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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY YALAU CHEN,

Defendant and Appellant.

B289614

(Los Angeles County  
Super. Ct. No. GA098556)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Villalobos, Judge. Affirmed.

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Idan Ivri and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Andy Yalau Chen of the first degree murder of Min Gu and illegal cultivation of marijuana. Chen believes his convictions must be reversed because there was insufficient evidence to prove the murder was premeditated, and his counsel conceded the marijuana cultivation charge without his express consent. We disagree and affirm the judgment.

## **BACKGROUND**

### **I. Gu disappears**

Gu came to the United States from Shanghai, China in January 2016. While in the United States, he lived with his cousin Yanwen “Vivi” Gu and her husband Andy Lin. Gu made a living as a “loan shark” and carried a lot of cash on his person.

Chen operated several marijuana grow houses. Chen borrowed somewhere between \$3,000 and \$30,000 from Gu and gave Gu a Rolex watch as collateral. Gu was concerned about repayment of the loan. Vivi overheard Gu tell Chen, “I don’t want to hear you talk about it. I want you to do something about it.” Gu told Chen’s friend, Jun Li that he was going to report Chen’s marijuana grow operation to the police if Chen did not repay him. Li cautioned Gu not to use violence against Chen because people in the United States were likely to have a gun.

On February 19, 2016, Gu, Lin, Vivi, and Li went out to dinner. Earlier that day, Gu told Vivi that Chen was supposed to repay him around \$3,000 or \$4,000. During dinner, Gu exchanged text messages with Chen on his cell phone. Gu asked Vivi to translate part of a message from Chen that contained Cantonese characters. Shortly after receiving the message, Gu became very angry and left to go to Chen’s house.

About an hour after Gu left dinner, Vivi received a message from Chen, which she showed to Li. The message said either,

“I’ve given him a chance, but he didn’t take it” or “I’ve given him a chance, but it was your brother who did not cherish his life.”<sup>1</sup>

## II. The investigation

Vivi reported Gu missing after he did not return home for three days. Gu’s cell phone records showed that he called Chen prior to the last time he was seen. Chen told the police that he did not know Gu well and that the last time they spoke was several days before Gu disappeared. He denied knowing what happened to Gu.

Over a month after Gu disappeared, police responded to a report of a suspicious vehicle with fogged up windows that was emitting a foul smell. Police found Gu’s badly decomposed body in the car’s trunk. The cause of death was multiple gunshot wounds, including a fatal head wound and a nonfatal wound on the left shoulder.

A jacketed hollow point bullet fragment was recovered from Gu’s shoulder, while the bullet that struck Gu’s head exited the other side of his skull. Gu’s blood was found in the trunk and on a cooler in the backseat. Gu’s empty wallet was recovered at the scene.

Detectives found a suitcase with his belongings and paperwork in Gu’s room, but did not find the Rolex that Chen had given to him as collateral for the loan.

When police took Chen into custody, he was wearing a Rolex and carrying \$2,787.31 in cash. Officers found a \$3,000 electric bill for a house on Sultana Avenue in Temple City. They also recovered a digital scale, a timer and other devices used to

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<sup>1</sup> Although they were biological cousins, Vivi referred to Gu as her brother.

regulate a water supply, two separate sets of keys, six garage door openers, eight cell phones, and several small Ziploc bags. Chen admitted that he borrowed \$5,000 from Gu, claiming to have repaid the debt. He continued to deny any knowledge of Gu's death and suggested someone from China may have come after Gu because he had stolen money from someone in Shanghai.

Police searched the house on Sultana Avenue and found a significant marijuana grow operation. In the garage, they found Gu's blood on the door, floor, a mop, and a dustpan. They also found indicia of cleaning activity and additional blood underneath the floorboards. Police located a nine-millimeter Winchester bullet cartridge case in the garage and another in the front room of the house, both fired from the same gun.

Detectives then searched Chen's family home in Baldwin Park. They found a box of 31 jacketed hollow point, nine-millimeter bullets, six loose bullets in a plastic container, and a loaded, nine-millimeter Winchester, semi-automatic handgun.<sup>2</sup>

Chen told police that he did not stay at the house on Sultana Avenue but only stopped by a few times a week to tend to the marijuana. He explained that he sold marijuana for \$1,600 per pound and produced 15 to 20 pounds of marijuana every month and a half to three months.

