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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODOLFO MARTINEZ,

Defendant and Appellant.

F059246

(Super. Ct. No. VCF204778)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

David Joseph Macher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Rodolfo Martinez stabbed and killed his longtime companion, Avelina Marie Parriera,¹ when she attempted to end their relationship. A jury convicted Martinez of first degree murder. He argues the verdict was not supported by substantial evidence, the jury was instructed improperly, and the prosecutor committed misconduct in closing argument. We are not persuaded by the arguments and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Information

The information charged Martinez with the murder of Parriera, in violation of Penal Code section 187, subdivision (a),² and alleged that he used a deadly and dangerous weapon within the meaning of section 12022, subdivision (b)(1).

Martinez's statement

The police learned of Parriera's murder when Martinez called the emergency operator from the police parking lot and informed her he was waiting to be arrested because he had stabbed Parriera. Martinez was taken inside the police station without incident and provided a statement. His statement was played to the jury during the prosecution's case.

As relevant, Martinez informed the officers he had lived with Parriera for 11 years and had lived in the current apartment with Parriera for about one year. Parriera was the manager of the apartment complex. The attack that caused the death of Parriera occurred on June 9, 2008, but problems in the relationship between Martinez and Parriera started during the Mother's Day weekend in 2008. The two had been working hard to pay off their debts so they could buy a home. On that weekend, Martinez discovered that

¹The correct spelling of victim's last name is unclear from the record. In this opinion we will spell it Parriera, which we believe is correct.

²All further statutory references are to the Penal Code unless otherwise stated.

Parriera had bought a significant amount of new clothes. A disagreement ensued over money. The argument dragged on for some time and Martinez “just got fed up.”

Martinez spent the night before the murder in the master bedroom, while Parriera slept in one of the guest bedrooms because she wanted to end their relationship. That was the first time the two had slept apart.

Parriera woke Martinez about 5:30 a.m. and asked him why he was not at work. Martinez said the alarm did not go off, but Parriera replied that Martinez simply did not want to go to work. Martinez called his place of employment and stated he was sick, and then they both went back to bed.

About 8:00 a.m., Martinez heard Parriera in the bathroom preparing for work. Martinez got up to take his medication for depression and stress when Parriera confronted him. The argument escalated and Parriera told Martinez to move out of the apartment. That is when Martinez “snapped.” He went into the bedroom, grabbed his knife, and returned to the bathroom. Martinez told Parriera he was “fed up with [her] shit” and that she could not talk to him in that manner. Then he stabbed her one time.

Parriera fell into the bathtub. She tried to get out of the bathtub and asked Martinez to call the emergency operator. Martinez did not know what to do, so he closed the bathroom door, got dressed, and drove to the police station. Martinez washed up before he left the apartment. Martinez described the clothes he was wearing and where he put the clothes when he changed to come to the police station.

Martinez did not want Parriera to die; he simply was trying to scare her. He did not know why he stabbed her; he simply “snapped.”

Martinez had been taking his medications for about four weeks. He also was taking sleeping medications because when he argued with Parriera he could not sleep.

Prosecution evidence

Parriera was found dead in the master bathroom, with the upper half of her body outside of the bathtub. She had suffered a single stab wound to the upper right chest

area.³ The knife wound was approximately two and one-half inches deep and lacerated the inferior vena cava, causing a slow hemorrhage into the chest cavity. Parriera bled to death as a result of this wound. No other injuries were observed on the body. Martinez's knife was found on top of his dresser.

Ernestine Mattos, Parriera's sister, received a phone call from Martinez at 8:27 a.m. on the day of the murder. Martinez stated he had stabbed Parriera and left her in a tub of water. He also said he was turning himself into the authorities. He sounded calm on the phone. The phone call lasted less than one minute.

Mattos had spoken to Martinez on prior occasions about his relationship with Parriera. About one month before the murder, Martinez stated he did not understand why Parriera wanted to end the relationship. Martinez said he thought Parriera was having an affair. Martinez was doing whatever he could to work out the problems in their relationship. Mattos had observed verbal altercations between Martinez and Parriera. She believed Martinez was a jealous person.

