Filed 7/12/10 P. v. Sandoval CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JULIO SANDOVAL, Defendant and Appellant.	H033728 (Santa Clara County Super. Ct. No. CC597299)

Julio Sandoval appeals from a judgment of conviction of first degree murder of Dario Arriola with personal use of a deadly and dangerous weapon (Pen. Code, §§ 187, 12022, subd. (b)(1))[1] (count one), assault with a deadly weapon upon Samuel Pinon with personal infliction of great bodily harm (§§ 245(a)(1), 12022.7, subd. (a)) (count two), and assault with a deadly weapon upon Beldon Mendez (§ 245(a)(1)) (count three) that followed a jury trial. The primary issue on appeal is the sufficiency of the evidence to prove deliberation and premeditation with regard to the murder of Arriola. Defendant argues that, under *People v. Anderson* (1968) 70 Cal.2d 15, the evidence is insufficient to show the murder was deliberate and premeditated. He also attempts to raise an equal protection issue.

---

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

We affirm.

A. *Deliberation and Premeditation*

1. *Evidence*

The evidence properly viewed (see *People v. Story* (2009) 45 Cal.4th 1282, 1296; see *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781]) shows the following.

In July 2005, the Agenda nightclub was located on the northwest corner of San Salvador and South First Street. Its front door faced First Street. In the early morning hours of July 2, 2005, after the Agenda nightclub had closed, Agenda bouncer Dario Arriola was fatally stabbed in the parking lot behind the club. The parking lot was located on the corner of Market Street and San Salvador and vehicular access to the lot was on Market Street. The low concrete wall that separated the parking lot from the Market Street sidewalk had gaps for pedestrian access. The California Theatre was north of the parking lot on Market Street. The Marriott Hotel was on the opposite side of the street further north on Market Street. Three knives, a Kershaw knife, an Eagle knife, and a Barracuda knife, were recovered after the incident.

Earlier on the night of the killing, defendant Sandoval had gone to the Agenda with three other Hispanic males: Nathan Juliano, Alex Espinosa, and Omar Delanda. Delanda was the tallest at five foot, eight inches and Espinosa was the shortest at five foot, five inches.

DeWayne Johnson, who was six foot, five inches tall and worked as a bouncer at the Agenda, had a problem with defendant that night. Defendant had taken off his red collar shirt and was wearing a short-sleeved white T-shirt, which violated the Agenda's dress code. Johnson asked defendant to put his shirt back on but defendant ignored him and shrugged him off. Johnson had to insist that defendant put on his shirt and eventually he did. Later, while Johnson was escorting a band to the stage, Johnson had to speak with defendant again about putting on his red shirt. Agenda bouncer Jermaine Baker,

who was six foot, three inches tall and over 300 pounds, told defendant that he would have to leave if he did not put his shirt on.

Angela Alatorre, her sister Veronica Renteria, and her sister's friend also went to the Agenda that night. Defendant tried to dance with Alatorre but she would not dance with him.

At closing time, about 1:40 a.m. on July 2, 2005, when most people had been cleared out of the nightclub, Agenda bouncer Samuel Pinon had a run-in with defendant. Defendant accidently bumped Pinon, who was standing at the exit. As Pinon continued clearing out the remaining customers, defendant said, " '[D]on't fucking touch me.' " Pinon told defendant, " '[W]hat are you talking about, nobody is touching you, make your way home, go to your car, go home." Defendant, who appeared intoxicated, became verbally aggressive and "a little bit confrontational" and went toward Pinon. Pinon shoved him back, causing him to take a couple of steps back, and told him to go home. Abdul Wali Hamidi, the Agenda's security manager, heard the confrontation. When defendant "persist[ed] on going at [Pinon]," Hamidi jumped in. Hamidi grabbed defendant, put him in an arm lock, and took him over to officers stationed in the street at closing time. A police officer flashed his light on defendant and told him to go home. Defendant walked away.

Eric Coleman, another Agenda bouncer, had also noticed the confrontation. By the time Coleman had made his way over to Pinon, defendant had already been walked over to the police.

Outside the Agenda after closing, Alatorre spoke with bouncer Arriola, whom she knew and who invited Alatorre and her companions to go have some drinks. When Arriola went inside to get his paycheck, Alatorre went into the parking lot. She exchanged numbers with Espinosa, one of defendant's three companions that night. Alatorre's sister was speaking to defendant. When Alatorre was done exchanging

numbers with Espinosa, Arriola came over and gave her a hug and kiss. Defendant asked Alatorre what she was doing with that punk. Arriola ignored him.

