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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. HUGO M. CRUZ, Defendant and Appellant.	B283925 (Los Angeles County Super. Ct. No. BA445510)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Drew E. Edwards, Judge. Affirmed.

Alan Siraco, 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, Senior Assistant Attorney General, Colleen M. Tiedemann and David W. Williams, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Hugo M. Cruz was convicted of first degree murder in the hatchet slaying of his estranged wife, Yanet Palma. He contends reversal is compelled as a result of evidentiary and instructional error and challenges the sufficiency of the evidence to support the jury's findings of premeditation and deliberation. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In early 2016, after approximately four years of marriage, the victim separated from defendant. Defendant no longer lived in the family home; but until a day or two before the murder, he slept in the family's van and occasionally showered and ate meals in the house.[1] Defendant maintained a relationship with the victim's three children—a then 16-year-old daughter and two younger sons.

At 3:00 a.m. on the morning of April 7, 2016, defendant rapped on a front window of victim's home, asking to use the bathroom. His knocking woke up the daughter and the victim. The victim slept on a bed in the living room; she would not let defendant inside. But there was no argument at that hour or any further disturbance.

When the daughter left for school at approximately 7:00 a.m. that morning, defendant was sitting on the porch. It was not unusual for her to see defendant, usually in the parking area for the community of homes where the victim lived, as the daughter walked to school. Defendant did not acknowledge his step-daughter's wave and greeting. According to the daughter,

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[1] The victim's daughter testified the van was just gone one day, several days before the murder.

the victim would have walked the boys to school a bit later; and, in fact, a neighbor, Abigail Hernandez, saw the victim walking back home from the school sometime before 8:00 a.m.

Defendant was still sitting on the porch when another neighbor walked her sons to school at 7:50 a.m. Defendant, holding a mug, was there when this neighbor returned 10 minutes later.

A 911 call was made from the victim's cell phone at 8:54 or 8:56 a.m.[2] At about the same time, Ms. Hernandez, who lived four houses away, heard "chilling screams" from the victim's home. This neighbor described the screams as "out of control" and heard the word "help." She recognized the victim's voice. She went inside her home to call 911. But she only spoke Spanish and the 911 operator, who spoke to her in English, hung up. Ms. Hernandez ran to the victim's home and heard the victim cry out to come through the window. Hernandez met another neighbor there, Francisco Lol.

Mr. Lol first heard a loud noise from the victim's home, like furniture moving, followed quickly by a scream. He opened his door, but did not see anything. No sooner had he closed his door than he heard another scream from the victim's home. He ran to the victim's house. As he pounded on the victim's door, he heard more screams and the victim's plea for help. Mr. Lol ran to the side of the house, where he met Ms. Hernandez. Both witnesses heard the victim cry out to break the window, and Ms. Hernandez broke it with a rock. Mr. Lol cleared the glass with a stick and looked inside. He told Ms. Hernandez defendant was

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[2] Exhibit 25 indicates the call was received at 8:54 a.m. The custodian of records testified it was made at 8:56 a.m.

striking the victim in the head with a hammer. Mr. Lol heard the victim pleading for her life and her children.

Ms. Hernandez ran to the street to get more help. Two men followed her back to the victim's house, and one of them called 911. By then, the victim's screams had stopped. Mr. Lol and the two other men waited outside the home until the police arrived.

Upon their arrival, the police first knocked on the door and then attempted to kick it in. They could not breach the door, but defendant opened it and "exited [the home] in a calm manner. His demeanor was calm. He had his hands up." Defendant had blood on his hands and clothing. The deceased victim was discovered in a back bedroom. Her cell phone was on the bed in the living room, just inside the front door.

The victim had 21 hatchet wounds to her head, three of which penetrated her skull and were lethal. Any one of the penetrating blows would have resulted in the victim's losing consciousness almost immediately. She also had hatchet wounds to her arms and chest.

Other than the window broken by Ms. Hernandez and Mr. Lol, no other windows were open or damaged; some were barred. There were no signs of forced entry into the home.

The victim's daughter recognized the murder weapon as her step-father's hatchet. It was usually kept "outside in the place where all his tools were at" on the porch. She had not paid any attention to the hatchet since defendant moved out of the home.

