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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. PENIAMINA TOMASI, Defendant and Appellant.	B227065 (Los Angeles County Super. Ct. No. NA084458)

APPEAL from a judgment of the Superior Court of Los Angeles County, James B. Pierce, Judge. Affirmed.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In an information, the People charged defendant Peniamina Tomasi with the murder of Felix Sandoval (Pen. Code,[1] § 187, subd. (a); count 1) and the attempted willful, deliberate and premeditated murder of Biathriz Madriz (§§ 187, subd. (a), 664; count 2). The information further alleged as to both counts that defendant personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)) and as to count 2 that defendant personally inflicted great bodily injury upon Biathriz Madriz under circumstances involving domestic violence (§ 12022.7, subd. (e)).

A jury found defendant guilty as charged and found the enhancement allegations to be true. The trial court sentenced defendant to state prison for a total term of 25 years to life, plus life, plus six years. This appeal followed.

Defendant contends (1) the trial court committed instructional error, (2) the evidence is insufficient to support his convictions, and (3) the abstract of judgment must be corrected. We affirm the judgment and order correction of the abstract of judgment.

FACTS

Biathriz Madriz (Madriz) met defendant at work in 2008. At the time, Madriz had three young children under the age of 9—Breanna, Arianna and Felix; defendant had three young children under the age of 10—Ashlynn, Alexandrea and Brandon. After Madriz and defendant became a couple, they introduced their children to each other.

While Madriz was pregnant with defendant's child, she caught him cheating on her. Although Madriz no longer wanted to be with defendant, she stayed with him for the sake of their unborn child. One month after their daughter, Audrey, was born, Madriz again became pregnant. When Audrey was two months old, defendant and his children

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

moved into Madriz's two bedroom apartment on East Pleasant Street in Long Beach. Madriz told defendant she no longer felt the same way about him, but they talked about it and worked something out.

Madriz and defendant's second daughter, Kaylanie, was born in September 2009. The six older children shared one bedroom, while the babies stayed with Madriz and defendant in the other bedroom.

On the evening of January 8, 2010, defendant had the night off from work. Around 5:00 or 6:00 p.m., Madriz and defendant were in the living room, watching television and drinking beer. Kaylanie was with them in her bouncer. Audrey was in her crib in Madriz and defendant's bedroom, and the older six children were in their bedroom. That evening, prior to 9:00 p.m., Madriz had four beers; defendant had eight or nine beers.

Madriz went to the children's bedroom when she heard arguing. Defendant followed. Brandon and Alexandrea appeared to be crying and each blamed the other for starting the problem. Alexandrea accused Brandon of hitting her, after which defendant yelled at Alexandrea. Defendant told Alexandrea to go to bed, but Madriz told her she could stay up. Madriz and defendant then returned to the living room.

Later, arguing was again heard coming from the children's bedroom. Madriz got up and went to the children's room. Defendant followed behind. Inside the room, Madriz found Brandon on top of Arianna in the lower bunk bed. He appeared to be choking her. Madriz "grabbed" Brandon by the arms, took him off Arianna and placed him on the bed. Madriz did not, and had never, hit Brandon. She was upset and scolded Brandon, stating, "Don't hit my daughter." "Don't ever hit my daughter." "What were you doing?" "Don't ever hit girls. You're not supposed to hit them." When Brandon started shaking, crying and pointing in what appeared to be Madriz's direction, Madriz asked, "Why are you crying? Why are you crying? What did I do?" Madriz was unaware of where defendant was at that point in time.

Madriz was taken by surprise when defendant started "beating" her on the back and telling her to leave Brandon alone. Madriz described the hits as "very hard punches."

She was unable to tell if defendant struck her with an object. Madriz felt the first blow after Brandon started crying. Madriz was not touching Brandon at the time.

Madriz fell onto the lower bunk bed, after which defendant started hitting Felix, who was lying down in the upper bunk bed. Madriz looked up as she tried to get up. She made it out of the bedroom and into the hall when defendant attacked her again. It was during this second attack that Madriz saw defendant holding a bloody knife. Madriz asked defendant what he was doing and told him to stop. Defendant said, "Too late. I fucked up." "I already stabbed you three times." Madriz panicked when she realized for the first time that defendant had stabbed her with a knife. The children were screaming.

