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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MELVIN GALLEGOS,

Defendant and Appellant.

D058301

(Super. Ct. No. SCN246146)

APPEAL from a judgment of the Superior Court of San Diego County, Michael D. Wellington, Judge. Affirmed.

Melvin Gallegos appeals from a judgment convicting him of premeditated attempted murder and other offenses. He asserts the trial court erred by: (1) denying his motion to exclude statements he made to the authorities without being provided *Miranda*¹ warnings; (2) adding language to the standard instruction on premeditation and deliberation stating that it was not necessary to prove the defendant "maturely and meaningfully reflected"; and

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

(3) providing standard instructions on the use of evidence of uncharged domestic violence or elder abuse to infer his propensity to commit the charged offenses. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The offenses in this case occurred on May 10, 2008, when Gallegos, age 76, stabbed his wife, Penelope Gallegos, age 69. Penelope survived the assault and testified at trial.

Penelope and defendant were married in 1982, and about 10 years later defendant started becoming verbally abusive. Penelope coped with the verbal abuse by periodically leaving their home to stay with her daughter. On April 16, 2007, the verbal abuse escalated into physical abuse. During this incident, the couple got into an argument and defendant pushed Penelope against a wall and put his hands on her throat. Penelope ran out of the house and called 911 on her cell phone. Defendant was arrested, charged with misdemeanor spousal battery, and pleaded guilty to misdemeanor disturbing the peace. Penelope obtained orders prohibiting defendant from having any contact with her and requiring that he move out of their house. In September 2007, Penelope decided to try to reconcile with her husband. She had the stay-away order modified to allow contact; they went to counseling; and defendant moved back into their home. Although defendant was trying to treat her better, Penelope felt he was still angry because she had him "thrown away from the house."

The night before the stabbing incident, Penelope was speaking on the phone with her neighbor, Mary Ann Lopez. Penelope told Lopez that she did not think she could stay in the marriage because she had no respect for defendant and was afraid of him, and if he ever touched her "like that again" she would have him removed from their home. While Penelope and Lopez were talking, they heard a "click" on the phone. Lopez asked if defendant was listening and Penelope said he was not. Defendant then came out of his room, appearing upset. When Penelope asked if he had been listening in on her phone call, he said yes.² Lopez heard defendant scream, "all women are bitches . . . you bitch. . . . [Lopez], you'll be sorry if you come around this house."

Defendant went outside and started walking his dog. Lopez heard him screaming to a neighbor about his wife and Lopez talking on the phone. The neighbor told him to calm down.

When defendant returned home, he did not appear angry but seemed strangely calm. He did not say a word to Penelope, and they went to bed in their separate bedrooms. The next morning, Penelope made coffee and defendant came into the kitchen and poured himself a cup of coffee. The couple did not speak to each other and defendant was "quiet." While Penelope was drinking her coffee, defendant put her in a choke hold, told her he was going to punch her in the face, and repeatedly punched her in the face. She fell to the floor and defendant kicked her in the head. Defendant said he was not going to punch her

² Penelope was talking to Lopez in the living room on a "land line" and there was another phone on this line in defendant's room.

anymore but was going to kill her. He pulled a knife from the kitchen drawer; stabbed her in her breast and stomach areas; and stabbed himself in the stomach.

Penelope left her house and managed to go to the home of her next-door neighbor (Tatiana Stillwell). Penelope told Stillwell that defendant was trying to kill her, he punched her in the face and stabbed her, and he stabbed himself. Penelope was bleeding heavily and she passed out on the floor. Stillwell called 911. When the police arrived, Penelope told them that she had been stabbed by her husband; her husband was still at their home next door; and her husband had stabbed himself.

Penelope was transported by emergency personnel to the hospital. She had sustained multiple bruises on her face and two abdominal stab wounds; she was in critical condition; and she required immediate surgery. She was in the hospital for about five and one-half months; she underwent multiple surgeries including the removal of her spleen and portions of her liver, stomach, and duodenum; and she was in a rehabilitation center for about six weeks. She had to learn to walk again, has to take medication for seizures, has trouble with her balance, and has nerve damage.

