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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH DURAN BURCIAGA,

Defendant and Appellant.

F067420

(Kern Super. Ct. No. BF135473A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Patricia J. Ulibarri, 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, Stephen G. Herndon and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

On October 15, 2010, Frank Adams's (Adams) wife, Brenda Hernandez (Hernandez), dropped him off at the house where appellant/defendant Joseph Duran

Burciaga lived. Adams intended to briefly speak to defendant regarding the whereabouts of a mutual friend. Hernandez parked in front of the house and Adams walked up and knocked on the door. Hernandez saw someone answer the door, and watched as Adams walked into the house. Adams was never seen alive again. Hernandez eventually called the police, who responded to the house and spoke to defendant. Defendant claimed Adams asked him to party, defendant declined, and Adams and another man jumped over the backyard fence and left in a third man's car. The police briefly searched the house and did not see anything suspicious. During the search, an officer noticed a large plastic pool supply box in the backyard but did not open it. The officers believed defendant's account, advised Hernandez that he would eventually show up and left the scene, much to her shock and frustration. She immediately filed a missing person report.

A few days after Adams disappeared, defendant's house burned down as a result of a suspicious fire. The investigators realized that this was the same house implicated in the missing person report, and again questioned defendant about Adams. A week after the fire, Adams's decomposed body was found in an irrigation "sump." The body had been stuffed inside the large plastic pool supply box. Adams had been fatally shot in the chest. Defendant fled to Mexico, but eventually returned and was arrested for Adams's murder. While he was in custody, he made several admissions to a fellow inmate that he shot Adams and had someone else dump the body.

Defendant was charged with count I, first degree premeditated murder of Adams (Pen. Code, §§ 187, subd. (a), 189),¹ with an enhancement for personal discharge of a firearm causing death (§ 12022.53, subd. (d)); and count II, arson of his house (§ 451, subd. (b)). After a jury trial, he was found guilty of counts I and II. The jury found the firearm enhancement not true. He was sentenced to 25 years to life for count I, plus eight years for count II.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

On appeal, defendant contends there is insufficient evidence of premeditation and deliberation for the murder, as to the planning activities, motive, and method of killing. He points to the jury's "not true" finding on the firearm enhancement as raising the inference that the jury had a reasonable doubt about his guilt.

We find there is insufficient evidence to support defendant's conviction for first degree premeditated murder. However, there is substantial evidence to support a conviction for second degree murder, and we will reduce his conviction accordingly.

FACTS

Around 5:00 p.m. on Friday, October 15, 2010, Hernandez was driving her husband, Adams, and their young child to the store when Adams asked her to stop by a friend's house. Hernandez followed Adams's directions to the friend's house, located in a cul-de-sac of Big Bear Court in Bakersfield. The police later determined defendant was living in the house as a rental unit. Adams did not mention defendant's name to Hernandez.

Hernandez parked in front of the house. Hernandez noticed an older model car was parked in front. She did not see a Cadillac Escalade SUV (later identified as defendant's vehicle).

Adams told Hernandez he had been to that house once before and knew the guy who lived there. Adams said he wanted to "stop by real quick" and ask the resident about a mutual friend, "Jimmy," because Adams had not seen him for a while. Adams walked up to the house while Hernandez waited in car. Adams was wearing a black shirt, grey shorts, and sandals. He did not have a cell phone.

Hernandez testified Adams knocked on the front door. Nobody answered. Hernandez waved at Adams to return to their car. Adams held up his finger "like hold on. I think he heard—he had heard somebody that was coming to the door. And that's when they answered the door and he went inside."

Hernandez testified the front door opened, and she saw one person standing in the doorway. Adams went in, the door closed, and Adams was never seen alive again.

Hernandez Tries to Find Adams

Hernandez waited in her car while parked in front of the house. Her car windows were closed and she did not hear anything. After about five to 10 minutes, a man emerged from the house and spoke to Hernandez. The man said Adams had left and Hernandez should return to their home. The man said he would bring Adams back to his house later on. Hernandez replied that Adams had to come out of the house and tell her himself. The man went back into the house.

Hernandez honked the car horn and nothing happened. She walked up to the house, rang the doorbell, and knocked. The window blinds were closed, no one answered, and it was silent inside.

Hernandez returned to her car. A man on a bicycle arrived at the house, and a little boy was with him. Hernandez told the man that her husband had gone into the house and not returned. She asked the man if he could go in and call her husband. The man left the boy on the sidewalk. He walked up to the house, knocked on a window, and whispered to someone through the window. Hernandez testified the man “just came back and nodded his head.”

Hernandez testified it had been about 30 to 40 minutes since Adams went into the house. She knew something was wrong, and she called the police and reported the situation. The police did not immediately respond, and she had to call back three or four times. She drove her car around the neighborhood as she waited for the officers to arrive.

Arrival of Salcedo

As Hernandez waited for the police, Margarita “Daisy” Salcedo drove to defendant’s house in her black BMW. Defendant was her former boyfriend and the father of her child. Salcedo intended to pick up their child’s belongings because defendant had ended their relationship.

Salcedo testified her relationship with defendant had been rocky. They argued a lot, and they accused each other of having affairs. Salcedo described defendant as paranoid.

Salcedo testified that “Jimmy” was James “Rookie” Escandon. Salcedo testified defendant and Escandon had been friends. However, their relationship changed when defendant accused Salcedo of having an affair with Escandon. Defendant told Salcedo she was not allowed to be in the same room as Escandon.

Salcedo had never seen defendant with a gun, but she had seen a gun on the kitchen counter when defendant and other friends were there. There was a pool in defendant’s backyard, and Salcedo recalled defendant had a large pool container box which contained pool supplies and “floaty” vests.

Salcedo testified that as she drove onto defendant’s street, she saw a Cadillac Escalade driving away. She recognized the vehicle as defendant’s car. Salcedo slowed and rolled down her window. The driver of the Escalade rolled down the driver’s side window. Salcedo identified Amy Campos as the driver. Campos drove away from the area.

Salcedo parked in front of defendant’s house and knocked on the door. Salcedo thought she heard something inside: “I don’t know if it was a radio or if it was people talking, but I did hear faint noises inside the house.” No one answered the door, and she did not see anyone around the house. Salcedo testified the police arrived as she was knocking on the door.