Madriz pleaded with defendant not to kill her. She then picked up Audrey who was crying. Audrey appeared to have some blood on her nose, and Madriz thought something had happened to her. When Madriz continued to plead with defendant, he "kept saying, 'It's too late. I have to finish. I have to kill you.'" Madriz begged defendant not to kill her. At that point, one of the children brought Kaylanie to Madriz.

Now holding both babies, Madriz said, "I got the babies. Please don't do this to us." Defendant told Madriz to put the babies down because he was going to kill her. Madriz complied because she did not want them to be hurt. Madriz continued to plead with defendant stating, "Please don't. I won't say nothing. I won't call the cops. Please don't." "I'll just act like you didn't do it." Defendant appeared to be thinking, when one of his daughters interjected, "Yeah, Daddy, we'll clean everything up. We'll clean everything up." At that juncture, defendant let go of the knife. Madriz then started slowly backing up, acting as if she were going to the kitchen. She then ran for the front door and managed to open it. Defendant ran after her and tried to pull her back into the house. Madriz held on to the doorway and started screaming. While Madriz was struggling to get away, defendant grabbed on to Madriz's shirt which came off when Madriz managed to "kick [her] way out" and run for help. At some point after attacking Madriz in the hallway, but before she escaped, defendant turned up the volume on a radio that had been playing. The volume was so loud that Madriz was no longer able to hear the children screaming.

Once outside, Madriz yelled for someone to call 911. When no one seemed willing to help, she forced her way into a neighbor's apartment and pleaded, "Please call 911. The kids are still in the house. He's going to hurt my kids." After the neighbor called 911, Madriz started back toward her apartment. En route, Madriz heard someone shout that the kids were out of the apartment. Madriz felt some relief, but then someone shouted that Felix and Brandon were still inside. Madriz thought defendant was going to kill Felix. When Madriz got to her apartment, the police were kicking down the door. After the police dragged defendant outside, defendant called Madriz a "bitch."

Madriz, who suffered four stab wounds, a broken rib and other injuries, was transported to the hospital for treatment. She remained in the hospital for two days.

With regard to defendant's relationship with Felix, Madriz recounted that about one year earlier, defendant had "smacked [Felix] on the butt" after Felix failed to do as his mother requested. Madriz became upset, in that she had told defendant "from day one, don't ever hit my kids." Madriz threw defendant's clothes out but he would not leave.

Defendant hit his own children, particularly Alexandrea and Brandon. Madriz protected his children. They would run behind her, and she told defendant to leave the kids alone.

According to Madriz, defendant usually was calm when he drank beer. Madriz did see him become violent once, however.

In the past, defendant had complained that Felix talked too much and was loud, however. Defendant did not treat Felix like he treated Brandon. The two boys were close in age, and defendant encouraged a rivalry between them. For example, defendant told Brandon, "Fuck [Felix] up when he hit[s] you. Don't let him hit you. Fuck him up." In these situations, Madriz told defendant not to encourage fighting because she would tell them not to fight. It appeared to Madriz that defendant wanted Brandon to be dominant over Felix. This bothered Madriz.

On the day of the incident, defendant and Madriz had not had any kind of dispute or argument. He had not been violent or threatening to Madriz. Although Madriz had

made defendant aware she no longer was in love with him, she did not make a big deal about it. There was no tension in their relationship, and nothing unusual was going on at this time. Defendant was normally calm and quiet. In addition, Madriz and defendant had not had any particular problems with the children before.

Breanna saw her mother trying to separate Brandon and Arianna, who were fighting with each other. Breanna left the bedroom momentarily and then returned. She did not remember seeing her mother grab, slap or hit Brandon. She remembered being in the bedroom when Brandon was crying loudly, but she could not remember what was going on at the time. She could not remember what her mother was doing but recalled that defendant was in the room.

Breanna saw both stabbings. She was in her bedroom when she saw defendant stab Felix with a knife. Breanna remembered Felix being in the lower bunk bed. Before the stabbing, defendant said to Felix, "It's all your fault." Breanna also saw defendant stab her mother.