When the authorities arrived at defendant's home, they found defendant lying on the bed in Penelope's bedroom with a knife in his stomach. The police set up a recorder in the room, and the police and paramedics questioned him while he was being treated and prepared for placement in an ambulance. When asked about what occurred, defendant stated that his wife was going to "throw" him out in the street with "lies" again and that she accused him of making holes in the wall with a nail; he did not want any help and wanted to "leave the planet"; he used the same knife to stab his wife and himself; and the knife was

the "biggest one [he] could find." While in the ambulance, he told the paramedic that he was putting pictures up on the wall and his wife kept "nagging and nagging and nagging"; he "told her once and told her a thousand times" and he was "fed up"; and "that bitch will never nag at [him] again."

Jury's Verdict and Sentence

The jury convicted defendant of deliberate and premeditated attempted murder, elder abuse likely to cause great bodily harm or death, and corporal injury to a spouse resulting in a traumatic condition. The jury also found true allegations that he personally used a deadly weapon, and personally inflicted great bodily injury under circumstances involving domestic violence. He was sentenced to life with the possibility of parole for attempted murder, and a five-year determinate term for the great bodily injury enhancement for this offense. The court stayed the sentences on, or dismissed, the remaining counts and allegations.

DISCUSSION

I. Denial of Motion To Exclude Defendant's Recorded Statements

Defendant asserts the trial court erred in denying his motion to exclude the recorded statements that he made at his home without the provision of *Miranda* warnings. The statements were made when the police set up the recorder in the bedroom where defendant was lying and defendant was questioned prior to his transfer from the bedroom to an ambulance. As we shall explain, we conclude there was no *Miranda* violation because the questioning was conducted in an investigative, noncustodial environment.

A. Background

1. Defendant's Recorded Statements

When the police contacted Penelope at her neighbor's home, she told them that her husband had stabbed her and stabbed himself and that he was still at their home. The police then went to defendant's home and found him lying in the bedroom. Shortly thereafter, Sergeant Rene Bowman arrived at defendant's home, told some of the officers they could leave, and took over the handling of the scene. After the recorder was set up in the bedroom, Sergeant Bowman asked defendant if he wanted to talk to her; what happened; and whether the other injured person was his wife or his girlfriend. Defendant responded that his "life ended today"; the other injured person was his wife; and his wife "lies and lies and lies and lies." When the paramedics arrived in the bedroom, Sergeant Bowman told them, "Can't get out of him, what happened."

Paramedic John Neilson then asked defendant whether he had medical problems and what medications he took. Defendant responded that he did not want any help and he was "leaving the planet" Neilson told defendant:

"Well unfortunately right now whether you want to or not you're gonna be going where we want you to go. So it's kind of important that you . . . answer my questions and help me out here. Even though you don't feel like cooperating or you'[d] rather just feel like sitting there, keeping your mouth shut and stuff—all it's gonna do is just . . . kinda anger more people, okay? So do you have medical problems that you take medications for daily? Yes? No?"

After making these inquiries, Neilson asked defendant why he stabbed his wife, and defendant responded because she was going to "throw" him out in the street with "lies" again.

As Neilson and the other paramedics continued treating defendant in preparation for placement in the ambulance, Sergeant Bowman and Neilson asked him questions about the incident. When Sergeant Bowman asked what happened, defendant stated that his wife had accused him of being in the house with his neighbor "pounding holes in the wall with a nail." Sergeant Bowman asked how did they both "end up with[] stab wounds" on them, and Neilson asked whether defendant "[j]ust kinda got fed up. That kinda thing? . . . [¶] Told her once, told her twice, told her a million times kinda thing or what? Just had enough?" Neilson also interjected, "Hey Mel [i.e., defendant]. Help us out and answer some questions please."

Sergeant Bowman asked defendant if he wanted to "give [his] side of the story" that morning so they would not have "to guess at anything." Defendant responded that there was "no side," and he just wanted to "leave the planet" and did not "care about any sides right now." Sergeant Bowman asked why his wife had injuries and whether defendant wanted her "to leave the planet too." Defendant responded that his wife was a liar; he tried to talk to her; and she kept insisting he did certain things. When Sergeant Bowman asked how did they get "to this point," defendant stated, "It was a long time in coming." Sergeant Bowman asked what happened this morning and whether they were arguing, and defendant answered he just wanted to talk to her before she left for Los Angeles. As Sergeant Bowman continued to ask what happened, defendant stated it was "obvious." Sergeant Bowman told him it was not obvious because his wife was "somewhere else" and defendant was "lying here."

