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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DALE JUAN MCMILLAN,

Defendant and Appellant.

F062353

(Super. Ct. No. CRF32985)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Kim Malcheski, 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, Catherine Chatman and Larenda Delaini, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Dale Juan McMillan stabbed Kenneth Hansen in the lower abdomen, liver, chest, and back. A series of minor altercations over the course of several hours between the two men led up to this incident. Appellant now appeals from his convictions

for attempted premeditated murder and assault with a deadly weapon and their related allegations. He challenges the attempted murder conviction on three grounds: 1) insufficient evidence of premeditation and intent to kill; 2) erroneous jury instruction on the voluntary intoxication defense; and 3) prejudicial improper admission of bad character evidence. Appellant also challenges his assault conviction on this third ground. For the reasons discussed below, we affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Kenneth Hansen managed a home whose three occupants required assistance in various forms. Bill Tracy was wheelchair-bound and lived with cerebral palsy and multiple sclerosis. Michael Lortz lived with Asperger's Syndrome. Aleta Varela lived with depression and post-traumatic stress disorder.

Appellant and Hansen had met in 2000 through Hansen's sister. Varela met appellant when she went with other members of the house to visit him in jail in 2010.<sup>1</sup> Varela and appellant developed a relationship and appellant went to stay with Varela after he was released in mid-July 2010.

On July 25, 2010, a week after appellant's initial arrival at the house, appellant picked up a 12-pack of beer and began drinking. Hansen had left the house around 11:00 a.m. and was not expected to return until the next day. After several hours, appellant had drunk 10 of the 12 beers and decided to retire for the night. He went to say good night to Tracy and Lortz, but in the course of the conversation made some statements to Tracy and Lortz that alarmed them. Tracy and Lortz testified that appellant stated he was going to take over management of the house and Hansen had gotten into an accident. Tracy and Lortz also testified that appellant threatened to kill anyone who called the police. The

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<sup>1</sup> Appellant was then incarcerated for a violation of Vehicle Code section 14601.2, driving with a license suspended or revoked for driving under the influence. He was on probation for that offense at the time of the subject offense.

end result was that Tracy and Lortz called Hansen to return to the house. Upon Hansen's arrival, he and appellant engaged in some verbal sparring, which included appellant threatening to kill Hansen if he returned back to Varela's room. Tracy and Lortz also called the police, who arrived a short time after Hansen arrived back at the house.

Tuolumne County Deputy Sheriff Daniel Graziose testified the initial call to law enforcement was regarding a drunk in public offense at approximately 9:45 p.m. Both he and Deputy Matthew Stuart testified appellant appeared to have been drinking. Appellant was not arrested then, however, because he did not meet the criteria for public intoxication. Deputy Graziose testified appellant was able to understand what the deputy was saying, and that appellant was "able to operate." Though Hansen and Lortz made it clear to the officers that appellant had verbally threatened them, both officers were under the impression that appellant was not going to cause further trouble that evening. Appellant had agreed to stay in Varela's room for the remainder of the night.

After the sheriff's deputies left, it appeared things had calmed down. Varela testified, however, that while in her room, appellant appeared mad about the police getting called. Appellant testified that after the deputies left, he and Hansen started yelling at each other from their respective parts of the house. Appellant told Varela he was going to talk to the other house members, to "make things right." Varela testified this meant appellant was going to apologize to the other men, and appellant testified he went to the common area to apologize. It is undisputed that appellant then made his way to the common area where Hansen, Tracy, and Lortz were gathered.

Hansen, Tracy, and Lortz testified that appellant wielded a knife when he spoke to them in the common area, and threatened Hansen with words to the effect of, "How big is your God now?" Appellant, however, retreated after Hansen pointed out the collection of samurai swords at his (Hansen's) disposal nearby. Appellant initially testified he had no knife with him when he went out to the common area, but later testified he had a knife in his back pocket "most of the day," and stated during cross-examination he had the knife

in his back pocket when he went to the common area. The knife blade was three and a half to four inches long.

Shortly thereafter, Hansen walked to the back of the house and passed by Varela's room, where Varela and appellant were. The door was closed. He knocked on the door and Varela invited him in. Hansen kneeled down just inside the doorway and apologized to appellant about how the events had escalated that day.