Breanna saw defendant with a total of two or three knives, one of which Alexandrea put under the lower bunk bed with pink sheets. Breanna remembered that defendant left her bedroom and returned with a knife. After defendant stabbed Felix, Breanna ran out of the bedroom.

Police Investigation

When she arrived at the scene around 9:00 p.m. on January 8, 2010, Long Beach Police Officer Leticia Gamboa heard a woman screaming for help. Officer Gamboa approached and observed a woman running down the street screaming, "He's killing my kids. He's killing my kids. Please help me." When asked where he was, she directed Officer Gamboa to apartment number two, the door to which was closed and smeared with blood.

Armed with this information, Officer Gamboa and another officer forced their way into the apartment. Officer Gamboa saw defendant talking on his cell phone, yelling, "That fucking bitch, she killed them." With her gun drawn, Officer Gamboa ordered

defendant to "get on the ground." Defendant refused to comply and said, "She's going to pay. She killed them." Officer Gamboa switched to a taser, after which defendant got down on the floor. As the officer approached defendant, she saw a young boy standing to the right of him. Officer Gamboa also saw the body of a young boy, approximately eight years of age, covered in blood, lying face down on the living room floor. Two stab wounds were readily apparent to the officer, who checked for vital signs but found none. She then called for paramedics.

Although the child appeared to be dead, Officer Alejandro Cazares nevertheless commenced CPR. Paramedics thereafter arrived and transported the child.

Officer Cazares went to the southwest bedroom of the apartment, shared by the older children. There he saw two bunk beds, one of which had a trundle bed on the bottom. He observed blood stains on the carpet between the trundle bed and the dresser. He also saw blood on the wall and doorway leading into the bedroom.

Detective Teryl Hubert, the investigating officer, arrived at the apartment shortly after 10:00 p.m. Inside the children's bedroom, he located a kitchen knife "underneath the wire portion of the bunk bed support." It was about eight inches long, and the tip was bent. On the blade were red stains that appeared to be blood. Also collected from the children's bedroom were pillows with blood stains and a sheet from the trundle bed.

In the living room, a large kitchen knife was found on top of a blanket on the sofa directly beside the victim. There appeared to be blood on the knife, and the blade was bent at the base of the blade where the blade met the handle. An additional kitchen knife with what appeared to be blood also was located behind a stereo speaker near the front door of the apartment.

Recovered from the kitchen was a knife with an eight-inch blade and red stains that appeared to be blood towards the end. The tip of the blade was bent. A cleaver without any red stains also was recovered.

Officer Dustin Paladino took custody of defendant at the scene. During booking, Officer Paladino administered a blood alcohol test to defendant who was 5 foot 10 to 11

inches and weighed between 260 and 280 pounds. The two tests conducted on January 9 at 1:53 and 1:54 a.m. registered readings of .00.

Medical and Forensic Evidence

Forensic pathologist Susan Selser performed an autopsy on seven-year-old Felix, who was 51 inches tall and weighed 73 pounds. Three of the nine stab wounds he sustained were fatal. Extensive bruising appeared on the right side of his head and shoulder.

Hypothetically speaking, Long Beach Police Criminalist Gregory Gossage opined that a person who is 5 feet 10 to 11 inches tall and weighs 260 to 280 pounds and who drank eight to nine beers between 5:00 and 9:00 p.m. and had a blood alcohol level of .00 at 1:35 a.m., would have had a blood alcohol level in the range of .06 to .08 at 9:30 p.m.

Criminalist Gossage explained that typically a blood alcohol level of .06 to .08 was not likely to turn a person with a meek and mild personality into an aggressive personality type "at that low level concentration." A person with a violent or aggressive personality, however, who has the same blood alcohol level might become less inhibited and act more aggressively and violently. The criminalist opined, however, that a blood alcohol level of .06 to .08 may slow response time or inhibit the ability to concentrate or multiple task but "doesn't greatly [a]ffect one's personality at that lower concentration." "That aspect of the brain is not affected as greatly or as uniformly as the aspects regarding motor control with respect to driving a motor vehicle are."