Sergeant Bowman asked if they were arguing in the kitchen and defendant "pulled out a knife." Defendant stated that his wife was arguing with him but he was not arguing with her; he was pleading with her not to falsely accuse him of things; and she insisted he was there with a neighbor pounding nails but refused to show him where so he could fix them. Sergeant Bowman continued to ask defendant to describe how the injuries happened, stating: "Mel, how did the injuries happen? If you don't care about anything can you just please tell me how the injuries happened?" Defendant reiterated that it was obvious. Sergeant Bowman said defendant was there and why not tell her what happened, and asked why he stabbed his wife.³ Upon further questioning, defendant stated he did not remember how many times he stabbed his wife; he remembered stabbing himself; and he used the same knife to stab both his wife and himself. He also elaborated that the knife was the "biggest one [he] could find." While the paramedics continued treating him, defendant asked "Where's that investigator that was here talking to me?" Sergeant Bowman told defendant that she was "right here," and defendant told her that she could talk to the neighbor across the street about the spots on the wall, and that his wife kept accusing him "and lying and lying"

³ During this portion of the questioning, Neilson commented that defendant was not being cooperative about telling his medical history or problems, and Sergeant Bowman commented "You [defendant] don't wanna tell me." Defendant stated: "It's obvious, you're a detective put one and one together." Sergeant Bowman stated, "Well you're the one who [was] here. So why don't you just tell me," and asked, "Why did you stab her?" Defendant responded, "How many times do I have to tell ya?" Sergeant Bowman stated, "Well, you haven't yet, that's the problem."

As the paramedics continued with their preparations, defendant said that he wished they would not do this because he did not want to be saved. Sergeant Bowman told defendant, "Well, we have to."

At the end of the interview, an unidentified male (apparently another officer) asked defendant "what brought it to this" and if it was an "ongoing thing." Defendant stated his wife had "thrown [him] out" the previous year, and they went to court and the court evicted him but then his wife let him return. When another paramedic asked what caused this today and whether it "got this bad to the point where it got this violent[,]" defendant responded that he had already told "the other girl," apparently referring to Sergeant Bowman.

2. Trial Court's Ruling Admitting the Recorded Statements

During pretrial motions, defendant argued that his recorded statements should be excluded from evidence because at the time of the police questioning he had not been provided *Miranda* warnings, he was in custody for stabbing his wife, and the police questioning pertained to criminal, not medical, matters. In opposition, the prosecutor asserted there was no *Miranda* violation because defendant had not been arrested and the questioning was merely investigatory. The prosecutor stated that the police had been told by defendant's wife that her husband had stabbed her and he had stabbed himself; when the police found defendant lying in a bed they set up a tape recorder and asked what happened; the interview lasted for about 20 minutes and ended when the paramedics removed defendant from the home and placed him in the ambulance; and defendant was not arrested until one week later.

After reviewing the transcript of the recorded interview and hearing the parties' arguments, the trial court concluded there was no custodial interrogation under *Miranda*. The court stated it had "grave doubts" about defendant's custodial status, noting that he was not arrested until "some time after that." Further, the court concluded the police were "still in the investigatory stage" because they only had defendant's wife's "side of the story"; from their experience they would suspect they may not have been provided the entire story; and they were trying to "find out what the rest of it is."

B. *General Miranda Principles*

The *Miranda* rule implements the Fifth Amendment privilege against self-incrimination by requiring that statements made during custodial interrogation not be admitted as evidence of guilt unless the suspect was advised of the right to remain silent, the right to appointed counsel, and that statements may be used against him or her. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 428-429.) The *Miranda* rule " 'presume[s] that interrogation in certain custodial circumstances is inherently coercive' "; accordingly, as a matter of "preventive medicine," "unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded . . ." from the prosecution's case-in-chief. (*Oregon v. Elstad* (1985) 470 U.S. 298, 305, 307.)