Hansen then informed appellant and Varela that they needed to move out.<sup>2</sup> According to Hansen, appellant then stood up from where he was crouching, said, "I got something for you," and lunged at Hansen, stabbing him below the belly button with the same knife he had with him earlier. Hansen looked down and saw appellant reach back and stab him once more, this time in the liver. Hansen yelled that appellant had "gutted [him] like a pig," and yelled at Varela to call an ambulance because appellant was killing him. Appellant responded, "Yes, and I'm going to bleed you out." Appellant then stabbed Hansen in the upper chest, towards his heart. Hansen grabbed appellant's throat and began choking him. Both of the men fell to the floor. The impact of the fall forced Hansen's intestines and liver out of his body. Hansen gathered his entrails and began walking out of the room. Appellant stabbed Hansen once more, in the back, which pushed Hansen out into the hallway.

Appellant testified he had a clear recollection of everything that was said and done that day, notwithstanding the 10 beers he had drank that day. Appellant testified Hansen was the first to charge at him, and they had struggled until Hansen began choking appellant and appellant reached into his back pocket, took out the knife, and stabbed Hansen in self-defense. He denied stabbing Hansen in the back. Appellant described and

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<sup>2</sup> Hansen initially testified he had told appellant and Varela, "This thing needs to calm down for the night, and then first thing, you need to find a place to be." Later, however, Hansen testified he told them they had a week to move out.

mimicked the struggle, acting out both his position and Hansen's position. His description, however, did not match the forensic evidence of blood trails that had dried on appellant when deputies found him a few hours later. An expert testified that in his opinion, the blood trail was consistent with appellant being dripped on while laying down, but immediately standing up thereafter. Appellant testified he stayed on the ground until after Hansen had left the room.

Lortz was in the hallway, with his rifle. When Hansen came out into the hallway, he told Lortz to shoot appellant if he continued to stab him. Lortz went into the room, but appellant was no longer there. Hansen went and sat down in the living room to wait for an ambulance. Tracy saw Hansen's "insides." Hansen pinched off an artery to stem the bleeding. Police officers arrived shortly thereafter, at approximately 11:25 p.m. Hansen was flown to a regional medical center and treated for his wounds.

Police officers continued looking for appellant for at least two hours. Finally, they found him under the patio deck outside Varela's room. At trial, he denied that he had been hiding from the police, but that he had fallen asleep while under the deck, and had fled there in fear of Lortz and his rifle.

Appellant was charged with: 1) attempted murder (Pen. Code, §§ 664/187, subd. (a)),<sup>3</sup> with the further allegations that he acted willfully, with premeditation and deliberation, he personally used a deadly and dangerous weapon (a knife) (§ 12022, subd. (b)(1)), and he personally inflicted great bodily injury (§ 12022.7, subd. (a)); and 2) assault with a deadly weapon (a knife) (§ 245, subd. (a)(1)), with the further allegation that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). It was also alleged appellant suffered certain prior serious felony convictions and served certain prior prison terms.

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<sup>3</sup> All further statutory references are to the Penal Code unless otherwise indicated.

The jury deliberated for less than three hours before finding appellant guilty of all charges and finding all related allegations true. Appellant admitted his prior convictions and prison terms and was sentenced to an aggravated term of 27 years to life.

## DISCUSSION

### I. SUFFICIENT EVIDENCE SUPPORTS THE FINDINGS OF PREMEDITATION AND SPECIFIC INTENT TO KILL

Appellant's sufficiency argument is two-fold. First, he claims insufficient evidence supports the premeditation finding. Second, he claims insufficient evidence shows he harbored the specific intent to kill Hansen.

In reviewing appellant's claim of insufficiency of the evidence, we apply settled standards. We review the whole record in the light most favorable to the judgment for substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that any rational trier of fact could find the appellant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) “[We] presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “We do not substitute our judgment for that of the jury.” (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1427 (*Garcia*).)

#### Premeditation and Deliberation

“‘The test on appeal is whether a rational juror could, on the evidence presented, find the essential elements of the crime--here including premeditation and deliberation--beyond a reasonable doubt.’ [Citation.] A first degree murder conviction will be upheld when there is extremely strong evidence of planning, or when there is evidence of motive with evidence of either planning or manner [of the killing]. [Citation.]” (*People v. Romero* (2008) 44 Cal.4th 386, 400-401, citing to *People v. Anderson* (1968) 70 Cal.2d 15, 27.) “[T]hese [*Anderson*] factors need not all be present, or in any special

combination; nor must they be accorded a particular weight. [Citation.] Rather, the *Anderson* factors serve as an aid to reviewing courts in assessing whether the killing was the result of preexisting reflection. [Citation.]” (*Garcia, supra*, 78 Cal.App.4th at p. 1427; *People v. Perez* (1992) 2 Cal.4th 1117, 1127.) “A violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation. [Citation.]” (*People v. Pride* (1992) 3 Cal.4th 195, 247 (*Pride*).