DISCUSSION

A. *Instructional Errors*

As the Supreme Court observed in *People v. Cole* (2004) 33 Cal.4th 1158 at page 1206, "[a] trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof.

[Citation.] We review the trial court's decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of [the omitted instruction]."

1. Imperfect Self Defense

Defendant contends he was entitled to a jury instruction on imperfect self-defense. We disagree.

"'Imperfect self-defense' is shorthand for an actual but unreasonable belief in the need to defend oneself or others from imminent peril to life or great bodily injury." (*In re Lucero* (2011) 200 Cal.App.4th 38, 42, fn. 3, citing *In re Christian S.* (1994) 7 Cal.4th 768, 773.) "When imperfect self-defense applies, it reduces a homicide from murder to voluntary manslaughter because the killing lacks malice aforethought." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1178, citing *People v. Blakeley* (2000) 23 Cal.4th 82, 87-88.) The duty to instruct on imperfect self-defense "arises whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." (*People v. Barton* (1995) 12 Cal.4th 186, 201; accord, *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1231-1232.)

In this case, defendant's request for a jury instruction on imperfect self-defense of others prompted the following discussion:

"[PROSECUTOR]: Your Honor, the People would be objecting to any imperfect self-defense. I believe that there has to be a reasonable and actual belief that that force is needed to defend oneself, and we never heard any testimony from the defendant, nor did we hear any evidence that he had an actual belief in the need for defense. I would object to that.

"THE COURT: I am only going to give [murder] instructions, both first and second. I will give the voluntary manslaughter under the theory of heat of passion as to count one. I will give the attempted [murder] instruction as to count two. Both under the theory of premeditation and without. And then I will give attempted voluntary

manslaughter theories under the heat of passion. I will not give the imperfect defense of others. I don't believe there's sufficient evidence to justify that. . . ."

The trial court was correct. Defendant's assertion that he actually believed he had to defend his son Brandon from serious injury from Madriz was a complete fiction. There is no evidence in the record that Madriz ever struck any of her children or defendant's children. To the contrary, the evidence demonstrates that she was averse to corporal punishment and objected to defendant's use of the same against any of their children.

On the evening in question, when Madriz entered the children's bedroom the second time, she saw Brandon choking Arianna on the lower bunk bed. In the reasonable exercise of her parental responsibilities, Madriz physically removed Brandon from Arianna and placed him on the mattress. She then verbally reprimanded Brandon for his behavior. Thus, besides the absence of evidence as to what defendant actually believed, there is no evidence that would have allowed a reasonable jury to conclude that defendant actually believed Brandon's life was in imminent peril at the hands of Madriz. The trial court correctly refused to give the jury an instruction on imperfect self-defense. (*People v. Barton*, *supra*, 12 Cal.4th at p. 201; *People v. Valenzuela*, *supra*, 199 Cal.App.4th at pp. 1231-1232; cf. *People v. Vasquez*, *supra*, 136 Cal.App.4th at p. 1180.)

2. CALCRIM No. 640

Defendant next contends that the trial court committed reversible error in failing to instruct sua sponte with CALCRIM No. 640. The standard version of this instruction provides:

"[For each count charging murder,] (Y/y)ou (have been/will be) given verdict forms for guilty and not guilty of first degree murder (, /and) [second degree murder] [(, /and)] [voluntary manslaughter] [(, /and)] [involuntary manslaughter].

"You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of *<insert second degree murder or, if the jury is not instructed on second degree murder as a lesser included offense, <u>each</u> form of*

manslaughter, voluntary and/or involuntary, on which the jury is instructed> only if all of you have found the defendant not guilty of first degree murder, [and I can accept a verdict of guilty or not guilty of (voluntary/involuntary/voluntary or involuntary) manslaughter only if all of you have found the defendant not guilty of both first and second degree murder].

"[As with all of the charges in this case,] (To/to) return a verdict of guilty or not guilty on a count, you must all agree on that decision.

"Follow these directions before you give me any completed and signed final verdict form[s]. [Return the unused verdict form[s] to me, unsigned.]