The Initial Investigation

Around 6:00 p.m., Bakersfield Police Officers Gabriel Herriott and Jose Galvan responded to the house on Big Bear Court on a dispatch about a person missing under suspicious circumstances. Hernandez met them in the street. She was tearful and upset. She told the officers what had happened and that had Adams disappeared into the house. Hernandez said a Hispanic male came out of the house and told her that Adams had left.

The officers knocked on the door, but no one answered. An older model Chevrolet was parked in the driveway. The officers did not see a Cadillac Escalade at the house.

Officer Herriott testified they spoke to Salcedo, who had parked in front of the house. Salcedo explained that defendant lived there and provided his cell phone number. The officers advised her to leave, and she drove away before defendant returned to the house.

Officer Herriott called the cell phone number and reached defendant. Herriott told defendant that he needed to talk to him and asked defendant to meet them at the house. Defendant said he would be there in 10 to 20 minutes.

The Police Search the House

About 45 minutes after the call, defendant arrived at the house on foot. Officer Herriott testified Hernandez was present when defendant walked up to the house. Herriott testified he asked Hernandez if defendant was the man who came out of the house and told her that Adams left, and Hernandez said no.

At trial, however, Hernandez identified defendant as the man who came out of the house and told her that Adams had left and would be home later. Hernandez testified that when defendant walked up to the house, she told the officers that he was the same man who came out of the house earlier and said Adams had left. Hernandez testified that when the officers “met up with him when he was walking back to the house, I told them it was that guy.”

Search of Defendant’s House

Officer Herriott testified they spoke to defendant outside the house and asked if they could look inside. Defendant agreed but said he had the wrong set of keys. Defendant forced open the interior garage door to gain access to the house.

Officer Herriott testified he entered defendant’s house about one hour and 45 minutes after they initially arrived at the scene. The front door opened into the living

room. Herriott testified there were two couches in the living room, which were against the east and west walls. Herriott did not see any type of coffee table in the living room.

Officer Galvan stayed in the living room with defendant, who sat on one of the couches. Officer Herriott searched the rooms, closets, shed, backyard, the swimming pool area, and garage for any trace of Adams. Herriott conducted the sweep in six to eight minutes and did not find anything. Herriott testified the house was clean and orderly. There was no evidence of any pets or construction work. There were no signs of a struggle, a fight, blood, or broken glass on the property. Herriot did not smell gunpowder or see any evidence of gunfire. Herriott noticed the air conditioning was on.

Officer Herriott testified there was a large plastic pool storage box in the backyard next to the back door. He did not open the lid or look inside the box.² Herriott and Officer Galvan did not remember seeing a large coffee table with a black metal base anywhere in the house, or a power washer outside.

Defendant's Initial Statements

After he finished the search, Officer Herriott asked defendant if he knew Adams. Defendant said yes. Herriott asked if Adams had been at the house earlier that day. Defendant said Adams arrived and wanted “to party and hang out with some female companions.” Defendant told Adams he could not party because his former girlfriend (Salcedo) was on her way, and he did not want any problems with her. Defendant said they both “fled” over the backyard brick wall to the next street.

The officers asked defendant if he knew “Jimmy.” Defendant initially said no, and said no one else was at the house when Adams was there. However, defendant said Adams was looking for someone named Jimmy. Defendant initially told the officers he did not know anyone named Jimmy. As defendant continued to speak with the officers,

² As we will explain below, the evidence strongly implies that Adams was already dead, and his body was stuffed in the pool box when Officer Herriott walked by the box.

he said “Jimmy” was at his house when Adams arrived. Defendant said he jumped over the backyard wall with Adams and Jimmy. Defendant said Jimmy and Adams got into a black Mercedes driven by a black man, and they drove away from the area.

The Officers Leave Defendant’s House

The officers testified they completed their investigation and did not ask Hernandez any questions about Adams’s clothing, a more detailed description of the man who came out of the house and spoke to her or any additional questions because “[a]t that time it didn’t seem important.” They left the area without finding any information about Adams’s whereabouts.

Hernandez testified she was very upset about how the officers handled the situation because they appeared to believe defendant’s story. Hernandez reviewed the police reports and conceded the reports did not include her identification of defendant as the man who came out of the house and spoke to her, or her description of the man on the bicycle. Hernandez insisted she provided these details to the officers.³

Hernandez testified the two officers did not ask her about what happened after Adams disappeared into the house, and “[t]hey didn’t seem like they even cared. They thought that [Adams] had just left; that he had sneaked out and went partying. And that’s what they stuck with and that’s what they kept telling me, to just go home and that he would just show up later.”

Hernandez drove home and filed a missing person report that night.

THE CARPET

On Saturday, October 16, 2010, defendant went to Kmart with Amy Campos and her children.

³ Officer Herriott and Officer John Moss, who also investigated Adams’s disappearance, testified Hernandez never said anything about a man and child on a bicycle.

On or about October 16 or 17, 2010, Pablo Bustamonte (Bustamonte) hosted a barbeque at his house. The guests included Denorah Larios (Larios), who was Bustamonte's girlfriend and defendant's cousin. Defendant was also there.

Larios later told the police that defendant was dancing around and waving a nine-millimeter pistol at the party. Bustamonte also said defendant had a gun. Bustamonte said defendant went to answer the door when someone arrived. Defendant reached for his waistband as if he was going to grab his gun. The arriving guest was Raymond "Panther" Morales. Bustamonte told defendant to put away the gun.

Bustamonte said that defendant talked about getting rid of carpet from his house. Defendant told Bustamonte that he had a Hispanic male put some carpet in, and "he hoped the police wouldn't go check videos of the carpet stores during the investigation."⁴

Rivera Replaces the Carpet

Helder Rivera (Rivera), defendant's friend, testified defendant called him one evening and hired him to install carpet at his rental house. Rivera believed this call occurred on Sunday, October 17, 2010. Defendant said he would pay him \$150. Defendant told Rivera that he "forgot to close the water from the ... kitchen sink, and the carpet got wet."