Michael Williams worked with Martinez. Martinez called Williams on the day of the murder and stated he had just killed his wife, he was sorry, and asked for forgiveness. Martinez stated his wife would not be "bitching at me no more," or words to that effect. Williams had noticed in the two or three months leading up to the murder that Martinez was not the same happy person he had been previously.

Perry Phipps was a lieutenant with the Visalia Police Department on the day of the murder. He was the first officer to respond to Martinez when Martinez drove to the police station after the murder. As he exited the vehicle, Martinez stated he could not

³The pathologist explained that the wound was just below the clavicle on the right side of the body.

take it any longer, or words to that effect. When asked if he had any weapons, Martinez responded the knife was on the dresser. Martinez was calm and cooperative.

Officer Jason McWilliams filled out the booking forms for Martinez. While the two were in the booking room, Martinez said that Parriera was his girlfriend of 11 years, she had been nagging him for the past few days, and he became angry and stabbed her.

No injuries were noted when Martinez was examined at the jail.

The prosecution also presented a number of witnesses in an attempt to establish the relationship between Martinez and Parriera.⁴ In general, these witnesses testified that Martinez was a controlling individual who constantly was checking on Parriera. He was also suspicious that she was having an affair. Over time, Martinez became more withdrawn.

Defense evidence

Debra Roberts had known Martinez and his family for a number of years. She described him as generally a happy person, but when she saw him about one week before the murder she noticed he seemed as if “he had no feeling. I mean, his eyes were hollow. It just wasn’t him.” She could not believe it when she heard that Martinez had stabbed Parriera because it was “so out of character for him.”

Abel Camacho had known Martinez for a number of years, and he also could not believe it when he heard that Martinez had stabbed Parriera. Camacho described Martinez as very loving to Parriera, and as a “good guy.” Camacho had never known Martinez to become angry or violent.

Camacho saw Martinez about one week before the murder. Camacho described Martinez as “not himself that day” because he seemed like he was on some type of drug.

⁴These witnesses were Arlene Cervantes, Mike Martinho, Mary Mendonca, Brian Authors, Jose Dominguez, Melissa Rosales, and Mark Martinho.

David Silva had known Martinez for several years. He was surprised when he learned that Martinez had stabbed Parriera because “it wasn’t the type of person he was.” He described Martinez as a “good guy, jokester. You know, just an ordinary guy.” He had never seen Martinez behave violently or get angry.

Stuart Shipko, M.D., was a psychiatrist with a subspecialty in the effects of antidepressant medication on patients. Shipko explained that Pristiq, which Martinez was prescribed, is a selective norepinephrine reuptake inhibitor. This drug and other similar drugs are helpful for many people. Sometimes, however, there are adverse side effects, such as addiction, interference with sexual functioning, hostility, agitation, aggressivity, and impulsivity. The risk of violence is highest within the first month after the drug is started, or within the first month after the drug is stopped, or when there is a dosage change.

Verdict and sentencing

The jury convicted Martinez of first degree murder and found the enhancement true. Martinez was sentenced to a determinate term of one year for the enhancement and an indeterminate term of 25 years to life for the murder.

DISCUSSION

I. Sufficiency of the Evidence

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) The crime is voluntary manslaughter if a defendant unlawfully kills another without malice aforethought. (*People v. Blacksher* (2011) 52 Cal.4th 769, 832.) If malice is present, the jury must determine if the murder is of the first or second degree. As relevant here, first degree murder is a murder that is committed willfully, deliberately, and with premeditation. (§ 189.) Every murder that is not of the first degree is second degree murder. (*Ibid.*)

Martinez asserts that the jury finding that the murder was committed with deliberation and premeditation was not supported by substantial evidence.

“The standard of appellate review of the sufficiency of the evidence to support a jury verdict is settled. ‘In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] ... The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.]

“‘Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. “‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’” [Citations.]” [Citation.]’ [Citation.]” (*People v. Story* (2009) 45 Cal.4th 1282, 1296.)