Defendant was charged with first degree murder with personal use of a dangerous weapon. (Pen. Code, §§ 187, subd. (a); 12022, subd. (b)(1).) At the conclusion of the prosecution's case, outside the jurors' presence, the trial court advised it would

refuse to give CALCRIM No. 570, the voluntary manslaughter instruction based on heat of passion, finding the instruction was "not appropriate as to the state of the evidence at this point in the trial," i.e., before the defense had the opportunity to present evidence, including from defendant, should he choose to testify. When the jury returned to the courtroom, the defense rested without presenting any evidence.

In her closing argument, defense counsel conceded defendant intended to kill the victim. She argued, however, the crime was not a premeditated, deliberate act, but an emotional reaction to "a sudden quarrel."

The jury convicted defendant of first degree murder and found he personally used a hatchet to commit the crime. He was sentenced to 26 years to life in prison.[3]

DISCUSSION

I. Audiotape of the 911 Call from the Victim's Cell Phone

Defendant first complains the trial court prejudicially erred in permitting the jury to hear the 911 call made from the victim's cell phone. Defendant agrees we review this claim of error under the abuse of discretion standard. (*People v. Boyce* (2014) 59 Cal.4th 672, 687 (*Boyce*); *People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

Before the jury was impaneled, the trial court and counsel discussed whether the jury would hear this 911 call. At that time, defendant objected, arguing the prosecution had not established the call was made by the victim and the call was

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[3] The Attorney General advises that after judgment was entered, the trial court corrected a custody credit issue.

irrelevant and unduly prejudicial. The trial court agreed "the foundational aspect would be problematic to establish who in fact is screaming," but advised, "[w]e can table that."

Before opening statements and outside the presence of the jury, the prosecutor reminded the trial court of defendant's Evidence Code section 402 motion to exclude the 911 tape. The trial court and counsel engaged in another colloquy concerning the 911 call, with the court observing, "At this point, I don't believe a proper foundation has been laid. If you would like to take it up at a later point, you certainly can." The trial judge agreed the prosecution could introduce evidence that a 911 call was made from the victim's cell phone at the time the crime was committed.

After a number of witnesses testified, counsel revisited the issue. At that time, the court listened to the audiotape and then overruled defendant's objections based on lack of foundation, relevance, and undue prejudice and advised the prosecution could play the audiotape as part of its case-in-chief.

The victim's daughter confirmed her mother's cell phone number and identified as her mother's the cell phone recovered from the home after the murder. The custodian of records for 911 calls to the Los Angeles Police Department (LAPD) testified a 911 call was made from the victim's cell phone before 9:00 a.m. on the date the victim was murdered. The jury then heard the 911 telephone call. Other than the automated time counter and the words spoken by the 911 operator ("911 emergency operator 412"; "Hello? Anyone there? Anyone need police service?"; "Phase two screaming woman 4900 Southwestern Avenue. Female heard screaming out . . . . Called to 1796. Now I need 1203"), the only other sounds were screams.

Citing Code of Civil Procedure section 1008,[4] defendant first contends the trial court abused its discretion by arbitrarily reversing its interim ruling to sustain his objections to the 911 tape "in the absence of new facts or law." The argument overlooks the fact the trial court did not issue an earlier evidentiary ruling; the judge simply expressed reservations concerning the 911 tape's admissibility, but advised counsel on two occasions they could revisit the issue.

In any event, even if the trial judge had issued a ruling, he retained the inherent power to change it without relying on new or different facts or circumstances. (*People v. Nesbitt* (2010) 191 Cal.App.4th 227, 239.) At least one Court of Appeal has held Code of Civil Procedure section 1008 does not apply to criminal cases; but should it be found applicable, "that statute, by its express terms, governs only a litigant's ability to renew a motion or advance an application, not the court's inherent power to reconsider its own interim rulings." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1248 (*Costello*).)[5] As *Costello* observed, a trial court cannot "operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors, particularly in criminal cases where life, liberty, and public protection are at stake. . . . [¶] . . . At most, therefore, section

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[4] Code of Civil Procedure section 1008 allows parties to seek reconsideration of a previous ruling, provided they rely on "new or different facts, circumstances, or law."

[5] The Supreme Court cited *Costello* in holding that Code of Civil Procedure section 1008 does not limit a "court's authority to reconsider interim rulings on its own motion." (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1107.)

1008 requires courts to exercise due consideration before modifying, amending or revoking prior orders." (*Id.* at pp. 1249-1250.)

