosecutor may make "remarks . . . not phrased as assertions" that amount to "mere[ ] reasonable possibilities." (*People v. Winbush* (2017) 2 Cal.5th 402, 481 (*Winbush*).) Here, the prosecution should have avoided the general "that's not the truth" observation which was susceptible to being misunderstood by the jury, but in context of the specific observations that followed, the prosecution was merely raising reasonable possibilities about defendant's motives

for lying to his wife—as evidenced by the three prefatory *maybes*. In context, this was not misconduct.[14]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J. DUNNING, J.*

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[14] Defendant contends that even if each asserted instance of misconduct by the prosecution is not prejudicial when considered individually, the cumulative effect of those statements requires reversal. We have rejected all of defendant's misconduct arguments and the cumulative prejudice argument necessarily fails. (*Winbush*, *supra*, 2 Cal.5th at p. 486.)

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