On the afternoon of Monday, October 18, 2010, two men went to San Joaquin Interiors flooring company and purchased a roll of carpet for \$200 with Rivera's credit card. The men did not purchase any padding. They loaded the carpet into another person's pickup truck and drove away. The salesman later identified Jose Rubio from a photographic lineup as one of the men. The salesman did not get a good look at the other man because he was wearing a black hat and sunglasses.⁵

⁴ At trial, Bustamonte and Larios denied making these statements about defendant's conduct at the barbeque to Detective Moore.

⁵ The police traced the receipt because carpet rolls were later found in defendant's garage after the fire, and the company's name was on the merchandise.

Detective Moore testified that during the investigation, they had “information of another carpet purchase, but I wasn’t able to figure out when that was.”

Rivera testified he went to a store with defendant to purchase the carpet. Rivera identified the receipt from San Joaquin Interiors, which stated the carpet was purchased on Monday, October 18, 2010, at 4:00 p.m. Rivera testified he paid for the carpet with his credit card and defendant was going to pay him back. Rivera said they loaded the carpet into another man’s truck. Rivera did not know this man. Defendant said the man was his father-in-law.

Rivera purchased a carpet stretcher and started the job on the same day they bought the carpet. Rivera replaced the carpet in the living room. Rivera could not recall if all or some of the original carpet was still on the living room floor when he started the job. However, the padding was wet under the carpet in the living room and hallway, and some of the padding was missing. Rivera told defendant that he needed to glue down the padding so the carpet would not move. Defendant said he did not care if the carpet moved. Rivera was not able to finish the job that day.

THE FIRE

At 4:09 a.m. on Tuesday, October 19, 2010, fire crews responded to a fire at defendant’s rental house on Big Bear Court. Defendant was not present when the fire department arrived. A bystander saw the fire and called 911.

At 4:40 a.m., Fire Investigator Greg Ochoa arrived at the scene. The fire had been extinguished but caused substantial damage. A Cadillac Escalade and an older Chevrolet were parked in front of the house. The Escalade was unlocked. Ochoa noticed there were very few personal items in the house. He thought either the house had been robbed, or someone had removed their personal things and staged the fire.

Investigator Ochoa and the firefighters smelled ammonia in the house. Most of the fire damage was within the living room.

Investigator Ochoa took forensic samples from point of origin in the living room. The samples subsequently tested positive for ignitable liquids, possibly gasoline, lighter fluid, or a cleaning product.

Based on the burn patterns and damage, Investigator Ochoa determined the fire started around 3:30 a.m. in a couch located in the northwest corner of the living room. The flames started low and burned up the walls. It smoldered for about 45 minutes and then burst through the windows, when the bystander likely saw the flames and called 911.

A crime laboratory technician inspected the house after the fire. She looked through a trash can in front of the house and found broken glass from a coffee table. There was blood on the broken glass. She found a left insole shoe insert by the backyard swimming pool.

Investigator Ochoa found carpet rolls in the garage, a carpet installation tool in the house, and a power washer in the back of the house. Detective Heredia saw two carpet rolls in the garage, which had not been damaged by the fire. He thought the rolls were large enough to fit at least one room.

Detective Moore later unrolled the carpets and found two different colors of carpet and padding remnants inside the larger rolls. The remnants appeared as if they had been exposed to water. There were also carpet and padding remnants in a trash pile outside the house. The same trash pile also contained swimsuit “floaties” and a chlorine box. Moore did not see a large pool supply box in the backyard.

Defendant Talks to the Property Manager

Denise Waters rented the house on Big Bear Court to defendant. Waters learned about the house fire when she saw a story on the morning news on the same day as the fire. At some point between 9:00 a.m. and 11:00 a.m., defendant arrived at Waters’s house and asked her to talk to the police. He did not mention anything about the house fire. However, he wanted Waters to tell the police that as the manager of the rental

property, she asked him to replace the carpets in the house. Waters testified she refused because she never asked him to replace the carpets and never sent anyone to do so.⁶

Defendant's Statements After the Fire

Around 11:00 a.m. on October 19, 2010, Investigator Ochoa spoke to defendant outside the damaged house and asked him about the fire. Defendant said he spent the night at his grandmother's house, and "he had no knowledge" of the fire "until approximately ten minutes before I talked to him."

Investigator Ochoa asked defendant why the carpet was being replaced. Defendant said "they had a dog that was defecating on it." Defendant also said "he wasn't involved in it; that the property management company was the ones that were handling the work."

Around noon on October 19, 2010, Detectives Heredia and Moore conducted a tape-recorded interview with defendant by the driveway of the house. During the conversation, defendant became concerned about people seeing him with an officer and being a snitch. Defendant asked if they could speak in private.

Detective Heredia asked defendant if he knew why the officers were there. Defendant said to tell him. Heredia said there was a fire and a missing person report. Defendant replied "everybody knows that he left with somebody else," and they should talk to the police officers who had already investigated it.

When again asked about the missing person, defendant said: "[T]his fool f[**]king left. Jumped over the wall. I don't know what the f[**]k. He's tripping on his

⁶ On cross-examination, Waters conceded she had a felony record that went back to 1998; she was convicted of grand theft and sentenced to 16 months in prison in 2003; she was convicted of commercial burglary in 2010; and she was on felony probation for the crime of false pretenses. There was also evidence that Walters was illegally renting houses that had been foreclosed, including the residence where defendant was living.

old lady.” Defendant said, “We ... peeked over the wall” and saw “the fool” leave in a black Mercedes.

Defendant started talking about Daisy Salcedo, his former girlfriend, and claimed she was trying to get him. Defendant said Salcedo called the police and demanded that he talk to them. Defendant said he ran away because he did not want any problems with her. Defendant was suspicious because Salcedo showed up at the same time the man disappeared. He thought Salcedo was trying to “put me away for a long time.” Defendant said Salcedo had a new boyfriend, she was “going to try and set me up” to get him out of the picture, and “[s]ome fool is putting her up to all this shit.”

Defendant said no one was at the house when the fire started. Defendant told the officers to get to the bottom of everything so he could live his life.