The *Miranda* rule is concerned with the danger that a person will be induced to make incriminating statements that he or she would not otherwise make because of the inherently coercive nature of a confined, police-dominated atmosphere. (*Berkemer v. McCarty*, *supra*, 468 U.S. at pp. 437-438; *People v. Clark* (1993) 5 Cal.4th 950, 985, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22;

United States v. Martin (1985) 781 F.2d 671, 673.) The custodial interrogation necessary to trigger *Miranda* advisements has two components: custody and interrogation. (*People v. Mosley* (1999) 73 Cal.App.4th 1081, 1088-1089.) Custody under *Miranda* exists if the person has been formally arrested, or the person has been deprived of his or her freedom of action to a degree associated with a formal arrest. (*Berkemer v. McCarty*, *supra*, 468 U.S. at p. 440; *People v. Ochoa* (1998) 19 Cal.4th 353, 401.) Interrogation refers to express questioning, or to any words or actions that the police should know are reasonably likely to elicit an incriminating response. (*People v. Mayfield* (1997) 14 Cal.4th 668, 732.)

Physical restraint alone does not necessarily invoke *Miranda* protections; the question is whether the restraint "exerts upon a detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights." (*Berkemer v. McCarty*, *supra*, 468 U.S. at pp. 437-440; *Wilson v. Coon* (8th Cir. 1987) 808 F.2d 688, 689-690.) *Miranda* advisements are generally not required for a temporary investigative detention involving general, on-the-scene questioning as to facts surrounding a crime, during which the officer asks " 'a moderate number of questions to . . . try to obtain information confirming or dispelling the officer's suspicions.' " (*People v. Clair* (1992) 2 Cal.4th 629, 679.) "Questioning under these circumstances is designed to bring out the person's explanation or lack of explanation of the circumstances which arouse[] the suspicion of the police, and thus enable the police to quickly ascertain whether such person should be permitted to go about his business or held to answer charges." (*People v. Milham* (1984) 159 Cal.App.3d 487, 500.)

The courts reason that general investigative questioning, as opposed to accusatory questioning, is less likely to convey that the person is not free to leave. (*People v. Bellomo* (1992) 10 Cal.App.4th 195, 199; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1164-1165 [*Miranda* not implicated under circumstances of neutral investigative questioning that is of limited duration and that occurs in nonthreatening or noncompulsive public environment].) However, custodial interrogation may occur if the circumstances show the police have "moved past investigation and into the realm of inculcation." (*People v. Bejasa* (2012) 205 Cal.App.4th 26, 37-40 [custodial interrogation occurred at scene of car accident when police told defendant he was being detained for possible parole violation, handcuffed him, placed him in patrol car, and asked him what and how much he had been drinking]; *People v. Tom* (2012) 204 Cal.App.4th 480, 496 [custody status shown by detention after car accident that became "increasingly coercive," including police conduct of refusing to allow defendant to walk home after he was examined by paramedics, placing him in back of patrol car, and driving him to police station]; see also *People v. Aguilera*, *supra*, at pp. 1159, 1165-1166 [custodial interrogation occurred even though defendant agreed to be questioned at police station; circumstances showed aggressive, confrontational, intimidating questioning that would have led a reasonable person to believe he was not free to leave until he satisfied officers' demand for truth].)

The courts examine the totality of the circumstances to determine whether a custodial interrogation has occurred, including such factors as the site of the interrogation, whether the person is aware that he or she is the focus of the investigation, whether objective indicia of arrest are present, and the length and form of the questioning. (*People*

v. Milham, supra, 159 Cal.App.3d at p. 500; see *People v. Stansbury* (1995) 9 Cal.4th 824, 830.) No one factor is dispositive, and the relevant inquiry is whether a reasonable person in the defendant's position would have felt restrained in a manner that was tantamount to a formal arrest. (*Berkemer v. McCarty, supra*, 468 U.S. at pp. 441-442; *Stansbury, supra*, at p. 830.) On appeal, we independently determine, based on the undisputed facts and those properly found by the trial court, whether a custodial interrogation has occurred. (*People v. Ochoa, supra*, 19 Cal.4th at p. 402; *People v. Mayfield, supra*, 14 Cal.4th at p. 733.)

