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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. JUAN BRAVO LOPEZ, Defendant and Appellant.	B268817 (Los Angeles County Super. Ct. No. TA070338)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura R. Walton, Judge. Affirmed in part, reversed in part, and modified with directions.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Juan Bravo Lopez raises contentions of trial error following his conviction, by jury trial, of first degree murder (Pen. Code, § 187).[1] For the reasons discussed below, the judgment is affirmed in part, reversed in part, and modified.

BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *Martha H.'s murder.*

In April 2003, Martha H. rented an apartment owned by Veronica Arnold on East Queensdale Street in Compton. Martha lived upstairs, directly above Emilia Ramos. Martha had three children, and Lopez was the father of two of them—Edison and Cynthia. Martha's third child, Luis, was from a former relationship. Martha lived in this apartment with all three of her children and with Lopez.

Luis testified he was 10 years old in May 2003. At that time, Edison was five and Cynthia was three. Luis had known Lopez since he was three years old. He described Martha and Lopez's relationship as "verbally abusive." They had broken up at least two times and gotten back together. The last time Luis saw his mother alive was at the Compton apartment. Martha and Lopez had an argument in the living room. After the fight, Martha and Luis went into the bedroom and Lopez stayed in the

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[1] All further statutory references are to the Penal Code unless otherwise specified.

living room. When Luis fell asleep, his mother was watching Spanish soap operas. That was the last time he ever saw her.

When Luis woke the following morning, Lopez told him that Martha had gone to Mexico with her sister. Lopez had scratches on his face and was rushing around the apartment packing things up and putting them into a car. A couch had been pushed up against the living room bunk bed. Lopez told Luis to pack his belongings. After they finished packing, Lopez, Luis and the other two children got into the car and drove, without stopping, to Lopez's mother's house in Mexico. But Martha was not there. At one point, Luis asked Lopez if he had killed Martha. Luis asked the question because "my mom wouldn't go anywhere without taking me or . . . my . . . brother and sister." Lopez "kind of hesitated, but then he told me that he didn't." Lopez stayed in Mexico only for a few days and then he left. Luis remained in Mexico for about a month until his uncle arrived with some police officers and took him back to California.

On the Sunday after Lopez left with the children, Ramos noticed a rotten smell coming from Martha's apartment. By Monday, Ramos could no longer stand the smell so she alerted Arnold. Upon gaining entry into the apartment, Arnold noticed a very strong odor coming from the living room and, after moving a sofa, discovered Martha's body under the bunk bed.

Dulce Sanchez is the daughter of Lopez's sister. According to Sanchez, Lopez and Martha were constantly breaking up and getting back together. The last time Sanchez saw Martha was on a Friday, when Martha picked up her daughter from Sanchez's house. The following morning (this was apparently Saturday, May 10, 2003), Lopez came over to Sanchez's house looking for her father. He seemed to be in a hurry and was very nervous.

His eyes were "watery" and red, and there were red scratches under his eye. At some point, Lopez walked back outside and just drove off in her father's Bronco. Sanchez had not given Lopez permission to take the Bronco, nor had she given him the keys.

When Sanchez's father came home, he was angry because the Bronco was gone and he sent Sanchez to look for it. Sanchez found the Bronco parked one street over from Lopez and Martha's apartment. As Sanchez approached the apartment, Lopez walked out carrying a television set. He told Sanchez he was taking things because Martha was going to return and, if she saw him, she would call the police. Sanchez told him she had to return the Bronco because her father had gotten mad. When she asked if Lopez needed any help, he told her not to go inside the apartment. He said, " 'No, get me out of here.' " Lopez drove Sanchez back to her house in the Bronco. Lopez asked Sanchez's father if he could borrow Sanchez's mother's car to take his things to his brother's house in Long Beach. Her father agreed. Lopez took the car and never returned.

b. *Police investigation*.

Deputy Sheriff Michael Robinson, a crime scene investigator with the Los Angeles County Sheriff's Department, responded to a dead body call at Martha's apartment on Tuesday, May 13, 2003. There was a bunk bed in the living room with a sofa pushed up against it. Martha's body was on the floor underneath the bottom bunk. Bedding had been wrapped around her body, which was naked except for a shirt. There was a belt wrapped around her neck and another belt next to her body.