Detective Heredia asked defendant if he knew the man who disappeared. Defendant said no, but he had seen him one time. Heredia showed Adams’s photograph to defendant. Defendant said the person looked similar, and he wanted to figure out why someone was trying to “get me crossed up with a missing dude.” Heredia asked if the man left right away when he got to defendant’s house. Defendant said the man “came over here looking for somebody and like I being a gentleman I let him in. I shouldn’t have let him in.” The man was looking for “[s]ome fool named Jimmy.” The missing man’s “old lady ... was causing a ruckus” by honking her horn. Defendant told the man to make the woman leave. The man said he was leaving and jumped the wall, and the woman drove away. Defendant said the woman came back, Salcedo was also there, and they were banging on the door and threatening to call the police. Defendant ran away and went to the mall to get away from them. Defendant knew Salcedo gave his cell phone number to the police, and he came back when they called him. Defendant said the police searched his whole house, and they were “cool with me” and knew the man was not there.

Defendant said the house was being remodeled, and “they were putting carpet” in from the living room to the hallway because there were stains from his dog. Defendant said the management company sent a man to work on the carpet.

At the conclusion of the interview, defendant was transported to the police department for further questioning. He remained there for the rest of the day and evening until he was again interviewed.

Defendant’s Videotaped Interview

Around 11:00 p.m. on October 19, 2010, Detective Moore conducted a videotaped interview with defendant at the police department. Defendant was advised of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and he agreed to answer questions.

While asking for his contact information, defendant said he had broken and thrown away his cell phone a few days earlier because Salcedo had the number, and he did not want her to call. Defendant said he stayed overnight with his grandmother on the night of the fire.

Detective Moore again asked about Adams’s disappearance. Defendant said he didn’t know “that fool’s name I’ve only seen him twice.” Defendant again brought up Salcedo saying she had arrived at about the same time as that “fool” and his “old lady comes ranting and raving” and said “they’re gonna call the cops.” Defendant said two other men were at his house when Adams arrived; one man was outside watering, and the other man was in the house. Defendant would not reveal their names. Adams knocked on the door and defendant let him in.

Detective Moore asked defendant if Jimmy was there. Defendant said no, but he believed Jimmy used Adams to set him up “[w]ith all this shit. Like come on, my house is on fire and shit. This fool’s f[**]king missing. You know what I’m saying?” Defendant said Jimmy was “f[**]king evil.”

Defendant went on about Jimmy, and speculated about his involvement with Salcedo and Adams: “This fool was my friend. This fool was my friend, I looked out for this motherf[**]ker. Right? [¶] I think this fool’s been with Daisy. He (unintelligible) like I don’t know but it seem[s] weird every time he tried to set something up against me [Salcedo] ends up rolling up. You know what I’m saying? This other mother[**]ker [Adams] I didn’t know. I didn’t even know him. I didn’t even know why he is coming over.”

Defendant said Adams left and then “his old lady” came back and called the police. Defendant decided to leave “because Daisy is knocking on the door and they come and tell me you better get back here right now.” Defendant said Jimmy “wants me out of the f[**]king picture. He did, he’s the one (unintelligible) I know his f[**]king (unintelligible) and shit.”

Detective Moore showed defendant a photograph of Escandon and asked if he was “Jimmy.” Defendant verbally said no, but he nodded his head in the affirmative.

Detective Moore asked defendant if he thought Jimmy set him up. Defendant said: “*You know he did. You know I’m not stupid. He’s been trying to.*” (Italics added.) Defendant said he did not know Adams and had not seen him since that day. Adams “shouldn’t have even been going to my house” because defendant did not know him. Defendant believed Jimmy sent Adams to his house.

“Moore: Did Jimmy send him over there?”

“[Defendant]: He said to go over there and spy on me. Yes. Sending people over there to spy on me shit like that so he go do shit behind my back like my old lady or do whatever the f[**]k he’s doing. He called me over there just about a week ago. Ran up to my house, ‘Get over here, let’s go, let’s go. My old lady cut her wrist. She cut her wrist. She’s bleeding everywhere. She had the kids. And when I go and she’s fine”

Defendant said he told Jimmy that “I did nothing but good for you ... and this is what I get in return? And now you got this shit coming at me.”

Detective Moore asked how Adams was involved with Jimmy. Defendant he did not know, Jimmy never mentioned him, and “*that’s why I was tripping out.*” (Italics added.)

Defendant again claimed Adams jumped over his back fence, and Jimmy had someone pick him up in a black car. Defendant said after Adams left, he heard Salcedo outside, and he jumped the fence and ran down the street to get away from her.

Detective Moore asked defendant what happened in his living room. Defendant said he should ask Denise Waters. Moore again asked him. Defendant said he was supposed to move out and Waters was trying to fix up the place. Waters came by two days earlier and told him that she was sending someone to install new carpet because it was dirty. Defendant said Waters hired some guy in a pickup truck to replace the carpet, and the man changed the carpet in the living room and hallway.

Detective Moore asked defendant about how the coffee table was broken. Defendant said he and a “fool” were moving it from the living room to another room because “I knew the guy was coming to do the carpet.” Defendant said “the stupid fool didn’t set it down,” and “my side just tipped and boom it busted.” Defendant cleaned up the broken glass and threw it away. Defendant said his friend did not cut himself when he dropped the table.

Defendant said he did not cut himself on the broken coffee table. However, he claimed he already had a spider bite on his finger and it popped when he was at Walmart on Sunday night. “I’m showing people there, right there ... in the register.... It’s on tape. You could go look at Walmart.” He went home and “I probably got blood in a lot of places.”

Detective Moore told defendant that he did not believe his story about the carpet. Defendant said to call Waters, and she would confirm that she sent over the guy to change the carpet. Defendant added that “*Jimmy rents from her too, you know.*” (Italics added.) Defendant again claimed that Jimmy was “setting me up.” “[I]t only takes a

little bit of something to go tell (unintelligible) hey why don't you do this and you help me to do this and I'm over here and do this and we'll get this fool caught up like this and everybody's going to point at him."

Detective Heredia asked defendant what he would say if he learned Waters denied sending anyone to replace the carpet. Defendant said Waters was lying. Heredia said he thought defendant was lying and asked if he bought the carpet. Defendant said he thought it was odd that guy was missing "and the next thing there's a fire."