C. Analysis

Defendant was detained in a bedroom in his home while he was being administered emergency medical treatment and being prepared for transport in an ambulance. While this was occurring, an officer asked defendant what happened; how did he and his wife end up with the wounds; and did defendant want to give his "side of the story." At some points the questioning was more directive; i.e., asking why defendant stabbed his wife, whether defendant was "fed up" and "had enough"; whether defendant wanted his wife to leave the planet along with him; and whether they were arguing that morning and defendant pulled out a knife. The interview ended when defendant was removed from the room for transport to the hospital in an ambulance.

In several cases involving police questioning while the defendant was restrained solely for medical purposes, the courts concluded that the circumstances did not implicate the *Miranda* concerns that arise in an inherently coercive police environment that is tantamount to a formal arrest. (See, e.g., *Wilson v. Coon, supra*, 808 F.2d at pp. 689-690 [defendant questioned while restrained by ambulance attendant]; *United States v. Martin*,

supra, 781 F.2d at p. 673 [defendant questioned while confined in hospital]; *People v. Mosley, supra*, 73 Cal.App.4th at pp. 1085, 1089-1091 [defendant questioned while lying in ambulance]; *People v. Milham, supra*, 159 Cal.App.3d at p. 501 [defendant questioned while seated in ambulance]; *Commonwealth v. LaFleur* (2003) 58 Mass.App.Ct. 546 [791 N.E.2d 380, 381-383] [defendant questioned while strapped to stretcher].)

In *Wilson v. Coon*, the court reasoned that a reasonable person would expect a medically-related detention to last only for the time that is medically necessary rather than until information is divulged to the authorities, and the public environment and presence of medical attendants made the situation less police-dominated. (*Wilson v. Coon, supra*, 808 F.2d at p. 690.) Similarly, in *Milham*, the court observed that although the defendant may have been physically unable to leave, this restraint was not imposed because of police conduct, and further the police did not yet know that criminality was involved in the incident (a car accident). (*People v. Milham, supra*, 159 Cal.App.3d at pp. 500-501.) In *Mosley*, the court noted the police did not know if the defendant was a victim or a perpetrator of a shooting, the questioning was in the presence of medical personnel and was not accusatory, the defendant was not handcuffed, no guns were drawn, and the defendant was about to be transported to a hospital, not to a police station. (*People v. Mosley, supra*, 73 Cal.App.4th at p. 1091.)

We reach the same conclusion here. The officers did not suggest to defendant that he was being detained for stabbing his wife; rather, it is clear that the sole purpose of the detention was to administer emergency aid and transport defendant to the hospital due to his injury. Although the paramedic and the officer told defendant that he had no choice but

to accept their aid and transport to the hospital, this restriction of defendant's freedom was due to defendant's physical injury and was not based on an assessment of his guilt. Further, the overall tenor of the questioning was investigatory, not accusatory. When the police repeatedly asked defendant what happened and how he and his wife ended up being injured, these questions did not suggest that defendant was at fault. Notably, the police were faced with a situation where *two* people were stabbed, both Penelope and defendant. Even though Penelope had given a version of the incident suggesting defendant was the aggressor (i.e., he stabbed her and he stabbed himself), the police had no way of knowing whether this factual scenario was accurate. Although some of the inquiries were drawn from Penelope's version and were accusatory in nature (i.e., why did defendant stab his wife, and whether he stabbed her because he was "fed up" and wanted her to "leave the planet"), the questions were all in the context of requesting that defendant provide his version of what occurred. There is nothing in the questions that conveyed to defendant that the police intended to detain and question him until he admitted his guilt.

Defendant asserts the police questioning was not merely a preliminary inquiry about what happened because the police had identified him as a suspect based on his wife's statements, and they repeatedly asked about the details of the incident and why he stabbed his wife even though he had demonstrated his reluctance to talk. We are not persuaded. Although conduct by the police suggesting to the defendant that he or she is a suspect is a relevant factor to consider, this factor does not, standing alone, establish custodial status. (*Stansbury v. California* (1994) 511 U.S. 318, 323-325.) Rather, the circumstances as a whole must demonstrate that the defendant's freedom of action was restricted to the degree

associated with an arrest. (*Ibid.*) Consistent with these principles, the courts have found no custodial interrogation during a medically-related restraint even though the circumstances suggested the police had identified the defendant as a suspect. (See, e.g., *United States v. Martin, supra*, 781 F.2d at p. 673 [police questioned hospitalized defendant about explosives found at his apartment; no custodial interrogation occurred because police were not participants in hospital confinement]; *Commonwealth v. LaFleur, supra*, 791 N.E.2d at pp. 381-383 [defendant, who was strapped to stretcher at car accident scene, smelled of alcohol and admitted to emergency personnel that he had too much to drink; police questioning about his alcohol consumption and ability to drive was not custodial interrogation].)