The trial court exercised due consideration here. By the time the ruling was made, an LAPD custodian of records had verified the authenticity of the audiotape and testimony established the 911 call came from the victim's cell phone, which was found in her home after the murder. Witnesses who remained outside the victim's home confirmed no one entered or left the property from the time they heard the victim's screams until the police arrived. This supported the reasonable inference the screams were from the victim. The timing of the 911 call was consistent with eyewitnesses who heard screams from the victim's home and assisted the trier of fact in determining when the attack began and how long it lasted. As the Supreme Court noted in *Boyce, supra,* 59 Cal.4th 672, "the prosecution in a criminal case involving charges of murder or other violent crimes is entitled to present evidence of the circumstances attending them even if it is grim [citation], and even if it duplicate[s] testimony, depict[s] uncontested facts, or trigger[s] an offer to stipulate." (*Id.* at p. 687, internal quotation marks omitted.) The audiotape was relevant.[6]

Defendant, acknowledging there is no published decision in California addressing the admissibility of a 911 audiotape that includes only a victim's screams, argues, "Where, as here, there was no inference to be drawn from the recording other than the

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[6] Although defendant suggests on appeal the victim's 911 audiotape was cumulative, he did not make that objection in the trial court. Had it been made, it would not have carried the day. (*Boyce, supra,* 59 Cal.4th at p. 687.)

suffering of the victim, it should have been excluded as more prejudicial than probative." We disagree and turn to *Boyce, supra*, 59 Cal.4th 672 for guidance.[7]

There, during the course of a robbery, the defendant learned one of the victims was a deputy sheriff and executed him. The 911 call by the victim's fiancée, herself a deputy sheriff, and her sister, was played for the jury during the guilt phase of the defendant's death penalty trial; the jury was instructed it could consider all guilt phase evidence in the penalty phase. (*Boyce, supra*, 59 Cal.4th at p 687.) The callers described the shooting and provided the 911 operator with graphic descriptions of the victim's head wound. The Supreme Court described the callers' voices as "rapid and panicked . . . desperate and frustrated." (*Ibid.*) Both women testified at trial.

The trial court overruled the defendant's objections based on relevance and undue prejudice. The Supreme Court affirmed: "The court legitimately concluded that the probative value of the tapes was not substantially outweighed by undue prejudice. While the women are certainly in distress, their comments and affect are not unduly shocking, considering the nature of the crimes. [M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant [citations], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative." (*Boyce, supra*, 59 Cal.4th at p. 688, internal quotation marks omitted.)

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[7] Defendant insists *Boyce* "is of no assistance here" because the discussion was in the context of the penalty phase of a capital trial. Not so; the Supreme Court analyzed it as a guilt phase issue. (*Boyce, supra,* 54 Cal.4th at pp. 687-690.)

We have listened to the 911 audiotape, and it is not so raw as defendant suggests. The screams are sporadic and some are muffled. The 911 operator's voice does not carry the panic of an eyewitness to murder. The trial court did not err in admitting the audiotape of the victim's 911 call.

II. Challenged Crime Scene Photographs

A first responder testified that trial exhibits 16 and 17, photographs from the bedroom where the victim's body was found, accurately depicted the murder scene. The victim's body was partially visible in exhibit 16, where the image included most of the bedroom. Exhibit 17 focused on the bed. The defense objected the photographs were "gruesome" and given the photographs already in evidence, provided "no additional probative value." The trial court overruled the objections[8]: "I have looked at the photographs. In weighing the probative value of the photographs to the prejudice of [defendant], again, I notice the photographs do show material on the door and some sort of a cabinet. It is not, in my view an inordinate amount of blood and is not any more gory than the other photographs that are already going to be brought into evidence in this case."[9]

We, too, have examined the photographs and agree with the trial court's assessment. Defendant's 21 hatchet strikes to the victim's head resulted in considerable blood spatter in various

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[8] This discussion was held on the record, outside the jurors' presence. When the prosecutor moved later in the trial, in the jurors' presence, to admit the photographs into evidence, defendant did not object.

[9] By contrast, the autopsy photographs, the admission of which defendant does not challenge on appeal, were graphic.

areas of the bedroom where she died. The photographs were relevant to the issues of deliberation and malice. (See *People v. Lucas* (1995) 12 Cal.4th 415, 450, citing cases.) There was no error in their admission.