Jaime Lintemoot, a criminalist assigned to the Los Angeles County Coroner's Office, was also at the scene on May 13. Lintemoot testified that "[i]n order to . . . access the body, the

couch had to be moved." The only other item of clothing around Martha's body was a pair of shorts or underwear inside the bedding. As Lintemoot described the belt wrapped around Martha's neck, "It was not tied in a knot. It just crossed, the ends of the belt crossed each other at the front of the neck, right around the midline."

Deputy Medical Examiner Yulai Wang, who performed the autopsy on May 15, concluded Martha had been killed by ligature strangulation. He opined that Martha had been dead for more than two or three days before her body was discovered, and it was partially decomposed. Wang could not examine the vagus nerve (a nerve in the neck that is involved with respiration) because of the body's decomposition. Martha's hyoid bone had not been damaged, but a fractured hyoid is not required in order to make a strangulation diagnosis. Wang did not offer any testimony regarding how long it took Martha to die from the ligature strangulation.

Another criminalist, Ilene Krokaugger, testified Lopez's DNA was found in nail scrapings and clippings taken from Martha's hands, and that a possible DNA-match for his sperm was found on Martha's external genitalia.

Lopez was eventually extradited to the United States on November 5, 2014.

c. *Evidence of uncharged domestic violence.*

Luis described two incidents of domestic violence involving Martha and Lopez that happened when he was 10 years old. The first incident, on January 11, 2003,[2] occurred when the family

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[2] Detective Steven Keen testified this was the day he responded to a "domestic dispute" call and found Martha, outside the residence, with handcuffs on her wrists.

was living in a studio apartment. Martha said something to Lopez about his sister and he hit her. When Martha tried to make a phone call, Lopez broke the phone.[3] Although Lopez tried to stop Luis from leaving the apartment, Luis was able to slip out and go to a neighbor for help. Luis then saw Lopez dragging Martha outside by her arm. Martha was yelling at Lopez to let her go. Lopez handcuffed Martha to the front gate and then drove off. Luis testified that Martha and Lopez broke up as a result of this incident.

The second domestic violence incident occurred when Martha and the children were living in a converted garage. Lopez came by one night and knocked on the door, but Martha would not let him in. Lopez got mad and was yelling and hitting the door. He eventually entered the garage by breaking a window. He removed his pants belt, put it around Martha's neck, and started choking her with it. Neighbors called the police and Lopez was arrested.

The trial court took judicial notice that Lopez was placed on formal felony probation in March 2003 for having committed domestic violence.

2. *Defense evidence*.

Bradley McAuliff, a psychology professor at California State University Northridge, testified about children's memory and their suggestibility when interviewed about crimes. He explained that he was concerned about the fact Luis had apparently provided factual details in 2010 that he had not remembered in 2003. McAuliff opined the information might

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[3] Detective Keen testified the telephone cord had been ripped out of the wall.

have come from other sources, i.e., that Luis's memory might have been contaminated.

3. *Trial outcome.*

The jury convicted Lopez of first degree murder (Pen. Code, § 187) and he was sentenced to a prison term of 25 years to life.

CONTENTIONS

Lopez contends his conviction must be reversed because the trial court refused to instruct the jury on heat-of-passion voluntary manslaughter as a lesser included offense of murder, and because there was insufficient evidence to prove the premeditation and deliberation elements of first degree murder.

DISCUSSION

1. *Trial court properly did not instruct on heat-of-passion voluntary manslaughter.*

Lopez contends the trial court erred by refusing to instruct the jury on heat-of-passion voluntary manslaughter as a lesser included offense of murder. However, we conclude the trial court properly refused the instruction because there was no substantial evidence either that Lopez was provoked or that his reason was clouded by passion.

a. *Legal principles.*

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so. [Citations.]" (*People v. Webster* (1991) 54 Cal.3d 411, 443.) In this context, "substantial evidence" is evidence from which reasonable jurors could conclude the lesser offense, but not the greater, had been committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162

(*Breverman*).) "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed. [Citations.] (*Ibid*.) "On appeal, we review independently the question whether the trial court improperly failed to instruct on a lesser included offense. [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

Voluntary manslaughter is a lesser included offense of murder. "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter [citation], if the killer's reason was actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an ' "ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' [Citations.] ' "[N]o specific type of provocation [is] required . . ." ' [Citation.] Moreover, the passion aroused need not be anger or rage, but can be any ' " '[v]iolent, intense, high-wrought or enthusiastic emotion' " ' [citation] other than revenge [citation]." (*Breverman*, *supra*, 19 Cal.4th at p. 163.) "The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lee* (1999) 20 Cal.4th 47, 59.)