In determining whether a murder was committed with deliberation and premeditation, we apply well-established rules. Premeditated and deliberate murder does not require proof that the “defendant maturely and meaningfully reflected upon the gravity of his or her act.” (§ 189.) Instead, “‘In this context, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.”’ [Citation.] ‘An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.’ [Citation.] A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—

‘[b]ut these factors need not be present in any particular combination to find substantial

evidence of premeditation and deliberation.’ [Citations.]’ (*People v. Jurado* (2006) 38 Cal.4th 72, 118-119.)

The three kinds of evidence a reviewing court normally considers to determine if a murder was committed with premeditation and deliberation were first enunciated in *People v. Anderson* (1968) 70 Cal.2d 15, which is cited by Martinez. The *Anderson* court explained that “[t]he type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as ‘planning’ activity; (2) facts about the defendant’s *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a ‘motive’ to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn 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]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of 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 of type (1) or (2).” (*Id.* at pp. 26-27.)

“However, as later explained in *People v. Pride* (1992) 3 Cal.4th 195, 247: ‘*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.]’ Thus, while premeditation and deliberation must result from “‘careful thought and weighing of considerations’” [citation], we continue to apply the principle that ‘[t]he process of premeditation and deliberation does

not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” [Citations.]’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 331-332.)

More recently, the Supreme Court reiterated that “[u]nreflective reliance on *Anderson* for a definition of premeditation is inappropriate. The *Anderson* analysis 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.’ [Citation.] In other words, the *Anderson* guidelines are descriptive, not normative. ‘The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive.’ [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081 (*Koontz*)).

We find *Koontz* instructive. The defendant was a resident of a shelter, as was the victim. The two began arguing in their apartment. When the victim left the apartment, the defendant followed. The defendant was armed with two handguns. The argument continued near the program manager’s office. The program manager called the two men into the office in an attempt to resolve the dispute. The defendant entered the office, locked the door, and stated he would resolve the disagreement. He then pulled out a gun and shot the victim in the stomach. The defendant prohibited the manager from calling for emergency assistance and then forced the manager to assist him in locating the victim’s vehicle keys and in packing his (the defendant’s) belongings so he could get away. The victim died at the hospital from the gunshot wound.

The Supreme Court rejected the defendant’s assertion that there was insufficient evidence of deliberation and premeditation. “Applying the *Anderson* guidelines, we easily find evidence of planning (defendant’s arming himself and following the victim to

the project's office), motive (to effectuate a robbery), and a manner of killing indicative of a deliberate intent to kill (firing a shot at a vital area of the body at close range, then preventing the witness from calling an ambulance). These facts suffice to support a verdict of premeditated and deliberate first degree murder." (*Koontz, supra*, 27 Cal.4th at p. 1082.)

Applying the *Anderson* factors here, the jury could have inferred there was evidence of planning (Martinez had argued with Parriera for a period of weeks, and, when she told him he would have to move, he armed himself with a knife and returned to the room in which Parriera was readying herself for work), motive (jealousy and the impending end to his relationship with Parriera), and a manner of killing indicative of a deliberate intent to kill (stabbing Parriera in the chest area and then leaving her in the bathroom asking for help while he cleaned himself, made several phone calls, and drove himself to the police station instead of immediately calling for emergency services). "These facts suffice to support a verdict of premeditated and deliberate first degree murder." (*Koontz, supra*, 27 Cal.4th at p. 1082.)

Martinez argues there was no evidence that he planned to harm Parriera. He cites his own self-serving statements that he wanted the relationship to continue, he repeatedly tried to convince Parriera to continue the relationship, and he told police that he did not plan on stabbing Parriera. The jury apparently rejected this testimony. Our function is limited to determining whether any rational trier of fact could have been convinced of Martinez's guilt beyond a reasonable doubt. (*People v. Wharton* (1991) 53 Cal.3d 522, 546.) The jury could have determined that Martinez was jealous and possessive of Parriera, and, when she told him the relationship was over, he acted to punish Parriera for her decision. His act of leaving the bathroom, retrieving the knife, and then returning to the bathroom was ample evidence of planning the murder of Parriera.