About 15 or 20 minutes after the patrons had been cleared out of the Agenda, bouncer Coleman saw, through the windows, defendant with others outside the club. Coleman radioed to find out Pinon's location and mentioned that "those guys are back." When he learned that Pinon was upstairs, he walked outside to see if the men were waiting out there. Coleman saw defendant and his companions walk around the Agenda down First Street, turn onto San Salvador, and head toward the parking lot.

Pinon left the club and went to his vehicle, which was parked on the north side of the Agenda in the parking lot at the corner of Market Street and San Salvador. As Pinon was driving out of the lot with the intention of making a left turn onto Market Street, defendant and three other men rushed his vehicle. Defendant had his red shirt wrapped around his hand and was at the head of the group. Pinon turned right on Market Street, instead of going left as planned, because he felt his life was in danger and he saw that he would not be able to make an immediate left since vehicles were waiting at the red light at Market Street. The men were still chasing his vehicle; defendant was waiving his red shirt. Pinon went around the block and headed back toward the Agenda on First Street. Pinon called head bouncer Hamidi because he thought bouncers Arriola and Mendez were still in the parking lot and their lives were in danger. Pinon parked near the Agenda.

After Hamidi received Pinon's call informing him that Pinon had been rushed in the parking lot and help was needed, Hamidi, Johnson, and Baker, who were still upstairs at the Agenda, ran downstairs. Hamidi saw Pinon get out of his car and head toward the parking lot.

Bouncer Mendez, who had seen the four men start chasing Pinon's car, and bouncer Arriola were standing on the north side of the Agenda in the parking lot.

Mendez saw the men regroup on the Market Street sidewalk next to the northwest corner of the parking lot. When the four men started walking toward Arriola and him, Mendez became concerned for their safety.

Pinon reentered the parking lot on foot and saw the four men walking toward Mendez and Arriola. Hamidi, Baker, and Johnson ran into the parking lot.

The group of six bouncers, all big men, walked toward defendant and his companions. Pinon, who was upset, was yelling at them and telling them to leave. The four men started walking away slowly. Three of the four walked out toward the sidewalk; the fourth man ducked behind a vehicle in the northwest corner of the parking lot. At some point, one of the men took off his shoe or boot, dumped something out, and put it in his pocket. Pinon and the other bouncers continued to approach the group of three who had stopped.

Pinon was telling the group to go home. Baker and Mendez, who was also 300 pounds plus, were still making their way toward the sidewalk when a fight erupted.

Baker exchanged blows with the man who had remained behind in the parking lot. Hamidi saw a scuffle out of his left eye and saw defendant raise his hands to fight; Hamidi hit defendant, who went halfway down to the ground. The fight moved out to the sidewalk and street. Mendez and another bouncer went toward defendant. Mendez got in a few punches.

An onlooker in a vehicle said "watch out," and the tallest of defendant's group made "a wild punch" or "stabbing motion" toward Pinon's left abdominal area. Pinon turned to avoid it and thereafter Pinon could not use his left arm.

Bouncers Baker and Johnson yelled for Hamidi to watch his back. Hamidi put up his hand and blocked the attacker's wrist and struck the man, who fell backward. Hamidi backed off.

Defendant got up and lunged at Pinon. Pinon, who was in pain and could not raise his left arm, kicked defendant. Defendant, who now had a knife, lunged at Pinon again. Defendant was swinging a knife at Pinon. Defendant kicked Pinon; defendant dropped the knife, picked it up, and ran north. Pinon reentered the parking lot.

Juliano had also pulled out his knife and brandished it. Mendez "started back pedaling" when he saw two men, one of whom was defendant, with knives. Juliano did not believe that he had to run even though his companions and he were outnumbered and "outsized" by the bouncers. Mendez, who was on the sidewalk, heard Arriola, who was in the street, shout and then saw that Arriola's forearm had been cut. Mendez retreated to the parking lot.

When the knives came out, all the bouncers retreated into the parking lot. It seemed to Juliano that "everything had calmed, everything was done." Juliano was "really relieved that it was over."

Hamidi told Pinon that he was bleeding and was trying to make sure Pinon was okay. As the bouncers gathered in the parking lot, Hamidi said something like, "[A]ll right, back off, let's go, back off." As they approached the fourth man in the parking lot, Pinon told Baker to leave the man alone; Pinon was saying, "[L]et's just go, everybody is okay." Hamidi wanted to take Pinon to the hospital. Hamidi and Pinon continued walking away.

Pinon heard somebody yell something like, "He's got a gun. He's got a knife." In the parking lot, Espinosa hurled a bottle. It just missed Pinon's head and hit the window of a minivan parked in the lot, shattering the glass. The impact of the bottle hitting the minivan sounded like a gunshot. Pinon, who was unarmed, ran.