When detectives told Chen that they would charge him with robbery and murder, Chen explained that a man named "Wang," whom he only recently met, killed Gu at the Sultana Avenue house. Chen said he repaid Gu that night but Gu began

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<sup>2</sup> A firearms analysis revealed that the shell casings found at the Sultana Avenue house had not been fired from the handgun recovered at Chen's family home.

to yell at him about the delay. Wang got upset and unexpectedly shot Gu in the head and chest. Chen helped clean the house on Sultana Avenue while Wang put Gu's body in the trunk of the car. Wang had since disappeared, and Chen did not know how to contact him.

Chen was charged with murder (Pen. Code, § 187, subd. (a); count 1), and one count of cultivation of marijuana (Health & Saf. Code, § 11358; count 2). Firearm enhancements were alleged as to count 1. (Pen. Code, § 12022.53, subds. (b), (c), & (d).)

A jury found Chen guilty of first degree murder and marijuana cultivation, but found the firearm allegations to be not true. The court sentenced him to 25 years to life in prison for first degree murder. The trial court reduced the felony conviction for marijuana to a misdemeanor, and ordered Chen to serve a concurrent sentence of 180 days.

## **DISCUSSION**

Chen argues that there was insufficient evidence to support his first degree murder conviction because there was insufficient evidence of premeditation and deliberation. He also contends that the marijuana cultivation conviction should be reversed because the record fails to affirmatively show that he knowingly and intelligently consented to concede guilt at trial. Both contentions fail.

### **I. Substantial evidence supports Chen's first degree murder conviction**

When determining whether the evidence was sufficient to sustain a criminal conviction, “ ‘we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is

reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” ’ ’ ( *People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. ( *People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears “ ‘that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].’ ” ( *People v. Bolin* (1998) 18 Cal.4th 297, 331.) This standard applies equally to cases in which the prosecution relies primarily on circumstantial evidence. ( *People v. Salazar* (2016) 63 Cal.4th 214, 242.) We must accept logical inferences the trier of fact might have drawn from the evidence. ( *Ibid.* )

Murder is of the first degree when it is willful, deliberate and premeditated. (Pen. Code, § 189; *People v. Elmore* (2014) 59 Cal.4th 121, 133.) Premeditation and deliberation require more than a showing of intent to kill. ( *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) An intentional killing is premeditated and deliberate if it is considered beforehand and occurred as the result of preexisting thought and reflection, rather than as the product of an unconsidered or rash impulse. ( *People v. Pearson* (2013) 56 Cal.4th 393, 443.)

We typically consider three categories of evidence when determining whether a finding of premeditation and deliberation is adequately supported: motive, planning activity, and manner of killing. ( *People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) These factors are not all required and are not exclusive but are a framework to guide assessing the evidence. ( *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) Where there is evidence of all three

factors, a first degree murder verdict is typically sustained.  
(*People v. Sandoval* (2015) 62 Cal.4th 394, 424–425.)

Here, there was evidence of all three factors. First, there was evidence of motive. Chen owed Gu money and did not pay him back. Gu then threatened to report Chen's marijuana grow operation to authorities. As explained by Chen himself, the scheme produced significant amounts of marijuana and generated a relatively large amount of money. Gu's body was also found with his empty wallet despite the fact that he always carried large amounts of cash on his person. Chen also took back the Rolex which he had given Gu as collateral for the loan. These facts tend to show that Chen killed Gu for his own personal financial gain.

There was also evidence of planning, thought, and reflection. Chen's message to Vivi shortly after Gu disappeared read, "I've given him a chance, but it was your brother who did not cherish his life." This statement gives rise to an inference that Chen gave Gu a fatal ultimatum, which Gu did not accept. The evidence also supports an inference that Chen lured Gu to the house on Sultana Avenue. We know that Chen was one of the last persons that Gu called on his cell phone and that Gu was communicating with Chen before leaving dinner. Gu was upset by one of Chen's messages and spoke about collecting on Chen's debt that day. This supports an additional inference that Chen lured Gu to the house on Sultana Avenue where Gu was murdered.

Finally, the manner of killing provided substantial evidence to support a finding of premeditation. Gu was shot in the head and shoulder while inside the Sultana Avenue house. Chen admitted the shots were aimed at Gu's head and chest.