“[I]t is important to keep in mind that deliberation and premeditation can occur in a brief 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....’ [Citation.]” (*Garcia, supra*, 78 Cal.App.4th at pp. 1427-1428.) Attempted first degree murder requires the same finding of premeditation and deliberation as for the completed crime. (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223.)

Here, there was ample evidence from which the jury could infer that appellant premeditated and deliberated Hansen’s attempted murder. At least two plausible motives appear. One inference is that appellant acted on his apparent threat to harm the person who had called the police, or acted on his apparent threat to Hansen in the common area. (See *Pride, supra*, 3 Cal.4th at p. 247) The jury could also have concluded appellant tried to kill Hansen in retaliation for Hansen’s demand that they vacate the premises.

Even if we were to agree with appellant that his exhortations that he would kill anyone who called the police, or would kill Hansen if he came back to Varela’s room, or other words to that effect, were merely “blowing off steam” before the sheriff deputies arrived that evening, his statements and actions during the subsequent struggle in Varela’s room are sufficient evidence of appellant’s premeditation and deliberation.

The jury could have reasonably accepted Hansen’s testimony that appellant stated, “I got something for you,” before lunging at Hansen with a four-inch knife, then stabbing Hansen again, this time in the liver. The jury could have further believed Hansen’s

testimony that both stabbings were in such a manner that later, Hansen's intestines and liver were able to escape his body cavity while he continued to struggle with appellant.

Hansen further testified he yelled out that appellant had "gutted" him. Varela initially denied hearing Hansen say this, but then later admitted she did hear Hansen say something to that effect. Tracy testified he heard Hansen make a similar statement, from his place in the common area down the hall. The jury could have accepted that Hansen made this statement, and could have further believed Hansen's testimony that appellant's response was, "Yes, and I'm going to bleed you out," followed by a stab to Hansen's chest, near his heart. Finally, after Hansen had managed to subdue appellant for sufficient time to gather his internal organs and make his way to the bedroom door, appellant stabbed Hansen in the back. The stab wounds were undisputed.

Thus, the prosecution established that Hansen was stabbed four times; that at least three of the four were located through or near vital organs; and that appellant had further stabbed Hansen in the back as Hansen was exiting the room. The jury could infer appellant deliberately chose to try to disable Hansen by stabbing him in the lower abdomen, before dealing him attempted fatal blows to the torso, both in front and back. Sufficient evidence of planning, motive, and manner supports the premeditation finding. (See *Pride, supra*, 3 Cal.4th at pp. 247-248 [the placement of the wounds can support an inference of calculation].)

#### *Specific Intent to Kill*

"The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice -- a conscious disregard for life -- suffices. [Citation.] [Citation.] In contrast, '[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.] Hence, in order for defendant to be convicted of the attempted murder of the [victim], the prosecution had to

prove he acted with specific intent to kill that victim. [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*.)

“Intent to unlawfully kill and express malice are, in essence, ‘one and the same.’ [Citation.] To be guilty of attempted murder ... defendant had to harbor express malice toward that victim. [Citation.] Express malice requires a showing that the assailant “‘either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.’ [Citation.]” [Citations.]” (*Smith, supra*, 37 Cal.4th at p. 739.) “[E]vidence of motive is often probative of intent to kill.” (*Id.* at p. 741.)

“Evidence of motive aside, it is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant’s acts and the circumstances of the crime. [Citation.] ‘There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill ....” [Citation.]’ [Citations.]” (*Smith, supra*, 37 Cal.4th at p. 741.)

“We explained in [*People v. Arias* (1996) 13 Cal.4th 92] that ‘if the jury found defendant’s use of a lethal weapon with lethal force was purposeful, an intent to kill could be inferred, even if the act was done without advance consideration and only to eliminate a momentary obstacle or annoyance.’ [Citation.]” (*Smith, supra*, 37 Cal.4th at p. 741, italics omitted.)