Martinez also asserts the manner of killing did not support a premeditation and deliberation finding. Once again, we disagree. The jury could have inferred from the

evidence presented that when Martinez stabbed Parriera in the upper chest area, he chose a particularly vulnerable area of the body. While the knife penetrated approximately only three inches into the chest, the presence of numerous vital organs in this area permitted the jury reasonably to conclude that Martinez aimed for this area because any wound in this area was likely to be fatal. Moreover, his refusal to call for emergency assistance and his delay in reporting the murder also strongly suggested that Martinez intended the stab wound to be fatal.

Accordingly, there was substantial evidence that Martinez committed first degree murder.

II. Jury Instructions

“‘It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ [Citation.]” (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*).

The general principles of law include instructions on lesser included offenses if there is a question about whether the evidence is sufficient to permit the jury to find all the elements of the charged offense. (*Breverman, supra*, 19 Cal.4th at pp. 154-155.) There is no obligation to instruct the jury on theories that do not have substantial evidentiary support. (*Id.* at p. 162.) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.]” (*Ibid.*) Evidence is substantial if it would permit the jury to conclude the lesser offense was committed, but the greater offense was not. (*Ibid.*) The trial court must instruct on lesser offenses, even

in the absence of a request for such instructions, or in the face of an objection by the defendant to the giving of the instructions. (*Id.* at pp. 154-155.)

If the trial court fails to instruct on a lesser included offense, reversal is required only if an examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial. (*Breverman, supra*, 19 Cal.4th at p. 165.)

A. Voluntary manslaughter

Martinez requested the jury be instructed that voluntary manslaughter was a lesser included offense to murder. The trial court rejected the instruction. Martinez argues the trial court erred in this ruling. We disagree.

Manslaughter is the unlawful killing of a human being without malice. (§ 192.) “But a defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a ‘sudden quarrel or heat of passion’ [citation], or when the defendant kills in ‘unreasonable self-defense’—the unreasonable but good faith belief in having to act in self-defense [citations].” (*People v. Barton* (1995) 12 Cal.4th 186, 199.) Voluntary manslaughter is a lesser included offense to murder. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).

“Although section 192, subdivision (a), refers to ‘sudden quarrel or heat of passion,’ the factor which distinguishes the ‘heat of passion’ form of voluntary manslaughter from murder is provocation. The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim. [Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] ‘Heat of passion arises when “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily

reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” [Citation.]” (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

“Thus, ‘[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, “this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” [Citation.]’ [Citations.] [¶] ““To satisfy the objective or ‘reasonable person’ element of this form of voluntary manslaughter, the accused’s heat of passion must be due to ‘sufficient provocation.’” [Citation.]’ [Citation.]” (*Manriquez, supra*, 37 Cal.4th at p. 584.)

The trial court here concluded there was not substantial evidence that Martinez committed the murder in a heat of passion. Martinez impliedly concedes there was no evidence that he acted in unreasonable self-defense. The issue, therefore, is whether there was substantial evidence of provocation, and, more specifically, whether the facts would have led an ordinary, reasonable person to lose reason and judgment.

“[A] voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words, a technical battery, or slight touching. [Citation.] ‘The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated. [Citations.]’ [Citation.] ... We have held that calling the defendant ‘a “mother f...er” and ...

repeatedly asserting that if defendant had a weapon, he should take it out and use it ... plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment.’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 826-827 (*Gutierrez*).

In *Gutierrez*, the defendant was charged with killing the mother of his child. His primary defense was that he did not commit the crime; two other individuals who accompanied him to the house must have done so after he left. On the day of the murder, the victim asked the defendant to pick up his son. The defendant, who did not have a driver’s license, obtained a ride from two friends. An argument ensued between the victim and the defendant, which escalated into a physical confrontation. The victim grabbed the defendant’s shirt, scratched his chest, and the two exchanged kicks. The defendant grabbed his son and got into the car while the two men approached the victim. A few minutes later the two men got into the car and the four drove away. (*Gutierrez, supra*, 45 Cal.4th at pp. 798-799.)