Here, the restraints placed on defendant for the sole purpose of emergency medical treatment were not a restriction of freedom akin to an arrest. Further, although the police were trying to persuade defendant to describe the details of what occurred, this questioning was in the context of asking defendant to provide his version of the incident during an on-the-scene investigation immediately after the incident. Even though some questions invited an incriminatory response, the focus of the questioning was open-ended and nonconfrontational, asking defendant what happened. Considering the totality of the circumstances, defendant was not subjected to the type of restraint or questioning that conveyed to him that he was, in effect, arrested.

We conclude that a reasonable person in defendant's position would have understood that he was not in police custody and that the police were merely asking him to provide his version of what occurred during the preliminary investigation of the incident.

Hence, there was no custodial interrogation and no error from the trial court's denial of defendant's suppression motion.

II. *Instruction that Premeditation and Deliberation Does Not Require
Mature and Meaningful Reflection*

Defendant contends the trial court erred in modifying the standard instructions on premeditation and deliberation by adding language from Penal Code section 189 stating that mature and meaningful reflection was not required.⁴

The trial court provided the jury with standard instructions on deliberation and premeditation, which stated: (1) deliberation occurs if the defendant "carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill," and (2) premeditation occurs if "he decided to kill before acting." Further, the standard instructions stated that a "decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated."⁵ (See CALCRIM No. 601.) At the prosecutor's request, the court added an additional instruction entitled "Mature Reflection Not Required." The additional instruction essentially quoted a portion of section 189, stating: "To prove an attempted

⁴ Subsequent statutory references are to the Penal Code.

⁵ This portion of the instruction elaborated on the concept of premeditation and deliberation as follows: "The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of the time."

killing was 'deliberate and premeditated' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of the act."

Objecting to the additional language, defense counsel argued that it was confusing because the jury would "equate careful and deliberate and calculated with mature and meaningful, and then they're going to be told in the next instruction it doesn't have to be mature and meaningful." The court rejected this contention, stating: "It appears to me that the legislative choice to include this language in [section] 189 is an example of them trying to bring clarity to the law here. [¶] It would be easy to read the requirement that the defendant carefully weighed considerations for and against as a requirement that he exercise mature and meaningful reflection. I think the Legislature expressly says they don't mean that deliberation requires mature reflection. And it says that in the statute."

On appeal, defendant argues that the concepts of careful consideration and mature and meaningful reflection are indistinguishable, and providing instruction on the latter concept diluted the deliberation/premeditation standard. We reject this contention. As we shall explain, the Legislature added language to section 189 to remove the concept of mature reflection from the definition of premeditation and deliberation. This legislative enactment reflects that mature reflection represents a higher quality of thought that is *not* required for premeditation and deliberation.

Prior to the abolishment of the diminished capacity defense which negated specific intent due to a mental disorder affecting the defendant's mental capacities, the concept of premeditation and deliberation included a requirement that the defendant could maturely and meaningfully reflect upon the gravity of the contemplated act. (*People v. Stress* (1988))

205 Cal.App.3d 1259, 1269-1270; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 22, p. 351.) Under this previous law, premeditation and deliberation required (1) the careful weighing of considerations, plus (2) "a *quality* of deliberation and weighing . . . described as mature and meaningful reflection." (*People v. Stress, supra*, at p. 1270, italics added.) This additional mature reflection requirement allowed "a defense based on the claim that even though a defendant had carefully planned, and had considered the consequences of an act, he nonetheless was not guilty of first degree murder when, because of mental disease or defect, his reflection was not mature and meaningful." (*Ibid.*) However, when the Legislature abolished the diminished capacity defense in 1981, it added a paragraph to section 189 "specifically stating that it was unnecessary to prove a defendant maturely and meaningfully reflected on the gravity of his or her act in proving deliberation and premeditation." (*People v. Stress, supra*, at p. 1270.)