Detective Moore asked defendant why would "they want to catch you." Defendant replied that "this fool is talking to my girl," and "I don't know why he hates me so much for," again referring to Jimmy. Defendant claimed "somebody plotted" against him and previously broke into his house.

Detective Moore asked defendant why there was blood on the broken glass from the coffee table. Defendant said, "It might be mine." Moore replied that they had already eliminated defendant as the source. Detective Heredia asked whether the blood belonged to Adams. Defendant said Adams wasn't there and he took off. Defendant also said it was an old table and the blood could be old. Defendant added, "I think, you know what, I think my friend did cut himself" when he carried the broken pieces to the trash can. Defendant said this same friend was always doing work at his house and perhaps cut himself before.

Detective Heredia told defendant the fire department determined the fire was not accidental and wondered if the house was set on fire to cover up something. Defendant wanted the police to find the missing man because it was ruining his life. Defendant offered to help find the missing man by "asking people" and doing "whatever I can to find him" even though he didn't know him.

Detective Heredia again asked defendant why Adams went to his house. Defendant again said it was because Jimmy and Adams knew each other. Adams had been to his house one time, but defendant did not really know him. Heredia and Moore

told defendant that they knew defendant changed the carpet, and Waters did not send anyone to do it. They speculated that Adams got hurt in the house, and the carpet and fire had something to do with it. They asked defendant who he was protecting. Defendant said he didn't start the fire, and he didn't know where Adams was.

At the conclusion of this interview, defendant was arrested for possession of stolen property, based on an item which had been found at the house. Defendant was subsequently released from custody when the officers determined the property found at his house was not stolen.

DISCOVERY OF ADAMS'S BODY

On October 23, 2010, a farmworker found Frank Adams's decomposed body in an irrigation "sump" about 30 miles from Bakersfield. There was a raised dirt berm and standing water in the sump. Adams's decomposed body was inside a large plastic pool storage box which had been dumped into sump. The box was similar to the one that Officer Herriott saw in defendant's backyard but failed to search. The box was four feet long and two feet wide.

The pathologist determined Adams died from a single gunshot wound to the chest. The bullet entered his left back, went through his heart and lungs, and lodged under the skin of his right front chest; the path was back left to front right, in a downward angle. The projectile was recovered but not matched to any weapon. The fatal wound could have cause either massive external bleeding, or the blood could have pooled inside his chest. The pathologist could not determine which scenario occurred because Adams's body was decomposed when it was found.

Adams had also been shot in the upper left arm; the bullet traveled from back to front, in an upward direction. The bullet passed through his arm and it was not recovered. There was some alcohol in defendant's system.

The pathologist did not find any indication of stippling on Adams's body from either gunshot wound. The lack of stippling meant the gunman was two or more feet away from the victim when he fired.

Additional Evidence

The bloody broken glass found in defendant's trash can after the fire contained DNA which matched Adams's DNA profile.

The pool box that contained Adams body also had an insert from Adams's right sandal. The insert was found near his body and one of his sandals. It matched the left shoe insert found in defendant's backyard after the fire. The pool box also contained a package of chlorine, a pool brush, goggles, a snorkel, and a beer cap.

Detective Moore interviewed Amy Campos, and asked her to describe the living room of defendant's house. Campos said there were two sofas and a coffee table. Campos said the sofas were adjacent to each other on the south and east walls.

Officer Herriott testified that when he searched the house on the day that Adams disappeared, there were two sofas in the living room. In contrast to Campos's description, Herriott testified the sofas were across from each other on the east and west walls. Herriott did not see a wrought iron or any type of coffee table, or any large black base for such a table, anywhere in the house.

Officer Galvan testified that defendant sat on the sofa on the east side of the living room while Officer Herriott searched the house. Galvan could not remember if there was a coffee table in the living room. Galvan did not see Herriott look under the couches during the search.⁷

Investigator Ochoa determined the fire was intentionally started with combustible liquid in the couch which was on the northwest side of the living room.

⁷ The prosecution's theory was that defendant moved one of the couches to cover blood stains on the carpet.

Officer Herriott did not see a power washer when he searched the property on the day that Adams disappeared. However, Detective Moore saw a power washer in the backyard after the fire.

Arrest of Defendant

Defendant apparently fled to Mexico. He called Salcedo, who advised him to return. On January 31, 2011, Salcedo picked up defendant in Mexico and drove him back to California. Defendant was arrested in San Diego for Adams's murder and transported back to Kern County.

Defendant was charged with count I, first degree premeditated murder of Adams (§§ 187, subd. (a), 189), with an enhancement for personal discharge of a firearm causing death (§ 12022.53, subd. (d)) and count II, arson (§ 451, subd. (b)), with gang enhancements (§ 186.22, subd. (b)(1)); and two prior prison term enhancements (§ 667.5, subd. (b)).

TRIAL EVIDENCE ABOUT ADAMS'S MURDER

Disposal of Adams's Body

At trial, Jose Gutierrez testified about his involvement in the disposal of Adams's body. The court granted the prosecution's motion to give use immunity to Gutierrez for his testimony.

Gutierrez denied that he knew defendant. One night in October 2010, however, Alvaro "Wally" Quintero (Wally)⁸ drove to Gutierrez's house and asked him to help dump some trash. Gutierrez testified Wally was driving a Cadillac Escalade SUV. Gutierrez identified a photograph of defendant's Escalade as the vehicle that Wally was driving.

⁸ Both Quintero brothers testified, and we will refer to them by their first names; no disrespect is intended.

Gutierrez testified he got into the Escalade, and Wally drove to a “reservoir.” Gutierrez identified a photograph of the irrigation sump where Adams’s body was found as similar to the “reservoir.” Wally backed up to the sump and told Gutierrez to help him dump a large box out of the vehicle. Wally and Gutierrez dragged a large box out of the Escalade and dumped it into the water. Gutierrez did not see a body or look inside the box. Gutierrez identified a photograph of the pool box that was found in the sump as the item they dragged out of the Escalade. Wally drove Gutierrez back to his house after they finished.

Defendant’s Postarrest Admissions

Fernando Quintero (Fernando), Wally’s brother, did not know Adams and he was in custody when Adams disappeared. In October or November 2011, however, Fernando was housed with defendant at the Lerdo jail. Fernando and defendant were friends, but they had not seen each other for nearly 12 years.