Espinosa was yelling and defendant went up to Juliano and demanded Juliano's Kershaw knife. At first, Juliano refused but when defendant demanded it again, Juliano

handed it to him. Defendant ran back into the parking lot toward Mendez. As he came, defendant was unwinding his red shirt from around his hand, which held a knife.

Hamidi saw armed men running toward them in the parking lot and saw them surrounding Mendez and then saw defendant chase and cut Arriola. Hamidi decided the situation was getting out of hand because the bouncers had backed off and now the men were chasing them with weapons and looked like "[t]hey want[ed] to start stabbing people." Hamidi ran back to the Agenda, told the Agenda's owner to call 9-1-1, and grabbed a couple items to use as weapons.

As Mendez was "back pedaling," he put up his hands and told the men coming after him, "[J]ust let it go, it's not that serious." Defendant was among those attacking Mendez. At the moment Mendez was cut by another attacker, Mendez was "[b]ack pedaling for [his] life." Arriola pushed that attacker and Mendez, who had been cut twice at this point in time, was able to get away.

The attackers, including defendant, went after Arriola. Arriola raised "his hand up in a surrender kind of way" and was saying something like, "Hey, kick back, man. What are you doing, what are you doing?" The men surrounding Arriola were making jabbing or stabbing motions. Arriola slipped or fell in the parking lot. One man charged and stabbed Arriola. All four men, including defendant, attacked Arriola. Arriola was stabbed, kicked and forcefully stomped. Defendant was making "wild stabbing" motions and kicking Arriola. At first Arriola was in a fetal position, but then he went limp.

When Pinon tried to reach Arriola, an attacker slashed at him. Pinon was able to kick off one attacker. Johnson kicked at another attacker and one of them swung a knife at him.

Aaron Jimenez, a bystander, witnessed the attack upon Arriola. His friend Mike's two-door black Mustang was parked in the lot and Jimenez was standing outside the car. Jimenez described the attack as brutal and thought the victim would be dead. When it

appeared the attackers had left the victim on the ground, Jimenez inched closer. Suddenly, Jimenez was being chased. Jimenez ran, weaving in and out of cars, and was finally able to jump back into the Mustang.

One of the pursuers started pounding on the Mustang's passenger window and demanding Jimenez get out. That man then ran north, down the eastern side of Market Street toward the Marriott. Delanda, who had been chasing Jimenez and looked really angry, held up an unfolded knife with blood on it next to the Mustang's passenger window with his right hand and smeared his left hand down the window. He then slashed the Mustang's tires on the passenger side. He then ran north in the direction of the Marriott hotel.

When Hamidi returned to the parking lot, Arriola was on the ground.

Espinosa and Delanda were apprehended and arrested in the parking lot on the northeast corner of Market and San Carlos Streets, diagonally across from the Marriott. A folding Barracuda knife, without a hand guard, was found in the ivy around the parking lot where Espinosa and Delanda were arrested. Delanda was the source of all the DNA samples obtained from the Barracuda knife. Persons wielding knives without hand guards often cut themselves during assaults because their hands become sweaty and slip. The source of blood drops found on Espinosa's long sleeved white T-shirt, jeans, and shoes, which he was wearing when arrested, was Arriola.

Juliano took off when he heard police sirens. He put his shirt in a garbage can. Juliano and Sandoval each separately obtained a ride home later that night.

Juliano threw away the boots he had been wearing that night because he found a spot of blood on them that he was "almost 100 percent sure was [Arriola's] blood." On July 4, 2005, Juliano turned himself into the police.

Juliano eventually pled guilty to assault with a deadly weapon and received a four year prison term. At trial, Juliano admitted having the Kershaw knife with him the night

of the incident, which he carried with him while he was at the club. At trial, Juliano admitted kicking Arriola after he fell.

Police found defendant's red shirt lying on the pavement along the west wall in the parking lot behind the Agenda.

The folding Kershaw knife was found with its blade open in a trash can north of the Market Street entrance to the California Theatre. Sandoval was the source of the DNA sample obtained from the Kershaw knife's handle. Arriola was the source of DNA samples obtained from the knife's blade.

The folding Eagle knife with its blade closed was found in a trash can south of the Market Street entrance to the California Theatre. Arriola and Pinon were the only possible sources, among the comparative samples from those involved in the incident, for the DNA sample obtained from a bloodstain on the knife's blade. Arriola was the major source of DNA obtained by swabbing the Eagle knife's blade. Defendant Sandoval was the source of the DNA obtained from a bloodstain on the top flat edge of the blade where it is part of the handle.