Here, as discussed in the context of premeditation and deliberation evidence above, appellant’s act of stabbing Hansen in his chest near his heart immediately after he stated he was going to “bleed [Hansen] out” gives rise to an inference appellant intended to kill Hansen. He purposefully used a lethal weapon with lethal force. Moreover, the surrounding circumstances further bolster the jury’s finding. Appellant had had a series

of escalating verbal disputes earlier in the day with Hansen, including threats that he would kill Hansen. Appellant had threatened Hansen a short time earlier with the same knife he later used to stab him. Hansen had demanded immediately before appellant stabbed him that appellant and Varela vacate the premises. These circumstances are probative of whether appellant stabbed Hansen with an intent to kill and weigh in favor of the jury's findings.

Furthermore, appellant engaged in post-crime behavior from which the jury could infer a consciousness of guilt. He fled the room immediately after Hansen left and hid under the back porch. He refrained from coming out from hiding even while police were calling out his name and actively searching for him in the backyard for at least two hours before they found him. Sufficient evidence of a specific intent to kill supports appellant's conviction for attempted first degree murder.

## II. ANY ERROR IN INSTRUCTING ON VOLUNTARY INTOXICATION WAS HARMLESS

Appellant asserts the trial court erred -- and defense counsel provided ineffective assistance in failing to raise the issue with the trial court -- when it used the phrase "malice aforethought" instead of "specific intent to kill" in the jury instruction on the voluntary intoxication defense, CALCRIM No. 3426. As given, the instruction thus began, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider the evidence only in deciding whether the defendant acted with malice aforethought, premeditation or deliberation."<sup>4</sup> This

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<sup>4</sup> The instruction continued, "A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink or other substance knowing it could produce a [*sic*] intoxicating effect or willingly assuming the risk of that effect. [¶] In connection with the charge of attempted murder or attempted voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to kill. If the People have not met this burden, you must find the defendant not guilty of attempted murder or attempted voluntary manslaughter. [¶] If you find the defendant guilty of the charge of attempted murder, the People have the

instruction should have read: “You may consider the evidence only in deciding whether the defendant acted with the specific intent to kill, premeditation or deliberation.”

Appellant asserts “malice aforethought” (which was not defined for the jury) has a broader meaning than “specific intent” and cannot be substituted for “specific intent to kill” because “malice aforethought” encompasses both express malice and implied malice. While voluntary intoxication is relevant to express malice, implied malice cannot be negated by voluntary intoxication.<sup>5 6</sup> (§ 22; *People v. Turk* (2008) 164 Cal.App.4th 1361, 1374-1375.)

Appellant further asserts that the trial court’s modification prevented the jury from deciding the “key legal issue at trial of whether his intoxicated state negated his alleged specific intent to kill when he stabbed the victim,” in violation of his constitutional rights. Appellant overreaches with this argument, since his defense at trial was not voluntary intoxication, but self defense.

We do not review a claim of instructional error in isolation, but rather review the jury instructions as a whole. (See *People v. Price* (1991) 1 Cal.4th 324, 446.)

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further burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant did not act willfully and with premeditation and with deliberation and premeditation. [¶] You must not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to assault with a deadly weapon.”

<sup>5</sup> Section 22 sets forth the voluntary intoxication defense and states in pertinent part, “(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.”

<sup>6</sup> Section 188 defines the malice required for murder, as defined in section 187. Section 188 states in pertinent part, “Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”

“[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury.” (*People v. Holt* (1997) 15 Cal.4th 619, 677.) “The failure to give an instruction on an essential issue, or the giving of erroneous instructions, may be cured if the essential material is covered by other correct instructions properly given. [Citations.]” (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.)

Here, the jury was advised, pursuant to CALCRIM No. 200, to “[p]ay careful attention to all of these instructions and consider them together.” CALCRIM No. 3426 itself notes that “the People have the burden of proving beyond a reasonable doubt that the defendant acted with the intent to kill.” As both appellant and respondent point out, the trial court also explained the intent requirement for the attempted murder charge using CALCRIM Nos. 600 [attempted murder elements]; 601 [attempted murder - deliberation and premeditation]; and 252 [union of act and intent]. The jury asked no clarifying questions about these or any other instructions.