III. Jury Instructions

A. Voluntary Manslaughter

Defendant asserts the trial court erred both in refusing his proffered voluntary manslaughter instruction based on heat of passion (CALCRIM No. 570)[10] as a lesser included offense to

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[10] CALCRIM No. 570 provides, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

"The defendant killed someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;

AND

"3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

murder and then in failing to instruct the jury that the prosecution "must prove beyond a reasonable doubt the absence of provocation sufficient to overbear [defendant's] reason." Our review of the claimed errors is de novo; we "independently determine whether an instruction on the lesser included offense of voluntary manslaughter should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).)

As *Manriquez* explained, "an intentional killing is reduced to voluntary manslaughter if other evidence negates malice. Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation ([Pen. Code,] § 192, subd. (a)) . . . . [¶] . . . The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim.

"It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

"[If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.]

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

[Citations.] The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*Manriquez, supra,* 37 Cal.4th at pp. 583-584.)

Defendant requested CALCRIM No. 570 at the close of the prosecution's case. In response to the trial judge's inquiry as to "what evidence is presented so far for the court to give voluntary manslaughter," defense counsel argued the evidence to support the instruction was circumstantial, noting there was no forced entry into the victim's home; the crime occurred during the day when "people were around"; defendant had no history of domestic violence against the victim; and "the nature of the death, specifically the 21 hatchet wounds . . . [¶] [could lead] [t]he jury [to] conclude that something volatile—something happened that made my client go from zero . . . that caused passion to arise such that [defendant] murdered." The prosecutor objected to the instruction, and the trial court took the matter under submission overnight.

The next morning, the trial judge advised "there has been no evidence of provocation of [defendant] . . . [and] for that reason" declined to give a voluntary manslaughter instruction. The trial court gave CALCRIM Nos. 520 and 521.[11]

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[11] The jurors were instructed as follows:

"The defendant is charged with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] One, the defendant committed an act that caused the death of another person; and, [¶] Two, when the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either

is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] One, he intentionally committed an act; [¶] Two, the natural and probable consequences of the act were dangerous to human life; [¶] Three, at the time he acted, he knew his act was dangerous to human life; and [¶] Four, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. [¶] In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. [¶] If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521.

The trial court then continued, "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the act that caused death. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. [¶] A decision to kill made rashly, impulsively, or

The defense theory was that defendant must have been provoked in order to commit such a brutal, frenzied murder. But the theory was based on counsel's conjecture; no evidence supported it. As the Supreme Court has recognized, "in a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant's* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder." (*People v. Rios* (2000) 23 Cal.4th 450, 461-462.) And without substantial evidence of provocation, a voluntary manslaughter instruction was not required. (*People v. Breverman* (1998) 19 Cal.4th 142, 149, 154.)

B. Pinpoint Instruction

Defendant next faults the trial court for refusing his requested pinpoint instruction, "Brutality of a killing does not establish premeditation and deliberation." The proffered instruction was based on, but deviated slightly from, the wording

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without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder. [¶] You will be given verdict forms for guilty and not guilty of first degree murder and second degree murder. [¶] You may consider these different kinds of homicide in whatever order you wish, but I can accept a verdict of guilty or not guilty of second degree murder only if all of you have found the defendant not guilty of first degree murder."

in *People v. Pensinger* (1991) 52 Cal.3d 1210 (*Pensinger*). There, the Supreme Court held, "brutality *alone* cannot show premeditation; a brutal killing is as consistent with a killing in the heat of passion as with a premeditated killing." (*Id.* at p. 1238, italics added.) The *Pensinger* statement drew from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), where the Supreme Court identified three categories of evidence that sustain a finding of premeditated, deliberate murder: planning, motive, and the manner of killing. (*Pensinger, supra,* 52 Cal.3d at p. 1237.)

Defense counsel presented no oral or written argument in support of the request, and the trial court refused the instruction: "In my view, that instruction goes along the line of argument. Certainly counsel is free to argue that. . . . I will not be giving that pinpoint instruction."[12]

Defendant acknowledges the Supreme Court rejected this precise claim of error in *People v. Moon* (2005) 37 Cal.4th 1 (*Moon*). The proposed pinpoint instruction in *Moon* was "'[t]he brutality of a killing cannot *by itself* establish that the killer acted with deliberation and premeditation.'" (*Id.* at p. 31, italics added.) The Supreme Court held the proffered instruction was properly refused because the concept behind it "was incorporated" in the standard premeditation jury instruction (then CALJIC No 8.20, similar to CALCRIM No. 521, which was given in this case). (*Moon, supra,* 37 Cal.4th at p. 31.) Although defendant

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[12] Counsel did argue the point: "The 21 hatchet wounds [were] terrible. It is just as likely, in my opinion, actually more so, that someone has lost it then they are doing that. When they are just going and going and going. That is rage incarnate[] That is not methodical. That is not well thought out. That is pure passion and heat."

recognizes this court is bound by the holding in *Moon,* he asserts we are still free to, and should, criticize *Moon's* reasoning and result. We decline to do so.