"1. If all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form. Do not complete or sign any other verdict forms [for that count].

"2. If all of you cannot agree whether the defendant is guilty of first degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms [for that count].

"*<In addition to paragraphs 1–2, give the following if the jury is instructed on second degree murder as a lesser included offense.>*

"[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and the form for guilty of second degree murder. Do not complete or sign any other verdict forms [for that count].

"4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of second degree murder, complete and sign the form for not guilty of first degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].]

"*<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder as the <u>only</u> lesser included offense.>*

"[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the verdict forms for not guilty of both. Do not complete or sign any other verdict forms [for that count].]

"*<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and only <u>one</u> form of manslaughter (voluntary or involuntary) as lesser included offenses.>*

"[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder and the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

"6. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

"7. If all of you agree that the defendant is not guilty of first degree murder, not guilty of second degree murder, and not guilty of (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms [for that count].]

<In addition to paragraphs 1–4, give the following if the jury is instructed on second degree murder and <u>both</u> voluntary and involuntary manslaughter as lesser included offenses.>

"[5. If all of you agree that the defendant is not guilty of first degree murder and not guilty of second degree murder, complete and sign the forms for not guilty of first degree murder and not guilty of second degree murder.

"6. If all of you agree on a verdict of guilty or not guilty of voluntary or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]. Do not complete or sign any other verdict forms [for that count].

"7. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]

"*<In addition to paragraphs 1–2, give the following if the jury is not instructed on second degree murder and the jury is instructed on <u>one</u> form of manslaughter (voluntary or involuntary) as the <u>only</u> lesser included offense.>*

"[3. If all of you agree that the defendant is not guilty of first degree murder but also agree that the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of first degree murder and the form for guilty of (voluntary/involuntary) manslaughter. Do not complete or sign any other verdict forms [for that count].

"4. If all of you agree that the defendant is not guilty of first degree murder but cannot agree whether the defendant is guilty of (voluntary/involuntary) manslaughter, complete and sign the form for not guilty of first degree murder and inform me that you cannot reach further agreement. Do not complete or sign any other verdict forms [for that count].

"5. If all of you agree that the defendant is not guilty of first degree murder or (voluntary/involuntary) manslaughter, complete and sign the verdict forms for not guilty of each crime. Do not complete or sign any other verdict forms [for that count].]

"*<In addition to paragraphs 1–2, give the following if the jury is instructed on <u>both</u> voluntary and involuntary manslaughter, but <u>not</u> second degree murder, as lesser included offenses.>*

"[3. If all of you agree that the defendant is not guilty of first degree murder, complete and sign the form for not guilty of first degree murder.

"4. If all of you agree on a verdict of guilty or not guilty of voluntary or involuntary manslaughter, complete and sign the appropriate verdict form for each charge on which you agree. You may not find the defendant guilty of both voluntary and involuntary manslaughter [as to any count]. Do not complete or sign any other verdict forms [for that count].

"5. If you cannot reach agreement as to voluntary manslaughter or involuntary manslaughter, inform me of your disagreement. Do not complete or sign any verdict form for any charge on which you cannot reach agreement.]"

The Bench Notes to CALCRIM No. 640 state that "[i]n all homicide cases in which the defendant is charged with first degree murder and one or more lesser offense is submitted to the jury, the court has a **sua sponte** duty to give this instruction or CALCRIM No. 641 . . . . (See *People v. Avalos* (1984) 37 Cal.3d 216, 228 . . . [must instruct jury that it must be unanimous as to degree of murder]; *People v. Dixon* (1979) 24 Cal.3d 43, 52 . . . [jury must determine degree]; *People v. Breverman* (1998) 19 Cal.4th 142, 162 . . . [duty to instruct on lesser included offenses]; *People v. Dewberry* (1959) 51 Cal.2d 548, 555-557 . . . [duty to instruct that if jury has reasonable doubt of greater offense must acquit of that charge]; *People v. Fields* (1996) 13 Cal.4th 289, 309-310 . . . [duty to instruct that jury cannot convict of a lesser offense unless it has concluded that defendant is not guilty of the greater offense]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 . . . [duty to give jury opportunity to render a verdict of partial acquittal on a greater offense], clarified in *People v. Marshall* (1996) 13 Cal.4th 799, 826 . . . [no duty to inquire about partial acquittal in absence of indication jury may have found defendant not guilty of greater offense].)"