Thus, the instruction stating that premeditation and deliberation does not require mature and meaningful reflection properly referred to an element that has been affirmatively removed from the premeditation/deliberation standard, and the instruction did not dilute the careful consideration element that defines premeditation/deliberation. The California Supreme Court reached essentially the same conclusion in *People v. Smithey* (1999) 20 Cal.4th 936. The *Smithey* court rejected the defendant's assertion that instructing the jury that he need not have maturely reflected in effect told the jury that he could be convicted of first degree murder even if he acted "with little thought or regard for the consequences." (*Id.* at p. 980.) The court reasoned there was no reasonable likelihood the jury interpreted the instruction in this manner, stating that the phrase "mature and

meaningful reflection" contained commonly understood terms, and the premeditation/deliberation instruction as a whole "made clear that reflection must have preceded commission of the crime and could not have been unconsidered or rash, but rather must have resulted from careful thought and a weighing for and against the chosen course of action." (*Id.* at pp. 980-981.)

Consistent with *Smithey*, we conclude the trial court did not err in instructing the jury that for premeditation and deliberation the defendant need not have maturely reflected on the gravity of his act.

Defendant also contends that even if an instruction stating that the defendant need not maturely reflect might be appropriate in cases where the defendant relies on a "diminished actuality" defense (as was the situation in *Smithey*), if no such defense is presented the additional instruction is irrelevant and confusing. Notwithstanding the abolishment of the diminished capacity defense, a defendant may still present a diminished actuality defense based on a claim that due to a mental disorder he or she did not actually form the specific intent required for the offense. (See 1 Witkin & Epstein, Cal. Criminal Law, *supra*, Defenses, § 23, p. 353.)⁶ Here, defendant did not claim he had a mental disorder that obviated premeditation and deliberation, but he did claim he did not premeditate and deliberate because his conduct was irrational and showed that "he lost

⁶ In *Smithey*, the defendant presented expert testimony that he suffered from several mental disorders that caused him to be out of control on the day of the homicide. (*People v. Smithey, supra*, 20 Cal.4th at pp. 955-956.)

control of his emotions."⁷ Given that defendant urged the jury to find there was no premeditation and deliberation because his mental functioning was less than fully rational at the time of the stabbing, it was appropriate to provide a clarifying instruction stating that the defendant need not engage in mature and meaningful reflection in order to premeditate and deliberate.

In support of his contention that the additional instruction should not have been provided to the jury, defendant cites *People v. Dunkle* (2005) 36 Cal.4th 861, 910-912.⁸ In

⁷ Defense counsel argued: "Well, there's no evidence Mr. Gallegos is crazy or he's a moron. So let's consider what kind of deliberations he could have entered into. . . . [¶] According to the prosecution he's deciding, I'm angry at Penny because she's going to kick me out, and I have no place to go, and I'm 77 years old. And so, I know, I'll kill her and then after I do that I'll kill myself. That will solve all my problems. Well, no, it wouldn't. What it would mean is, you'd be guilty of a crime, hurting Penny, and you would go to jail or you would die. You would still get evicted, your marriage would be over. Everything you want to have happen would not happen, and everything you don't want to have happen would happen. [¶] It makes no sense. It is irrational. And what Mr. Gallegos did was irrational. There was no, well, if I kill her the following events will flow from that. There was no such consideration. . . . [¶] . . . [A] skillful prosecutor can make a coherent argument that Mr. Gallegos in these circumstances . . . did deliberate. But, I think there's another reasonable interpretation. . . . The other reasonable interpretation is he stabbed out of anger and frustration. . . after . . . 15 years of a very unhappy marriage [¶] . . . He didn't say a word all that night. This is bottling up your emotions. This is trying to hold back, trying to restrain yourself from going crazy. . . . He finally lost it when he saw her in the morning, . . . he lost control of his emotions."

In rebuttal, the prosecutor argued: "[Defense counsel] talked about it's not premeditated and deliberated because . . . [i]t would be irrational to think . . . that a way out is to kill your wife and kill yourself. . . . Well, crime isn't always rational. If we thought that it was irrational to think like that no one would ever commit crime, no one would ever be guilty, and no one would ever premeditate or deliberate with regards to anything. It's just whether or not he considered the consequences of his actions, not all the way down the line, oh, if this happens I'm going to trial It's, I could kill her or I could not kill."