Fernando testified defendant approached him and they started talking. Defendant said he was in custody because “he had shot somebody, killed somebody.” Defendant said it happened in his house. Fernando testified defendant said that “some girl had took some—that guy over there, and when he walked in he had shot him in the head, I think.” Defendant said he shot the man when “he got dropped off,” and “[a]s soon as he walked inside the door.” Defendant said the guy had been charging him rent.

Fernando testified defendant said that after he shot the man, he “took the body and put it in a box in the garage, cleaned up everything.” Defendant said a police officer came to the house that day and walked around, but “he didn’t see the body inside the box.” Defendant said that after the police left, he called Wally about getting rid of the body. Defendant said he did not know what happened to the body until the police found it. Defendant said the people who dumped the body “were dumb” because “they didn’t

do it right, didn't get rid of it right," and they "didn't do what they were supposed to do."⁹

At the time they were housed together, Fernando was in custody for a drug offense. Fernando also had prior convictions for drug possession, attempted carjacking with a gun allegation, possession of stolen property, assault with force likely to cause great bodily injury, and escape from work release. He had served time in prison and violated parole.

Fernando admitted that he did not immediately contact the police and report defendant's statements. At some point after their conversation, Fernando was released from custody. While he was out of custody, Fernando spoke to his brother and Jose Gutierrez about this case. In 2012, Fernando was again arrested, and had pending charges for drugs and giving a false name to an officer. He believed his brother had turned him in for one of the drug cases. In May 2012, Fernando spoke to Detective Moore about defendant's statements because he wanted to help his brother and get a lesser sentence for himself.

When he spoke to Detective Moore, Fernando knew defendant's first name was "Joey," but he did not know his last name. He initially referred to defendant as "Jesse" because he did not want to disclose his name. Fernando also implicated Jose Gutierrez in the case. Fernando testified for the prosecution in exchange for dismissal of pending charges and placement in a witness protection program.¹⁰

⁹ In contrast to Fernando's statements, Adams was fatally shot in the chest and not the head, and Officer Herriott said the pool box was in the backyard and not in the garage. There is no evidence Adams collected rent or had anything to do with Denise Waters. During the videotaped interview, however, defendant told the police that Jimmy also rented a house from Waters, and he believed Jimmy sent Adams to his house, thus indicating that defendant thought Jimmy, Adams, and Waters were somehow connected.

¹⁰ Raymond "Panther" Morales and Jimmy "Rookie" Escandon refused to testify. They were in custody, however, and were brought into the courtroom for various witnesses to identify.

Verdict and Sentence

The prosecutor's closing argument theory was that defendant believed Escandon sent Adams to spy on him, he was paranoid and jealous because of Escandon's alleged affair with Salcedo, and he decided to instantly kill Adams when he entered the house. After a jury trial, defendant was found guilty of count I, first degree premeditated murder and count II, arson. The jury found the firearm enhancement not true. The court granted the prosecution's motion to dismiss the prior prison term enhancements.

Defendant was sentenced to 25 years to life for count I, and a consecutive term of eight years for count II.

DISCUSSION

I. Insufficient Evidence of Premeditation

Defendant contends his conviction for first degree murder of Adams must be reversed because there is insufficient evidence of premeditation, willfulness, and deliberation. Defendant asserts there is no evidence of planning activity, defendant did not entice Adams to drive to his house, the events leading to the murder are unknown, there may have been multiple people in the house when Adams disappeared, the motive evidence was weak and speculative, and the evidence was equally consistent with an unplanned killing that occurred as a result of a heated exchange.

We agree that there is insufficient evidence of first degree murder, and reduce defendant's conviction to second degree murder.

A. Murder

"A conviction for murder requires the commission of an act that causes death, done with the mental state of malice aforethought (malice). (§ 187.) Malice may be either express or implied. (§ 188.) Express malice is an intent to kill. [Citation.] Implied malice does not require an intent to kill. Malice is implied when a person willfully does an act, the natural and probable consequences of which are dangerous to

human life, and the person knowingly acts with conscious disregard for the danger to life that the act poses. [Citation.]” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.)

“The law recognizes two degrees of murder. The degrees are distinguished by the mental state with which the killing is done. A person who kills unlawfully with implied malice is guilty of second degree murder. [Citation.] A person who kills unlawfully and intentionally is guilty of first degree murder if the intent to kill is formed after premeditation and deliberation. [Citations.] If the person kills unlawfully and intentionally but the intent to kill is not formed after premeditation and deliberation, the murder is of the second degree. [Citation.]” (*People v. Gonzalez, supra*, 54 Cal.4th at p. 653.)

Thus, “[a] killing with express malice formed willfully, deliberately, and with premeditation constitutes first degree murder. [Citation.]” (*People v. Beltran* (2013) 56 Cal.4th 935, 941.) An unlawful killing of a human being with malice aforethought but without the additional elements of willfulness, premeditation, and deliberation that would support a conviction of first degree murder, is second degree murder. (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

B. Second Degree Murder

We begin by finding overwhelming evidence of defendant’s malice aforethought and intent to kill Adams to support a conviction for second degree murder in this case. Defendant supplied his possible motive when he talked to the officers and repeatedly expressed his anger about Escandon’s affair with Salcedo, his belief that Escandon sent Adams to his house to spy on him, that defendant was “tripping out” when Adams arrived at his house, he thought Escandon and Salcedo were using Adams to set him up, and that Escandon was evil.

After Adams disappeared into the house, defendant went outside and told Adams’s wife to leave, and created the story that Adams had left and would return later—a somewhat plausible story that he repeated and embellished to the police, who apparently

believed it. Nearly two hours passed after Adams's disappearance until the officers entered the house, conducted the cursory search for Adams, and walked by the pool box where Adams's body was likely dumped. Defendant had more than enough time to clean up and remove any evidence of Adams's murder, get rid of the blood-stained coffee table, and move the couch to perhaps cover evidence embedded in the carpet. Defendant's efforts were aided by the nature of the officers' cursory search and failure to open the pool box, which was large enough to conceal a body.