The trial court refused to instruct that voluntary manslaughter was a lesser included offense to murder. The Supreme Court found no error because there was not substantial evidence that the defendant committed voluntary manslaughter. (*Gutierrez, supra*, 45 Cal.4th at p. 825.) The Supreme Court noted the defense was that the defendant did not murder the victim, but also held that the confrontation described by the defendant would not support a heat of passion defense. Although both parties swore at each other during the heated exchange, such taunting words would not cause an average person to lose reason and judgment. (*Id.* at pp. 826-827.) Nor would the physical confrontation rise to the level of provocation necessary to support the voluntary manslaughter instruction because case law has established that a simple assault is insufficient to support a heat of passion instruction. (*Id.* at p. 827.)

In *Manriquez*, witnesses testified that the defendant shot the victim. However, the description of the events leading up to the shooting varied. One witness testified the

victim approached and began offending the defendant. The victim called the defendant a “mother f...er” and dared the defendant to shoot him. The defendant responded by telling the victim he did not want any problems and asking the victim to calm down. (*Manriquez, supra*, 37 Cal.4th at p. 585.) Other witnesses testified that the defendant murdered the victim without any provocation. (*Ibid.*)

The Supreme Court held that a voluntary manslaughter instruction was unnecessary for two reasons. First, there was no evidence that “defendant’s actions reflected any sign of heat of passion at the time he commenced firing his handgun at the victim. There was no showing that defendant exhibited anger, fury, or rage; thus, there was no evidence that defendant ‘actually, subjectively, kill[ed] under the heat of passion.’ [Citation.]” (*Manriquez, supra*, 37 Cal.4th at p. 585.) Second, “the evidence of provocation was insufficient to satisfy the objective requirement, that is, that defendant’s heat of passion resulted from sufficient provocation caused by the victim. Although the provocative conduct may be verbal, as it may have been if [the first witness’s] testimony were to be credited, such provocation ‘must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment.’ [Citation.] That standard was not met here.” (*Id.* at pp. 585-586.)

While there is some evidence here that Martinez may have acted subjectively under the heat of passion (Martinez testified he “snapped”), there is no evidence to support the objective requirement, i.e., that an ordinary, reasonable person would have been so provoked as to act rashly and lose all reason and judgment. In his statement to the police, Martinez stated that Parriera swore at him and told him he had to move out of the apartment. This is patently inadequate to provoke an ordinary, reasonable person to commit murder in a heat of passion. Therefore, the trial court correctly refused Martinez’s request for an instruction on voluntary manslaughter.

Martinez focuses his argument on the subjective portion of the provocation requirement. He refers to the difficulties in his relationship with Parriera, his attempt to

overcome those difficulties, the arguments on the morning of the murder, and that Parriera ordered him to move out of the apartment. While these events may have subjectively affected Martinez, they do not meet the objective requirement for provocation.

Accordingly, the trial court properly rejected the request for instructions on voluntary manslaughter.

B. Involuntary intoxication

Martinez contends that because he was under the influence of prescription medications resulting in *involuntary intoxication*, we should apply a different standard to him. It is unclear from Martinez's opening brief exactly what standard he asks us to apply, although he refers to CALCRIM No. 3427. Under this instruction, however, one is involuntarily intoxicated only if he or she unknowingly ingests a drug or the intoxication is caused by force, duress, fraud or trickery of someone else. Martinez does not fall within either of these conditions. He voluntarily took the medication and there was no evidence of fraud or trickery.

Instead, it appears to us that Martinez is seeking to impose an objective element that is tailored to every individual, which, of course, is not an objective element at all. Moreover, it is unclear what effect, if any, the prescribed medication had on the events on the morning of the murder. Martinez's expert merely testified that a possible effect of the medication was for some people to develop violent tendencies. None of the lay witnesses described Martinez as displaying any violent tendencies. Instead, they described an individual who was depressed, which is not involuntary intoxication. Therefore, even if there were some legal basis for this instruction, which there is not, the evidence would not support giving such an instruction.