We agree with defendant that the trial court should have instructed the jury with CALCRIM No. 640. We do not, however, agree that the failure to do so was prejudicial.

The trial court instructed the jury regarding the general principles of homicide (CALCRIM No. 500), murder with malice aforethought (CALCRIM No. 520), first and second degrees of murder (CALCRIM No. 521), the provocation that may reduce murder from first to second degree and reduce murder to manslaughter (CALCRIM No. 522), the

lesser included offense of voluntary manslaughter due to heat of passion (CALCRIM No. 570), attempted murder (CALCRIM No. 600), deliberation and premeditation for attempted murder (CALCRIM No. 601), and attempted voluntary manslaughter based on heat of passion as a lesser included offense (CALCRIM No. 603).

The trial court also instructed the jury that each count charged in the case was a separate crime and that it was to consider each count separately and return a separate verdict for each (CALCRIM No. 3515). In addition, the trial court instructed the jury with CALCRIM No. 3517 as follows: "If all of you find that the defendant is not guilty of a greater charged crime, you may find the defendant guilty of a lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both a greater and lesser crime for the same conduct. [¶] I'll now explain to you which charges are affected by this instruction. [¶] Voluntary manslaughter is a lesser crime of murder charged in count one. [¶] Attempted voluntary manslaughter is a lesser crime of attempted murder charged in count two. [¶] It is up to you to decide the order in which you consider each crime and the relevant evidence. But I can't [*sic*] accept a verdict of guilty on a lesser crime only if you have found the defendant not guilty of the corresponding greater crime. [¶] For the count in which a greater and lesser crime charged, you'll receive verdicts of guilty and not guilty. Follow the directions when you decide whether the defendant is guilty or not guilty of the greater crime or for any lesser crime."[2]

In our view, the instructions actually given adequately informed the jury of the decisions it was required to make in order to render a verdict. In no way did the instructions individually or collectively tell the jury that it had to make an all or nothing choice between first degree murder or voluntary manslaughter or reduce the People's burden of proof. The bottom line is that defendant has utterly failed to demonstrate that

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[2] The written version of CALCRIM No. 3517 was provided to the jury. It differs in content, however, from the oral version of the instruction. We reject defendant's assertion that the giving of this instruction compounded the problem.

the jury would have acquitted him of the greater crimes and convicted him of the lesser included offenses, or acquitted him completely, if the trial court had instructed the jury with CALCRIM No. 640. (Cal. Const., art. VI, § 13.)

B. *Sufficiency of Evidence*

Defendant challenges the sufficiency of the evidence to support his murder and attempted murder convictions. We reject this challenge.

When the sufficiency of the evidence is challenged, we review the entire record in the light most favorable to the judgment to determine if it contains substantial evidence—i.e., evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Solomon* (2010) 49 Cal.4th 792, 811.) This standard of review is applied when determining the sufficiency of the evidence to support a conviction or a special circumstance. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) It is also applied regardless of whether the People rely primarily on direct or circumstantial evidence. (*Solomon*, *supra*, at p. 811.) We presume in support of the judgment the existence of any fact the jury reasonably could have deduced from the evidence. (*Maury*, *supra*, at p. 396.) Thus, we must accept logical inferences that the jury could have drawn even if we would have reached a contrary conclusion. (*Solomon*, *supra*, at pp. 811-812.)

Defendant challenges the evidence supporting the jury's determination that his murder of Felix and attempted murder of Madriz were committed willfully, deliberately and with premedication. "We do not distinguish between attempted murder and completed first degree murder for purposes of determining whether there is sufficient evidence of premeditation and deliberation. [Citation.]" (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the Supreme Court enumerated three categories of evidence to aid in analyzing the sufficiency of evidence demonstrating premeditation and deliberation: (1) planning activity; (2) a prior relationship with the

victim supporting a motive to kill; and (3) the manner of the killing. (*Id*. at pp. 26-27; *People v. Solomon*, *supra*, 49 Cal.4th at p. 812.)