Just days after Adams disappeared, defendant appeared at his friend's party with a handgun, danced around with it, talked about getting rid of the carpet in his house, and said that he "hoped the police wouldn't go check videos of the carpet stores during the investigation."

As the detectives later determined, defendant went to great efforts to quickly change the carpet and claim the management company arranged for the work. He hired Rivera to change the carpet, used Rivera's credit card to pay for the carpet, and told Rivera that he damaged the carpet when he left on the water faucet. Rivera discovered the carpet and padding were still wet when he worked in the living room. He warned defendant that he needed more time to glue down the padding so the carpet would not move, but defendant said he did not care.

The firefighters responded to the suspicious fire at defendant's house the day after Rivera had worked on the carpet. Defendant obviously decided that replacing the carpet, moving the couch, and throwing out the remains of the coffee table were not sufficient to hide whatever happened in the house. During the fire investigation, the detectives determined the fire had been intentionally started with a combustible liquid in the couch which had been moved.

It was also during the fire investigation when the bloody broken glass was found in defendant's trash, and a left shoe insert was found in the backyard. Adams's DNA was on the broken glass.

The firefighters did not see a pool box in the backyard because Jose Gutierrez had already joined Wally in defendant's Escalade and dumped it into the irrigation sump. When Adams's body was found in the irrigation sump, it was inside a pool box similar to the one that had been in defendant's backyard. The box contained a right shoe insert from Adams's sandal which matched the left shoe insert found in defendant's backyard.

After defendant was arrested, he told Fernando that he was in custody because he shot and killed somebody in his house. Defendant said he shot the man "[a]s soon as he walked inside the door," he put the body in a box and cleaned up, and the police never looked in the box when they walked around the house. Defendant said he called Wally to get rid of the body after the police left. Defendant complained that the people who dumped the body were stupid and did not do it right.

Based on these facts, there is overwhelming evidence of malice and defendant's intent to kill Adams to support a conviction for second degree murder. "[P]roof of unlawful 'intent to kill' is the functional equivalent of express malice. [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 601.) "[W]hen an intentional killing is shown, malice aforethought is established." (*People v. Saille* (1991) 54 Cal.3d 1103, 1114.)

C. Premeditation and Deliberation

In this case, however, defendant was convicted of first degree murder, and challenges the sufficiency of the evidence of premeditation, deliberation, and willfulness.

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] 'Deliberation' refers to a careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080; *People v. Solomon* (2010) 49 Cal.4th 792, 812.)

"An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time."

(*People v. Stitely* (2005) 35 Cal.4th 514, 543.) “The 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.]” (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390.)

Deliberation and premeditation must be distinguished from malice aforethought. (*People v. Bender* (1945) 27 Cal.2d 164, 180, overruled on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101, 100.) A willful, deliberate, and premeditated murder requires “substantially more reflection than may be involved in the mere formation of a specific intent to kill.” (*People v. Thomas* (1945) 25 Cal.2d 880, 900; *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1264 (*Boatman*).)

“Malice aforethought is ‘an essential element of the crime of murder whether it be of the first degree or of the *second* degree ... [¶] ... [¶] ... [and] is not synonymous with the elements of deliberation and premeditation’ [Citation.] ‘Obviously, if malice aforethought necessarily included or presupposed a deliberate and premeditated intent[,], then all murder would be of the first degree because any homicide, to constitute murder at all, must be an unlawful killing with malice aforethought; and the Legislature would be guilty of an utterly meaningless classification of murder into two degrees, with no field in which the second could operate. Likewise it is obvious that the mere intent to kill is not the equivalent of a deliberate and premeditated intent to kill.’ [Citation.]” (*Boatman, supra*, 221 Cal.App.4th at p. 1264, italics in original.)

While the process of premeditation and deliberation “ ‘ ‘ ‘does not require any extended period of time,’ ” ’ ” this definition “has led to criticism that courts have ‘collapsed any meaningful distinction between first and degree murder.’ [Citations.] In response, our state Supreme Court reaffirmed the significance of ‘preexisting reflecting, of any duration’ to distinguish first degree murder (based on premeditation and

deliberation) from second degree murder. [Citations.]” (*Boatman, supra*, 221 Cal.App.4th at p. 1265.) “The very definition of ‘premeditation’ encompasses the idea that a defendant thought about or considered the act beforehand.” (*People v. Pearson* (2013) 56 Cal.4th 393, 443.)

D. Anderson

In this case, there is no direct evidence of defendant’s mental state aside from his pretrial statements to the officers and his post-arrest statements while in jail. In these statements, however, defendant never revealed exactly what happened in his house when Adams knocked on the door and entered the front room. Thus, the evidence of premeditation and deliberation in this case was necessarily circumstantial. (See, e.g., *Boatman, supra*, 221 Cal.App.4th at p. 1265.)

The use of circumstantial evidence to prove first degree murder was addressed in *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*), where the court explained:

“Given the presumption that an unjustified killing of a human being constitutes murder of the second, rather than of the first, degree, and the clear legislative intention to differentiate between first and second degree murder, [a reviewing court] must determine in any case of circumstantial evidence whether the proof is such as will furnish a *reasonable foundation* for an inference of premeditation and deliberation [citation] or whether it ‘leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation.’ ” (*Id.* at p. 25, italics added in original.)

Anderson identified three basic categories of evidence relevant to finding premeditation and deliberation: (1) events before the murder that indicate planning; (2) a motive to kill; and (3) a manner of killing that reflects a preconceived design to kill. (*People v. Gonzalez, supra*, 54 Cal.4th at p. 663; *Anderson, supra*, 70 Cal.2d at pp. 26–27.) “Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least

extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3).” (*Anderson, supra*, at p. 27.)

The *Anderson* factors do not require a “special combination,” and they are not accorded any particular weight, but these factors are a guide for an appellate court to assess whether the evidence supports an inference that a killing or attempted killing occurred because of preexisting reflection. (*People v. Bolin* (1998) 18 Cal.4th 297, 331–332.) “Drawing on these three categories of evidence, *Anderson* provided one framework for reviewing the sufficiency of the evidence supporting findings of premeditation and deliberation. In so doing, *Anderson*’s goal ‘was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.’ [Citation.]” (*People v. Solomon, supra*, 49 Cal.4th at p. 812.)