As noted, appellant’s defense at trial was not one of voluntary intoxication but of self-defense. Appellant testified that he stabbed Hansen in self-defense and that he had a clear recollection of everything that was said and done the day of the stabbing, notwithstanding the 10 beers he had had. Appellant’s trial counsel never mentioned the defense of voluntary intoxication or instruction No. 3426 in his closing argument, but focused instead on the elements of self defense.

Even assuming the trial court erred in the giving of CALCRIM No. 3426, the error was not prejudicial. Depending upon the basis of the claimed error, instructional error is reviewed under either *Chapman v. California* (1967) 386 U.S. 18, 24, or *People v. Watson* (1956) 46 Cal.2d 818, 836. Appellant seeks review under the *Chapman* standard, which requires reversal unless we conclude beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra*, at p. 24.) Under the alternative standard of *Watson*, reversal is not required unless it is reasonably probable the defendant would

have obtained a more favorable result had the error not occurred. (*People v. Watson*, *supra*, at p. 836.) We need not decide whether the *Chapman* or *Watson* standard for prejudicial error applies here because the error was harmless under either standard.

Because we find the error harmless, we need not address appellant's corollary claim that counsel was ineffective for failing to object to the wording of CALCRIM No. 3426 as given. (*Strickland v. Washington* (1984) 466 U.S. 668, 690.)

### III. ADMISSION OF IMPROPER CHARACTER EVIDENCE WAS HARMLESS

Appellant claims the trial court abused its discretion in allowing admission of certain testimony from Hansen, Lortz, and Tracy of appellant's character -- primarily his prior incarceration and his violent nature. He claims there was legal error on several grounds, the primary being that admission of the character evidence violated Evidence Code sections 1101, subdivision (b),<sup>7</sup> and 352,<sup>8</sup> requiring reversal of his convictions on both counts. Even assuming there was error, it was harmless.<sup>9</sup>

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<sup>7</sup> Evidence Code section 1101 states in pertinent part:

“(a) ... evidence of a person's character trait of his or her character ... is inadmissible when offered to prove his or her conduct on a specified occasion.

“(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident ...) other than his or her disposition to commit such an act.

“(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.”

<sup>8</sup> Evidence Code section 352 states, “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

<sup>9</sup> Appellant either failed to object or objected on other grounds to a number of instances of the complained-of testimony, forfeiting his current claims. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 674.) Appellant thus raises a claim of ineffective assistance of counsel for failing to properly object to the improper evidence. Because we

Tracy testified that appellant was “violent,” and had just been released from jail before his stay at the house. Lortz testified appellant made him uncomfortable because he “talked about killing a lot,” and over the prior week appellant had made statements about killing. Hansen testified he had told appellant a few months before the incident that in order to get help from him (Hansen), appellant would have to “get legal with the law,” referenced appellant’s incarceration just prior to his arrival at the house, and mentioned appellant’s drug and alcohol abuse.

“We agree with the observation that no reasonable jury will convict a defendant exclusively on the basis of the propensity demonstrated by prior offenses, without giving any consideration to the evidence of the charged offenses. [Citations.]” (*People v. Younger* (2000) 84 Cal.App.4th 1360, 1382-1383.) Moreover, the jury here was instructed on the requirement of proof beyond a reasonable doubt of each element of the offense, the elements of attempted murder, and its duty to consider all evidence received throughout the entire trial. Thus, the likelihood the jury returned a conviction based solely or inordinately on these few comments was insignificant. (See *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1101.) Whether or not the jury believed appellant was a violent person by nature, or merely stabbed Hansen violently, is insignificant in light of the fact that appellant was not disputing the fact that he had stabbed Hansen. The key issue was whether or not appellant acted with premeditation and deliberation, not whether or not he had committed the stabbing. In view of the strong evidence of appellant’s premeditation and deliberation, as discussed above, we are persuaded, by any standard, that Tracy’s, Lortz’s, and Hansen’s comments did not contribute to the jury’s findings. (See *People v. Tate* (2010) 49 Cal.4th 635, 690; *People v. Vines* (2011) 51 Cal.4th 830, 867.)

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find any error was harmless, appellant was not prejudiced by counsel’s omissions, and his ineffective assistance claim fails. (*People v. Gamache* (2010) 48 Cal.4th 347, 391.)

**DISPOSITION**

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Gomes, Acting P.J.

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Detjen, J.