In *People v. Pride* (1992) 3 Cal.4th 195, the Supreme Court noted, however, that "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *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 or rash impulse. [Citation.]" (*Id*. at p. 247; accord, *People v. Hughes* (2002) 27 Cal.4th 287, 370.)

Indeed, "[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate." (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) The analysis set forth in *Anderson* "was intended as a framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations. It did not refashion the elements of first degree murder or alter the substantive law of murder in any way." (*Ibid*.)

Premeditation and deliberation do not require any specific length 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, but the express requirement for a concurrence of deliberation and premeditation excludes . . . those homicides . . . which are the result of mere unconsidered or rash impulse hastily executed.'" (*People v. Velasquez* (1980) 26 Cal.3d 425, 435, vacated on other grounds in *California v. Velasquez* (1980) 448 U.S. 903 [100 S.Ct. 3042, 65 L.Ed.2d 1132], reiterated on remand in *People v. Velasquez* (1980) 28 Cal.3d 461.)

In this case, substantial evidence of premeditation and deliberation supports defendant's conviction for the first degree murder of Felix and the attempted murder of Madriz. Madriz testified that defendant followed her into the children's bedroom when the second argument occurred. During the time that Madriz was separating Brandon and Arianna and reprimanding Brandon, Madriz was unaware of defendant's exact

whereabouts or actions. Breanna, however, testified that at some point defendant left the bedroom and returned with a knife. That he did so and thereafter used one or more knives to stab Madriz and Felix repeatedly is evidence that his actions were "the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.'" (*People v. Anderson*, *supra*, 70 Cal.2d at p. 27; accord, *People v. Herrera*, *supra*, 70 Cal.App.4th at pp. 1462-1463, fn. 8.)

Defendant's statement to Felix before he stabbed him that "'It's all your fault'" further supports the jury's finding of premeditation and deliberation. Defendant's statements to Madriz that he had stabbed her three times and had to finish what he started provide additional support. Also telling was defendant's act of turning up the volume on the radio in an obvious attempt to drown out Madriz's further screams and pleas for help.

According to Madriz, defendant had an issue with Felix. Defendant thought Felix talked too much and was too loud. Defendant struck Felix once when Felix failed to follow Madriz's directions. Defendant also fueled a rivalry between his son Brandon and Felix, encouraging Brandon to "fuck up" Felix up if he hit him.

We conclude that the foregoing constitutes substantial evidence supporting the jury's determination of premeditation and deliberation. We therefore reject defendant's sufficiency of the evidence challenge.

C. *Abstract of Judgment*

Defendant correctly points out, and the People agree, that the abstract of judgment must be corrected because it does not correctly reflect the trial court's oral pronouncement of judgment.

The trial court's oral pronouncement of judgment is controlling over the minute order and abstract of judgment. (*People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2; see *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402.) Clerical errors in an abstract of judgment may be corrected on remand. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

The reporter's transcript reflects that for the murder of Felix (count 1) the trial court sentenced defendant to 25 years to life, plus an additional year pursuant to section 12022, subdivision (b), to be served consecutively. Item No. 4 on the abstract of judgment, however, indicates incorrectly that defendant was sentenced to life without the possibility of parole on count 1.

On count 2, the attempted murder of Madriz, the court sentenced defendant to life in prison, plus one year pursuant to section 12022, subdivision (b), and another four years pursuant to section 12022.7, subdivision (e). The court further directed that the terms imposed on counts 1 and 2 run consecutively. Item No. 5 on the abstract of judgment is blank and must be amended to reflect the court's oral pronouncement of a consecutive life term on count 2. Given our authority to correct clerical errors (*People v. Mitchell, supra,* 26 Cal.4th at p. 185), we order the abstract of judgment corrected to reflect that defendant was sentenced to state prison for 25 years to life on count 1 and to a consecutive life term on count 2.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment correctly reflecting its oral pronouncement of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J. ZELON, J.