The manner of a killing is but one of three categories of evidence that courts examine to assist in determining whether the death was the result of deliberation and premeditation. Some killing methods, e.g., arsenic poisoning or use of a spring gun, more easily lend themselves to that finding than others. (Compare, e.g., *People v. Alcala* (1984) 36 Cal.3d 604, 626 (*Alcala*).) Under any circumstance, however, the conduct should not be viewed in a vacuum; and that is the inherent shortcoming of the proffered pinpoint instruction. (See, e.g., *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1118.)

IV. Sufficiency of the Evidence of Premeditation and Deliberation

Maintaining focus on the brutal nature of the attack, defendant asserts the record lacks sufficient evidence of premeditation and deliberation to support his conviction of first degree murder. We disagree.

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. ([Pen. Code,] § 189 . . . .) 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 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 . . . ." (*People v. Cage* (2015) 62 Cal.4th 256,

275-276, internal quotation marks omitted (*Cage*).) The *Anderson, supra,* 70 Cal.2d 15 categories of evidence–planning, motive, and the manner of killing–provide the starting point for our analysis. (*Cage, supra,* at p. 276.)

In this analysis, "we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] Our review must presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] . . . . [T]he relevant inquiry on appeal is whether, in light of all the evidence, '*any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.'" (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

The jury reasonably could have found defendant planned to kill the victim. Photographs of the inside and outside of her home showed any number of household items or tools defendant could have used in his attack, but he chose the hatchet. Whether defendant retrieved the weapon from the porch or inside the house (as the defense suggested), it was reasonable to conclude his decision to use it evidenced a "cold and calculated decision to take [the victim's] life after weighing considerations for and against." (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, abrogated on another point in *People v. Scott* (2015) 61 Cal.4th 363, 391.) That the attack occurred while the children were at school, after defendant apparently barricaded the front door, also supports the finding that defendant planned to kill the victim.

The jury also reasonably could have found motive. The victim kicked defendant out of the family home several months

before her murder, and defendant apparently lost the van he had been living in several days before the killing. In the middle of the night, hours before the attack, the victim would not let defendant into the house to use the bathroom. These facts could lead the jury to reasonably infer defendant was angry and had motive to kill the victim.

Finally, there is the manner of the killing. Evidence at the scene established the attack started in the living room and ended in a back bedroom. Although the coroner could not testify as to the order in which the blows were inflicted, a reasonable inference from the evidence is that the three penetrating blows, any one of which was fatal, were inflicted near the end of the attack. Any of those blows would have rendered the victim unconscious, and the 911 audiotape and eyewitness testimony established the victim was conscious and pleading for her life for at least three minutes before she died. The coroner testified the victim could have survived a number of the hatchet wounds, but defendant kept striking her until he penetrated her skull. This supports a finding of premeditation. (*People v. Elliot* (2005) 37 Cal.4th 453, 471 [premeditation suggested where the victim "suffered three potentially lethal knife wounds, not to mention almost eighty other stab and slash wounds to her body. The jury could have construed the repeated slashing of [the victim's] throat, in connection with the dozens of other wounds, as intimating a preconceived design to kill"].)

The brutality of the killing and the fact it "involved multiple wounds, cannot alone support a determination of premeditation. Absent other evidence, a brutal manner of killing is as consistent with a sudden, random 'explosion' of violence as with calculated murder." (*Alcala, supra,* 36 Cal.3d at p. 626.) By

the same token, a finding of premeditation is not defeated simply because the killing was brutal or frenzied. "[T]he relevant question on appeal is not whether *we* are convinced beyond a reasonable doubt, but whether *any* rational trier of fact could have been persuaded beyond a reasonable doubt that defendant premeditated the murder." (*People v. Perez* (1992) 2 Cal.4th 1117, 1127.) Here, the brutal manner of killing–unrelenting hatchet blows to the victim's head–combined with substantial evidence of planning and motive, all provide substantial evidence to support a finding the murder was deliberate and premeditated.

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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