Thus, "[t]he heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago . . . 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252–1253.)

b. *Background*.

The trial court denied Lopez's request for a heat-of-passion voluntary manslaughter instruction for lack of substantial evidence. As the court explained: "There has been . . . no evidence presented . . . that there was any type of verbal or physical altercation leading up to her strangulation and death. [The evidence] shows that an argument did occur [but] . . . that was over. They stayed in the same house, but different and separate rooms. That a television show, a soap opera . . . was being watched, and that's the state of the evidence. . . . [¶] There's no evidence to show . . . what . . . happened when Luis was asleep. And that's what you are asking, [defense counsel], that obviously, when he fell asleep, the fight continues. There's no evidence of that."

The trial court noted that the People were not required to prove motive, and that "it is on the defense to show that there is

substantial evidence. There has not been any substantial evidence that the defense can point to. The mere fact that your client had scratches on his face . . . there's still no evidence that they were caused by a fight or a heat of passion prior to [Martha's] death. The scratches could have been caused when she was trying to get him to stop strangling her to death, and she was fighting back as the belt was wrapped around her neck." "[A]ny argument that occurred, occurred hours earlier, [and] had ended . . . . [T]here's been no testimony that there was arguing later on, that there was another fight later on. [¶] Luis said he simply fell asleep. The question was asked. He heard nothing more. He saw nothing more."

c. *Discussion*.

Although Lopez relies principally on *Breverman* to support his claim that the trial court erred, there are two fundamental differences between *Breverman* and Lopez's case. In *Breverman*, there was clear evidence of both an actual, reasonable provocation and an actually clouded state of mind; here, there was no substantial evidence of either required element.

In *Breverman*, "there was evidence that a sizeable group of young men, armed with dangerous weapons and harboring a specific hostile intent, trespassed upon domestic property occupied by defendant and acted in a menacing manner. This intimidating conduct included challenges to the defendant to fight, followed by use of the weapons to batter and smash defendant's vehicle parked in the driveway of his residence, within a short distance from the front door. Defendant and the other persons in the house all indicated that the number and behavior of the intruders, which defendant characterized as a 'mob,' caused immediate fear and panic. Under these

circumstances, a reasonable jury could infer that defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Breverman*, *supra*, 19 Cal.4th at pp. 163–164, fn. omitted.)

In addition, there was evidence the defendant told the police "that when he [initially] fired [the gun] . . . it looked like the group was 'coming at me' and 'rushing the door.' Defendant declared that he 'thought we were going to get killed.' " (*Breverman*, *supra*, 19 Cal.4th at p. 151.) Although, in defendant's version of events, there had been a hiatus of about five minutes between the time the attacking group first approached him and the time he fired his gun,[4] our Supreme Court concluded: "A rational jury could . . . find that the intense and high-wrought emotions aroused by the initial threat had not

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[4] "In a tape-recorded police interview, defendant stated as follows: . . . On the evening of December 18, as he entered his car to go to the market, a group of unknown men came toward him, yelling. He reactivated his car alarm, ran back inside, told his mother to call 911, but then wondered if he was being too 'paranoid.' Nothing happened for five minutes. Defendant and a friend, Kyle Beck, then peered over the back fence. They did not observe anybody in the area where the group had previously been spotted, but when defendant turned his gaze, he saw the group approaching again from the opposite direction, still yelling. Defendant ran back inside to tell his mother 'they're coming.' He then heard the alarm go off as they began 'bashing' his car. Defendant saw at least 12 people, and they were 'mobbing[,] basically.' He broke the glass in the front door and fired three or four rounds . . . . The intruders stopped hitting his car, but defendant came outside and shot six or seven more times as the group fled." (*Breverman*, *supra*, 19 Cal.4th at p. 151, fn. omitted.)

had time to cool or subside by the time defendant fired the first few shots from inside the house, then emerged and fired the fatal second volley after the fleeing intruders. At one point in his police statement, defendant suggested that he acted in one continuous, chaotic response to the riotous events outside his door." (*Id.* at p. 164, fn. omitted.) Both of these elements—objective provocation and subjective state of mind—are missing from Lopez's case.