Although there was no evidence of gun residue or stippling on Gu's body, this was likely due to the fact that his body had been decomposing for a month in the car's trunk. Nevertheless, Chen admitted that Gu was shot to death inside the house on Sultana Avenue, including a fatal shot to his head. There was sufficient evidence for the jury to infer that Chen committed a deliberate and premeditated murder.

Chen argues that the conflict between him and Gu over the debt is actually consistent with a rash and impulsive killing. Chen suggests that Gu initiated the dispute over the unpaid debt and that the record demonstrates the shooting was likely the result of an unexpected confrontation after Gu angrily left dinner and arrived at the Sultana Avenue house. While this is certainly one possible theory supported by the evidence, the record also supports an inference that the killing was premeditated. We do not reweigh the evidence on appeal. (*People v. Snow* (2003) 30 Cal.4th 43, 66.) After the phone altercation with Chen, Gu told Li that he was going to see Chen to demand his money back. Chen's message upset Gu so much that he abruptly left dinner to confront Chen. While Chen's theory does find some support in the record, it was also reasonable for the jury to conclude that Chen was expecting a confrontation with Gu that day. Police also found the same type of bullets used to kill Gu at Chen's home, suggesting that Chen may have armed himself or the individual referred to as Wang prior to the confrontation.

II. Defense counsel's concession was not the equivalent of a guilty plea

Next, Chen argues pursuant to *People v. Farwell* (2018) 5 Cal.5th 295, his conviction for marijuana cultivation must be reversed because, during opening statement and closing



argument, his counsel conceded the charge without Chen's express consent.

In *People v. Farwell*, *supra*, 5 Cal.5th at page 298, defendant was charged with vehicular manslaughter and driving with a suspended license. Defense counsel stipulated to all the elements of the suspended license charge and the trial court advised the jury that it must accept those stipulated facts as true. (*Id.* at p. 299.) There was no showing that counsel discussed the stipulation or its legal effect with Farwell. (*Id.* at p. 307.) Nor did the trial court advise Farwell of his constitutional rights implicated by a guilty plea or the stipulation. The jury found Farwell guilty as charged. (*Ibid.*) The Supreme Court set aside the conviction, finding that the stipulation was tantamount to a guilty plea. (*Id.* at p. 308.)

Here, unlike *Farwell*, there was no stipulation admitting the elements of marijuana cultivation. Rather, the jury was instructed that the prosecutor had to prove guilt on all counts beyond a reasonable doubt and that statements by counsel were not evidence. Defense counsel's opening statement and closing argument conceding Chen's guilt on the marijuana cultivation charge did not change the burden of proof, nor limit the scope of the jury's role.

Similarly, Chen relies on *McCoy v. Louisiana* (2018) \_\_\_ U.S. \_\_\_ (138 S.Ct. 1500). In *McCoy*, defendant was charged with a triple murder. His counsel attempted to avoid a death sentence at the penalty phase by conceding that McCoy committed the murders. When McCoy learned his counsel was going to concede guilt, his request for new counsel was denied. (*Id.* at p. \_\_\_ [138 S.Ct. at p. 1506].) McCoy protested and said his attorney was selling him out by maintaining that he was a murderer. (*Ibid.*)

During opening statement, defense counsel told the jury there was “no way reasonably possible” that they could hear the prosecution’s evidence and reach “‘any other conclusion than . . . McCoy was the cause of these individuals’ death.’” (*Ibid.*) McCoy testified in his own defense, maintaining his innocence and giving an unlikely alibi. (*Id.* at p. \_\_\_\_ [138 S.Ct. at p. 1507.] In closing, defense counsel reiterated that McCoy was the killer. (*Ibid.*) The jury found McCoy guilty of first degree murder on all three counts. (*Ibid.*)

This case is distinguishable from *McCoy*. Chen did not object to his counsel’s decision to concede guilt on the marijuana cultivation charge. Chen himself readily discussed with police the details of his marijuana cultivation operation including the specific amount of marijuana he was producing and the monthly income it generated. It appears that both Chen and his counsel conceded that Chen grew marijuana in an attempt to appear candid with investigators and the jury. The decision to concede various degrees of guilt to maintain credibility before the jury does not support Chen’s claim that his counsel was ineffective. (See, e.g., *People v. Freeman* (1994) 8 Cal.4th 450, 498.)

## DISPOSITION

The judgment is affirmed.  
NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.