“Unreflective 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.]” (*People v. Thomas* (1992) 2 Cal.4th 489, 517.)

“Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation that was previously set forth. Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.] The standard of review is the same in cases such as this where the People rely primarily

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, 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 be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.’ [Citation.]” (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

Using *Anderson* as a guide, we turn to the instant record.

E. Analysis

Given the evidentiary limitations in this case, we can only speculate as to what happened relevant to the elements of premeditation, deliberation, and willfulness, even based on defendant’s statements and actions, and the inferences raised by the *Anderson* factors.

When a defendant commits an execution-style killing, a reasonable trier of fact may find premeditation and deliberation based solely on the manner of killing, with little or no evidence of planning or motive. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127; *People v. Romero* (2008) 44 Cal.4th 386, 401; *People v. Bloyd* (1987) 43 Cal.3d 333, 348.) The manner-of-killing evidence may be so strong on its own that it supports the jury’s finding of premeditation and deliberation without evidence of motive or planning. (*People v. Hawkins* (1995) 10 Cal.4th 920, 957, overruled on other grounds in *People v. Lasko, supra*, 23 Cal.4th at p. 110 and *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) In this case, however, Adams did not die from an execution-style gunshot and there was no stippling on his body, indicating that the two gunshots to his arm and back were not fired at close range. Thus, the manner of killing evidence is not so strong as to prove premeditation and deliberation without evidence of motive or planning.

As to the other *Anderson* factors, we have already found strong inferences of defendant's possible motive based on his statements to the officers about his anger toward Escandon and his belief that Escandon sent Adams to spy on him. Aside from his obsession with Escandon, however, we can only speculate about what happened when Adams entered the house. There is no evidence of any planning activities. Indeed, there is no evidence that defendant knew Adams was coming to his house. Adams's wife testified they were on their way to the store when Adams gave her directions to defendant's house and said he wanted to stop by and check on "Jimmy's" whereabouts. Adams's wife waited in front of defendant's house but she did not hear any gunshots or sounds consistent with an assault. Defendant admitted that he was "tripping" when he saw Adams walk up to the house, further indicating that he did not know Adams was going to be there.

The prosecution theory was that defendant premeditated the murder based on the brief pause between the time that Adams knocked on the front door and someone let him in, and that defendant used that short period to prepare to murder Adams immediately upon entry. This argument is pure speculation because there is no evidence about what happened inside the house. That same brief pause could have resulted from the occupant hearing someone knocking on the front door, and walking from another room to answer it. While defendant told Fernando that he shot the man when "he got dropped off," and "[a]s soon as he walked inside the door," these statements show his intent to kill and express malice, rather than a willful, deliberate, and premeditated murder.

In reviewing a conviction for substantial evidence, "[w]e may *speculate* about any number of scenarios that may have occurred A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] ... A finding of fact must be an inference drawn from evidence rather than ... a mere speculation as to probabilities without evidence.'

[Citations.]" (*People v. Morris* (1988) 46 Cal.3d 1, 21, italics in original; disapproved on

other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543.) In the absence of any substantial evidence of premeditation, deliberation, and willfulness, we must conclude that the evidence will not support a conviction for first degree murder.

F. Conclusion

We have concluded there is insufficient evidence of premeditation to support defendant's conviction for first degree murder. That conclusion does not end our analysis.

Section 1260 states:

“The court may reverse, affirm, or modify a judgment or order appealed from, *or reduce the degree of the offense* or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances.” (Italics added.)

Under section 1260, a reviewing court is not restricted to the remedies of affirming or reversing a judgment of conviction. “ ‘Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. [Citations.]’ ” (*People v. Edwards* (1985) 39 Cal.3d 107, 118; *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278; *People v. Muszynski* (2002) 100 Cal.App.4th 672, 683.)

While we have found insufficient evidence of premeditation and deliberation to support defendant's conviction for first degree murder, there is overwhelming evidence of his malice and intent to kill to support a conviction for second degree murder. We therefore reduce defendant's conviction to second degree murder and remand the matter for resentencing.

II. The Firearm Allegation

As explained above, defendant was charged with count I, first degree premeditated murder of Adams, with an enhancement for personal discharge of a firearm causing death (§ 12022.53, subd. (d)). Defendant was convicted of count I, but the jury found the firearm enhancement not true.

Defendant asserts the inconsistencies between the jury's findings on count I and the firearm enhancement demonstrate that the jury had a reasonable doubt whether he was the gunman, or whether he premeditated the murder as an aider and abettor. Defendant further argues there is insufficient evidence he was an aider and abettor.

We have already found insufficient evidence to support defendant's conviction for first degree murder. The jury's finding on the firearm enhancement does not change our conclusion that his conviction must be reduced to second degree murder. "[A] criminal defendant ... is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient." (*United States v. Powell* (1984) 469 U.S. 57, 67; *People v. Lewis* (2001) 25 Cal.4th 610, 656.)

"It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.]" (*People v. Lewis, supra*, 25 Cal.4th at p. 656.) The existence of inconsistent verdicts does not imply that the jury must have been confused. (*Ibid.*) "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citations.]" (*Ibid.*) The rule that inconsistent verdicts are allowed to stand "applies equally to inconsistent enhancement findings ... and to an enhancement finding that is inconsistent with the verdict on a

substantive offense. [Citation.]” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405.) Apparent inconsistencies between verdicts, or between a verdict and a finding on an enhancement or special circumstance allegation, do not impeach the validity of the verdict. (*Ibid.*; *People v. Avila* (2006) 38 Cal.4th 491, 600–601.)

We have determined there is substantial evidence to support a conviction for second degree murder. “Thus, even if we assume for argument’s sake that the jury verdicts were inconsistent, that conclusion, does not, of itself, warrant reversal.” (*People v. Lewis, supra*, 25 Cal.4th at p. 656.)

DISPOSITION

Defendant’s conviction for arson is affirmed. Defendant’s conviction for first degree premeditated murder is reversed and reduced to second degree murder. The sentence is stricken and the matter is remanded for resentencing.

POOCHIGIAN, J.

WE CONCUR:

LEVY, Acting P.J.

KANE, J.