Lopez tried to counter this conclusion by arguing: "The reasonable inference . . . is that [Martha] scratched appellant's face after Luis fell asleep and during the resumption of the earlier argument and resulting altercation that ended with her death. . . . [¶] Accordingly . . . a rational jury could infer that appellant was aroused to 'intense and high-wrought emotions' brought on by the resumption of the earlier argument between [Martha] and himself and by [Martha's] physical assault upon and scratches to his face, and that his reason was thus obscured by a provocation sufficient to produce such effects in a person of average disposition. A jury could reasonably conclude from all the evidence that appellant may have acted intentionally, but while his judgment was obscured due to passion arouse[d] by sufficient provocation." Lopez asserts: "The trial court's analysis was flawed because a rational jury could find either inference to be a reasonable inference. A rational jury might reasonably infer that [Martha] scratched appellant's face in a futile attempt to stop him from strangling her, as the court inferred. A rational jury might also reasonably infer that [Martha] scratched appellant's face during a resumption of their earlier argument."

But Lopez's proposed "rational scenario" is entirely speculative. He himself did not testify and, as the trial court

pointed out, the record reveals only that Martha and Lopez went to bed in separate rooms following a verbal argument and then, sometime during the night or early the next morning, they had a second encounter which ended with Martha's strangulation by a belt. There was simply no evidence about how this came to pass, let alone substantial evidence that she had provoked Lopez to kill her. Mere speculation does not justify a lesser included offense instruction. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174 ["Defendant argues counsel should have requested an instruction on theft as a lesser included offense of robbery. He asserts the jury could have concluded that the 'force or fear' element of robbery was not proven because the jury might have found that defendant did not form the intent to steal until after his attack on victim Litovich. Defendant's argument is based on speculation, not evidence, and we therefore reject it."]; see also *People v. Perez* (1992) 2 Cal.4th 1117, 1133 ["By definition, 'substantial evidence' requires *evidence* and not mere speculation. In any given case, one '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 . . . mere speculation as to probabilities without evidence.' "].)

But even if we were to assume, arguendo, that there had been evidence of reasonable provocation, Lopez's claim would fail because there was absolutely no evidence that *his* "reason was actually obscured as the result of a strong passion . . . ." (*Breverman*, *supra*, 19 Cal.4th at p. 163.) Lopez did not testify and there was no surrogate evidence establishing the requisite subjective component of heat-of-passion voluntary manslaughter.

Lopez does not even suggest that the trial evidence demonstrated he had "acted while under 'the actual influence of a strong passion' . . . [which] caused him to ' "act rashly or without due deliberation and reflection, and from this passion rather than from judgment." ' " (*People v. Moye* (2009) 47 Cal.4th 537, 553.)

The trial court did not err by refusing to instruct on heat-of-passion voluntary manslaughter.

2. *There was insufficient evidence to prove first degree murder.*

Lopez contends his conviction for first degree murder must be reversed because there was insufficient evidence the crime had been committed with premeditation and deliberation. We agree.

a. *Legal principles.*

"It is well established that the brutality of a killing cannot in itself support a finding that the killer acted with premeditation and deliberation. 'If the evidence showed no more than the infliction of multiple acts of violence on the victim, it would not be sufficient to show that the killing was the result of careful thought and weighing of considerations.' [Citations.] Moreover, although premeditation and deliberation may be shown by circumstantial evidence [citation], the People bear the burden of establishing beyond a reasonable doubt that the killing was the result of premeditation and deliberation, and that therefore the killing was first, rather than second, degree murder. [Citation.] [¶] 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, we 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.' (Italics added.)" (*People v. Anderson* (1968) 70 Cal.2d 15, 24–25 (*Anderson*).)

In *Anderson*, our Supreme Court discussed the three categories of evidence that are sufficient to sustain a finding of premeditated and deliberate murder: "(1) facts about how and what the defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing—what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Anderson*, *supra*, 70 Cal.2d at pp. 26–27.) *Anderson* concluded that a verdict for deliberate or premeditated murder should be upheld where there is "evidence of all three types" or "at least extremely strong evidence of (1) [planning

activity] or evidence of (2) [motive] in conjunction with either (1) [planning activity] or (3) [manner of killing]." (*Id*. at p. 27.)