C. Provocation reducing first degree murder to second degree murder

A murder may be reduced to second degree where premeditation and deliberation are negated by heat of passion arising from provocation. "If the provocation would not

cause an average person to experience deadly passion but it precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder.” (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332.)

As we explained in rejecting Martinez’s assertion that the trial court should have instructed the jury that voluntary manslaughter was a lesser included offense to murder, there was some evidence that Martinez acted under a heat of passion when he murdered Parriera, but the provocation was insufficient to meet the objective requirement of voluntary manslaughter. Since there was evidence that Martinez acted unreasonably under the heat of passion, *Hernandez* compels the conclusion that the trial court should have instructed the jury that the heat of passion Martinez exhibited could have reduced the murder from first degree to second degree. (CALCRIM No. 522.)

This error, however, was not prejudicial because there was not a reasonable probability the error affected the verdict. The jury was instructed that to prove Martinez committed first degree murder, he must have acted willfully, with premeditation and deliberation. (CALCRIM No. 521.) The jury also was informed that a decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.

Martinez’s trial counsel argued to the jury that there was no deliberation in this case, and instead Martinez acted rashly and impulsively. He emphasized that a decision made rashly and impulsively would reduce the crime to at least second degree murder and perhaps involuntary manslaughter. He pointed out the facts that suggested Martinez acted impulsively and explained why those facts established that Martinez did not deliberate the decision to stab Parriera. These are the same facts that would support the claim that Martinez acted under a heat of passion.

The jury rejected this argument when it concluded that Martinez acted with premeditation and deliberation. Since the issue was squarely before the jury, there was no possibility Martinez would have obtained a better result had the jury been informed

that it could consider provocation when deciding whether the murder was of the first or second degree.

III. Prosecutorial Misconduct

Martinez claims the prosecutor committed misconduct in numerous respects during closing argument.

““The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]’ [Citation.] [¶] Regarding the scope of permissible prosecutorial argument, ““a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.] ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness,’” [citation], and he may “use appropriate epithets”” [Citation.]’ [Citation.] [¶] Finally, ‘a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

A. Baseball analogy

Martinez first asserts that the prosecutor's use of a baseball analogy was inappropriate. While attempting to impress on the jury that premeditation and deliberation could occur quickly and do not require any specific duration of reflection, the prosecutor suggested the time a baseball batter has to decide whether to swing at a pitched baseball is sufficient premeditation for a first degree murder conviction.

Martinez argues the prosecutor misstated the law when he used this analogy by reducing premeditation and deliberation to an instantaneous decision.

We agree the analogy was inaccurate, but there is no authority for the assertion that a bad analogy constitutes a misstatement of the law. Instead, this analogy appears to fall within the wide latitude given to a prosecutor during closing argument.

If there was error, however, it clearly did not constitute a pattern of conduct that infected the trial with such unfairness that the conviction violated Martinez's right to due process.

The prosecutor's analogy was used once, and the jury properly was instructed on deliberation and premeditation during the prosecutor's closing argument and at the end of all of the arguments. The jury also was instructed that it was required to follow the instructions provided by the trial court, regardless of what the attorneys stated in closing argument.

Moreover, Martinez's counsel responded to this argument by stating that the "baseball example is utter nonsense and totally misrepresents the idea of deliberation." He then went on to argue to the jury that Martinez acted impulsively.

Accordingly, the jury was instructed properly on deliberation and premeditation and undoubtedly followed the instructions in reaching its verdict. There was no prosecutorial misconduct.

B. Misstatement of the facts

During closing argument, the prosecutor argued that Martinez stabbing Parriera in the “neck area” established he intended to kill her. The doctor who conducted the autopsy testified that the stab wound was in the upper chest just below the clavicle, or collar bone. The clavicle connects to the sternum and within an inch or two of the neck. One could argue that the neck area encompasses the area of the wound, depending on the exact location of the wound. Nonetheless, Martinez asserts the prosecutor’s argument misstated the location of the stab wound.

First, Martinez’s trial counsel failed to object to this characterization. Accordingly, the issue is not reviewable on appeal.