⁸ Disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at page 421, footnote 22.

Dunkle, the court found no error in failing to instruct on the mature and meaningful reflection requirement in a case involving a murder committed when the diminished capacity defense was still recognized. (*People v. Dunkle, supra*, at pp. 910-912.) The *Dunkle* court reasoned that the evidence did not support a diminished capacity defense and there was "no case requiring an instruction on 'mature and meaningful reflection' outside the context of a diminished capacity defense." (*Id.* at p. 912.) The fact that under prior law a trial court need not instruct on mature reflection absent a diminished capacity defense, does not mean that under current law a trial court errs by generally informing the jury that there is no mature reflection requirement. In any event, assuming that the concept of mature reflection is relevant only when the jury is presented with a defense related to a mental disorder, defendant's claim of distorted thinking is sufficient to support the relevancy of the additional instruction in this case.

Alternatively, assuming *arguendo* the trial court should not have given the additional instruction due to lack of relevancy, the error was harmless even under the stricter harmless beyond a reasonable doubt standard. (See *People v. Catlin* (2001) 26 Cal.4th 81, 154.) As stated, the additional instruction did not dilute the premeditation/deliberation standard. Further, reading the instructions as a whole, the standard instructions clearly apprised the jury that to find premeditation and deliberation the defendant must act with careful consideration and reflection, rather than rashly or impulsively. There is no reasonable possibility that the additional instruction stating that the reflection need not be mature caused the jury to ignore this distinction between a

considered act and an impulsive act when deciding the issue of premeditation and deliberation.

III. *Instruction on Uncharged Domestic Violence or Elder Abuse
as Propensity Evidence*

Defendant asserts the trial court violated his due process rights by providing a standard instruction to the jury concerning the use of the uncharged April 16, 2007 incident of domestic violence and/or elder abuse as propensity evidence. Using the language of CALCRIM Numbers 852 and 853, the court told the jurors that if they found the incident of prior domestic violence and/or elder abuse true by a preponderance of the evidence, they "may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit such acts, and based on that decision, also conclude that the defendant was likely to commit and did commit" the charged crimes. The instruction also cautioned the jurors that any conclusion that defendant committed the uncharged domestic violence and/or elder abuse "is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant was guilty of the crimes. The People must still prove each charge beyond a reasonable doubt."

Defendant asserts the instruction is likely to mislead the jury about the prosecution's burden of proof because it permits a finding of guilt based on a mere likelihood from prior misconduct found true by a preponderance of the evidence. Further, he contends the instruction is confusing because it first tells the jury it can use the uncharged misconduct to find him guilty of the charged offenses, and then it states in contradictory fashion that the uncharged misconduct is not sufficient to prove defendant's guilt of the charged offenses.

Recognizing that the California Supreme Court has rejected essentially the same contentions in *People v. Reliford* (2003) 29 Cal.4th 1007, defendant states that he is raising the argument for purposes of preserving his right to further federal review.

In *Reliford*, the court reviewed a similar CALJIC instruction and concluded it was not likely to mislead the jury concerning the prosecution's burden of proof. (*People v. Reliford, supra*, 29 Cal.4th at pp. 1011-1012.) *Reliford* reasoned that the instruction did not permit the jury to base a conviction solely on the uncharged misconduct evidence, but rather expressly stated the uncharged misconduct evidence was not sufficient by itself to prove guilt of the charged offense beyond a reasonable doubt. (*Id.* at p. 1013.) Further, the instruction did not suggest that the preponderance of the evidence standard applied to anything other than the preliminary determination whether the defendant committed the uncharged misconduct. (*Id.* at p. 1016.)

Likewise here, the instruction set forth the preponderance of the evidence standard only for the uncharged misconduct evidence; clearly explained that the uncharged misconduct evidence was only one factor that may be considered and was not alone enough to convict; and emphasized that the prosecution must prove the charged crimes beyond a reasonable doubt. The instruction was not misleading or confusing and it did not violate defendant's due process rights. (Accord, *People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740; *People v. Reyes* (2008) 160 Cal.App.4th 246, 250-253; see also *People v. Loy* (2011) 52 Cal.4th 46, 71-77.)

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.