" '*Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.' " [Citations.] (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) "However, '[w]hen the record discloses evidence in all three categories, the verdict generally will be sustained.' " (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) When evidence of all three categories is not present, appellate courts look for very strong evidence of planning or some evidence of motive in conjunction with planning or a deliberate manner of killing. (*People v. Raley* (1992) 2 Cal.4th 870, 887.)

b. *Discussion*.

Here there was certainly evidence of motive due to the history of domestic violence between Martha and Lopez. There was, however, no evidence of planning activity. The Attorney General argues there was planning evidence because Lopez "necessarily had to locate a belt, put it around [Martha's] neck, and continuously pull on the ends to strangle" her. But putting the belt around Martha's neck and tightening it could have been a spontaneous act rather than a planned act; there was simply no evidence pointing to one conclusion rather than the other. As for the belt, there was no evidence whatsoever that Lopez had obtained the belt in advance specifically for use as a ligature. (See, e.g., *People v. Rowland* (1982) 134 Cal.App.3d 1, 8 ["The People . . . assert that the use of an electrical cord [to strangle the murder victim] shows that defendant must have taken 'thoughtful measures' to procure a weapon for use against the victim. An electrical cord, however, is a normal object to be found

in a bedroom and there was no evidence presented that defendant acquired the cord at any time prior to the actual killing."].) Similarly, a pants belt is a normal object to be found holding up a man's pants, and there was no evidence Lopez had especially obtained this belt to strangle Martha.

Hence, the sufficiency of the premeditation and deliberation evidence comes down to the "manner of killing" factor described by *Anderson*. Because of the time that passed before Martha's body was discovered—three to five days—her body was bloated and partially decomposed. As a result, her body apparently yielded only sparse forensic details as to how her death occurred, other than the basic fact she had been strangled with a man's belt. For instance, there was no testimony estimating how long Lopez must have been strangling Martha before she stopped breathing. Lopez cites *People v. Rowland*, *supra*, 134 Cal.App.3d at p. 7, which reasoned: "Finally, we consider the manner of killing. The People argue that strangulation with an electrical cord shows a deliberate intent to kill. We agree. [Citation.] A deliberate intent to kill, however, is a means of establishing malice aforethought and is thus an element of second degree murder . . . . In order to support a finding of premeditation and deliberation the manner of killing must be, in the words of the *Anderson* court, 'so particular and exacting' as to show that defendant must have 'intentionally killed according to a "preconceived design" . . . .' [Citation.] The ligature strangulation in this case fails to show that defendant must have premeditated and deliberated the killing." (*Id.* at p. 9.)

The Attorney General responds by citing three California Supreme Court ligature strangulation cases where premeditation

and deliberation were proven. The problem is that in each case cited by the Attorney General there were *other significant factors* that supported the premeditation and deliberation findings.

In *People v. Bonillas* (1989) 48 Cal.3d 757, the evidence (based on the defendant's videotaped reenactment of the crime) showed that the defendant, intending to commit a burglary, climbed into his neighbor's empty house. When he saw the neighbor arrive home, the defendant hid in a closet but was discovered after knocking over a clothes rack. A struggle ensued, during which defendant hit the victim on the back of the head with a jar, rendering her "unconscious and no longer struggling." (*Id*. at p. 767.) Nevertheless, the defendant "tore the cloth belt from [the victim's] dress, wound it tightly around her neck, and knotted it twice." (*Ibid*.) An autopsy determined death had been caused by asphyxia resulting from ligature strangulation, and that the victim's traumatic head injuries "could have caused unconsciousness, but were not fatal." (*Ibid*.)

Our Supreme Court found sufficient evidence of premeditation and deliberation because, "[a]lthough there was no evidence of planning activity with respect to the killing, there was evidence of motive. The victim was defendant's neighbor and would easily have been able to recognize and identify defendant as the perpetrator of the burglary. In addition, the manner of the killing does furnish some indication of an intention to kill. Ligature strangulation is in its nature a deliberate act. *In this case, the ligature was knotted twice and applied after the victim had already been rendered unconscious and unresistant. Taking time to do this was inconsistent with defendant's stated objective, which was simply to escape*." (*People v. Bonillas*, *supra*, 48 Cal.3d at pp. 792–793, italics added.)