Second, even if we assume the argument was objectionable, Martinez cannot establish misconduct. The point the prosecutor was attempting to make was that the location of the wound established Martinez was attempting to kill Parriera. This argument was valid regardless of whether the wound was in the neck area or the upper chest area. Both locations contain vital organs, such as arteries, that if cut with a knife can lead to death. Indeed, one could argue the upper chest contains more vital organs than the neck area.

Moreover, the entire argument on this point was not misleading. In his rebuttal argument, the prosecutor clarified where Parriera was stabbed. “With regards to this injury, you guys know what the injury was. My impression was in the neck area. Right about here. Okay? Neck, shoulder. You know where she was stabbed. The pictures speak for themselves. And that’s how I’ve been describing it, is in the neck region. That’s where it is. That’s a pretty sensitive area. Okay. When you stab someone there, you want them dead.”

It is clear there was no intent to mislead the jury, and Martinez is attempting to make an issue where none exists. That defense counsel did not object to the “neck area” description confirms that the prosecutor did not misstate any fact.

C. Misstatement of the law of reasonable doubt

The trial court instructed the jury with the CALCRIM No. 220, which states that “Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.”

In his closing argument, the prosecutor discussed reasonable doubt and paraphrased the instruction by stating, “Talking about reasonable doubt and what the definition is. That’s what you guys determine. That’s what you are here for. But the definition as it is defined in the jury instruction is just an abiding conviction. That you have an abiding conviction that this is first degree murder. That’s what reasonable doubt is. An abiding conviction.”

Martinez argues these comments misstated the law of reasonable doubt by suggesting the jury was charged with deciding how to define the concept. Once again, Martinez failed to object to the argument at trial and therefore the issue is not reviewable.

Moreover, Martinez misreads the argument. The prosecutor’s point, although not made clearly, was that the jury was charged with deciding whether the prosecution had proven beyond a reasonable doubt that Martinez was guilty of first degree murder. The prosecutor emphasized several times that the jury was required to decide if it had an abiding conviction that Martinez premeditated and deliberated before murdering Parriera. There was no misstatement of the law.

D. Appeal for sympathy for the victim

The final area of alleged misconduct is an assertion the prosecutor appealed to the sympathy of the jury by reminding it that the reason for the trial was because Parriera was killed by Martinez. Martinez identifies two occasions, once during closing argument and once during rebuttal argument, where the prosecutor reminded the jury that “you are here because of [Parriera]. This is her day in court.”

“‘[A]n appeal for sympathy for the victim is out of place during an objective determination of guilt.’ [Citations.]” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130 (*Kipp*)). In *Kipp*, the Supreme Court concluded the prosecutor appealed to the sympathy of the jury when he stated, “‘So when you think about the elements of the offense of murder, as you will when you go back to deliberate, and as we, perhaps in somewhat of a legal abstract sense, the element satisfied a human being was killed. [¶] If you would, think for a moment about what it means. A living, breathing human being had all of that taken away.’” (*Id.* at pp. 1129-1130.)

Here, the prosecutor’s two comments were similar to those in *Kipp* and were objectionable. However, “‘To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.’ [Citation.]” (*Kipp, supra*, 26 Cal.4th at p. 1130.) Martinez’s trial counsel did not object to either comment. Nor is this a case where an admonition would not have cured the harm caused by the comment. Therefore, the issue is not reviewable on appeal.

Even were we to reach the merits, we would find no misconduct. The two comments were brief and in response to the focus that had been placed on Martinez’s mental condition throughout the trial and closing argument. Moreover, the trial court instructed the jury that it was not to let bias or sympathy influence its decision. We presume the jury understood and followed this instruction. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

Simply stated, this is not the type of conduct that infected the trial with unfairness that resulted in a conviction in violation of Martinez's right to due process.⁵

DISPOSITION

The judgment is affirmed.

CORNELL, Acting P.J.

WE CONCUR:

KANE, J.

DETJEN, J.

⁵Since we conclude there was only one instructional error that was not prejudicial to Martinez, and no other errors, we necessarily reject Martinez's argument of cumulative error.