In *People v. Lucero* (1988) 44 Cal.3d 1006, the "[d]efendant approached the [two] children near the edge of his property and was heard to reassure them that they would not be harmed by his goose. The girls were seen entering defendant's yard and were killed inside his house. Since it is unlikely two young girls would have readily accompanied a man they did not know into a strange house, the jury could have reasonably inferred that defendant lured or compelled the victims to enter. The evidence also indicated that *once inside the house defendant used a rope to bind the wrists of one girl, from which the jury could have inferred that defendant intended to immobilize one victim while he carried out his plan with respect to the other*." (*Id*. at p. 1019, italics added.) Moreover, "[t]he evidence indicated that Chris [one of the victims] was strangled with the necklace she was wearing. While ligature strangulation may not always evidence a premeditated murder (see [*Rowland*]), the jury could have viewed the strangulation as a deliberate manner of killing sufficient to indicate a 'preconceived design.' " (*Id*. at p. 1020.) In sum, "[t]he steps taken by defendant prior to the killings, including securing the girls' presence in his house and binding the wrists of one, the possible motive of preventing disclosure of these deeds and anything else that may have occurred in the house that afternoon, and the ligature strangulation of Chris, provide sufficient evidence to support the jury's finding that the murders were premeditated and deliberate." (*Ibid*.)

In *People v. Hovarter* (2008) 44 Cal.4th 983 (*Hovarter*), the body of a young woman named Danna Walsh was found lying 150 yards from the Eel River with some nylon rope wound several times around her neck. (*Id*. at p. 990.) The forensic evidence showed that she "had been killed by asphyxia due to

strangulation, resulting in the deprivation of oxygen to her brain. Under such circumstances, the brain will die within five to eight minutes. The hyoid bone in her throat was fractured, and her larynx was bruised. She had apparently been thrown or dropped from [a] bridge . . . ." (*Id*. at p. 991.) The evidence also showed that four months after Walsh's murder, the defendant had an encounter with a 15-year-old 10th grader that resulted in his conviction for rape, kidnapping and attempted murder. In that incident, the defendant picked up A.L. hitchhiking, threatened her with a knife, and then raped her. Afterward, he led her down to the Russian River where he tied her to a tree: "He took [a] gun from his pocket and placed [a] pillow over it. A.L. asked him whether he was going to shoot her. He said he would not and then shot her in the head. She became dizzy, fell to the ground, and tried to remain motionless. Defendant kicked her twice and asked her whether she was dead. He then shot her in the head again. Miraculously, neither bullet penetrated her cranium." (*Id*. at pp. 992–993.)

Analyzing the *Anderson* factors, our Supreme Court held: "In this case, a reasonable jury could have inferred from the circumstances of [defendant's] crimes against Walsh, coupled with his later, similar crimes against A.L., that in the latter half of 1984 defendant engaged in a deliberate plan of sexually preying on defenseless young women late at night on the highway. From these facts, which indicate defendant dumped Walsh's body off the Scotia/Rio Dell Bridge, no doubt hoping she would fall into the river and be swept away, 'a rational trier of fact could have determined that defendant's motive in murdering [the victim] was to avoid detection for the sexual and other physical abuses he had committed against her.' [Citation.] The

motive of eliminating possible witnesses in cases involving abduction and rape is often inferable from the circumstances of such crimes. [Citation.] Defendant's choice, moreover, of committing his crimes in isolated or secluded settings further suggests a premeditated plan designed to avoid detection. [Citation.] Finally, and most tellingly, the evidence shows that Walsh was strangled with a rope and that her death from asphyxiation would have taken between five and eight minutes. 'Ligature strangulation is in its nature a deliberate act.' [Citation.] This prolonged manner of taking a person's life, which requires an offender to apply constant force to the neck of the victim, affords ample time for the offender to consider the nature of his deadly act. 'A rational finder of fact could infer that [this manner of killing] demonstrated a deliberate plan to kill her.' [Citation.]" (*Hovarter*, *supra*, 44 Cal.4th at pp. 1019–1020.)

As noted above, the evidence against Lopez (perhaps because Martha's body had partially decomposed by the time it was found), did not include an expert opinion as to how long he must have squeezed Martha's neck with the belt before she died.

We conclude the People failed to prove the elements of premeditation and deliberation. "On appeal from a judgment of the superior court an appellate court is not limited to reversal or affirmance. It may modify the judgment by reducing the degree of the offense and the punishment imposed. (Pen. Code, § 1260.) In this case the proper disposition is to modify the judgment to hold defendant guilty of second degree murder and to modify the punishment to the term provided by law for that offense." (*People v. Rowland*, *supra*, 134 Cal.App.3d at p. 10.)

DISPOSITION

The judgment is affirmed in part, reversed in part, and modified. Lopez's conviction for first degree murder is reversed and the judgment is modified to provide that Lopez has been convicted of second degree murder. He shall serve the term provided by law for that offense: 15 years to life. (§ 190, subd. (a).) The trial court shall prepare and forward an amended abstract of judgment to the Department of Corrections reflecting these modifications. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

JOHNSON (MICHAEL), J., Concurring and Dissenting.

I concur with Section 1 of the court's discussion regarding voluntary manslaughter, and dissent from the discussion in Section 2 regarding first degree murder.

As the court discusses in Section 2, appellant Lopez contends there was insufficient evidence to support the jury's finding that he committed murder in the first degree. It is well settled that an appellate court's role in considering an insufficient evidence claim is "a limited one." (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) When the claim is considered on appeal, " '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. [Citation.] We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "[T]he relevant inquiry is 'whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.' " (*Lindberg*, at p. 27, quoting *People v. Alvarez* (1996) 14 Cal.4th 155, 224.)

Applying this standard, I believe the manner in which the crime was committed by Lopez supports willful, deliberate and premeditated murder. Lopez killed Martha by strangling her to death with a belt. The belt was found wrapped around Martha's neck, crossed over itself at the front, and unknotted. The jury could rationally conclude that this manner of death required a deliberate, determined and prolonged effort to kill Martha. This crime was very different from shooting, slitting a throat, or other means of killing that can be done quickly and without extensive thought or reflection. It is even different from wrapping someone's neck with a ligature, quickly knotting it off, and leaving the person to die from asphyxiation. Strangling someone to death with an untied belt requires constant and prolonged pressure, applied while literally watching the victim struggle and die. This alone would support the jury's finding of first degree murder.

This conclusion is reinforced by the evidence that Lopez had strangled Martha with a belt on a prior occasion. From this, the jury could rationally conclude that when Lopez strangled Martha to death with his belt, he knew exactly what he was doing and he knew exactly what the consequences of his actions would be. Repetition is entirely consistent with predetermined conduct.

The ligature cases cited by the court — *People v. Hovarter* (2008) 44 Cal.4th 983 (*Hovarter*), *People v. Bonillas* (1989) 48 Cal.3d 757 (*Bonillas*), and *People v. Lucero* (1988) 44 Cal.3d 1006 (*Lucero*) — provide ample legal support for an affirmance of first degree murder in this case. All three opinions recognized that strangulation by ligature suggests some inherent level of deliberation and premeditation. (See *Hovarter,* at p. 1020

(“ ‘Ligature strangulation is in its nature a deliberate act.’ [Citation.] This prolonged manner of taking a person's life, which requires an offender to apply constant force to the neck of the victim, affords ample time for the offender to consider the nature of his deadly act. ‘A rational finder of fact could infer that [this manner of killing] demonstrated a deliberate plan to kill her.’ ”); *Bonillas*, at p. 792 (“Ligature strangulation is in its nature a deliberate act.”); *Lucero*, at p. 1020 (“the jury could have viewed the strangulation as a deliberate manner of killing sufficient to indicate a ‘preconceived design.’ ”).)

The court stated that *Hovarter*, *Bonillas* and *Lucero* all included evidence that went beyond strangulation by ligature alone. This case carries an additional factor as well: the jury could have rationally concluded that Lopez’s earlier crime against Martha by using the same method and instrumentality of strangulation with a belt strongly supports willful, deliberate and premeditated conduct.

For these reasons, I respectfully dissent from Section 2 of the court’s majority opinion and would affirm the judgment in full.

JOHNSON (MICHAEL), J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.