Arriola had suffered six knife wounds, including a chest wound, three abdominal wounds, a superficial stab wound to the left forearm, and an incise wound to the right forearm. The stab wound to the chest was approximately four inches deep and involved a puncture to the aorta, the artery that delivers blood from the heart to the rest of the body. A person can die within a minute as a result of losing blood from a punctured aorta. Arriola had also suffered blunt trauma including abrasions and contusions of the face and scalp, lacerations to the right upper lip, an abrasion to the right knee, two abrasions on the right abdomen, and a contusion of the right thigh above the abrasion on the knee.

The knife injury to Pinon's left elbow exposed bone. Pinon needed surgery and it took five to six months to recover fully from the injury to his left elbow. Pinon had also been slashed on the rear left tricep, left forearm, left and right legs.

Mendez had been stabbed underneath his left tricep and cut across his belly. Mendez needed four stitches.

2. *Legal Definition*

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. (§ 189 ['willful, deliberate and premeditated killing' as first degree murder].) 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. (*People v. Bender* (1945) 27 Cal.2d 164, 183 . . . ; *People v. Thomas* (1945) 25 Cal.2d 880, 900 . . . ; see *People v. Perez* (1992) 2 Cal.4th 1117, 1123-1124 . . . ; CALJIC No. 8.20 (6th ed.1996).)" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

" '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 . . . .)" (*People v. Koontz, supra,* 27 Cal.4th at p. 1080.) "The length of time during which an intent to kill is pondered may vary with the individual and the circumstances." (*People v. Sedeno* (1974) 10 Cal.3d 703, 713, overruled on another ground in *People v. Breverman* (1998) 19 Cal.4th 142, 149, 165, abrogated on another ground by amendment of section 189 ["To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act"].)

"Anderson identified three factors commonly present in cases of premeditated murder: '(1) [F]acts about how and what 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).' (*Id.* at pp. 26-27.)" (*People v. Koontz, supra,* 27 Cal.4th at p. 1081.) The Supreme Court in *Anderson* observed that it had "sustain[ed] verdicts of first degree murder typically when there [was] evidence of all three types and otherwise require[d] at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Anderson, supra,* 70 Cal.2d 15, 27.)

"The goal of *Anderson* 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. (*People v. Anderson, supra,* 70 Cal.2d at p. 27.)" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) "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. (*People v. Daniels* (1991) 52 Cal.3d 815, 869-870 . . . .)" (*People v. Thomas* (1992) 2 Cal.4th 489, 517.) "The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez, supra,* 2 Cal.4th at p. 1125.)

3. *Sufficiency of the Evidence*

"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 . . . . 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. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 . . . ; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 . . . , 99 S.Ct. 2781, 2788-2789.) The standard of review is the same in cases such as this where the People rely primarily on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932 . . . .)" (*People v. Perez, supra*, 2 Cal.4th at p. 1124.)

In considering insufficiency of the evidence claims, appellate courts "resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 . . . .)" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) " '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.' (*Id.* at pp. 932-933, citations and internal quotation marks omitted.)" (*People v. Perez, supra*, 2 Cal.4th at p. 1124.)

In this case, the evidence shows that defendant Sandoval had a number of difficulties with the Agenda's bouncers earlier in the night and the bouncers tried to

intimidate defendant and his companions into leaving. These events cumulatively provided motive for the killing.

Inside the Agenda nightclub, bouncer Johnson caught defendant wearing only his T-shirt, a violation of the club's rules, and told him to put on his red shirt. Later, Johnson had to talk to defendant again about putting on his shirt. Bouncer Baker warned him that he would have to leave if he did not put on his shirt. At closing time, defendant had a brief confrontation with bouncer Pinon and head bouncer Hamidi. When bouncer Arriola came over to Alatorre in the parking lot after the Agenda had closed and gave her a hug and a kiss, defendant Sandoval asked Alatorre, " '[W]hat are you doing with that punk.' " Defendant Sandoval's remark reflects some animus toward bouncer Arriola, possibly because Alatorre, who had refused to dance with him earlier, was receptive to bouncer Arriola's attentions.

The evidence showed that, even though the Agenda had closed, defendant and his companions walked around the Agenda building and then returned to the parking lot behind the club. They rushed Pinion while he was driving out of the lot, they regrouped, and then they began walking toward Mendez and Arriola who were still in the lot. This evidence suggests defendant and his companions, who were carrying three knives between them, intended to provoke a fight with Mendez and Arriola. When the two bouncers in the parking lot were joined by four more bouncers, who together, in a show of strength, tried to run off the four smaller men, the men stayed and then brought out knives. This evidence indicates their willingness to take on, and use their weapons against, the bouncers.

When the bouncers were faced with knives, they backed off and retreated into the parking lot and the fight seemed over. During this momentary lull, defendant went to Juliano and obtained the Kershaw knife and he then ran into the parking lot and went after Mendez and Arriola. "Premeditation and deliberation can occur in a brief interval."

(*People v. Memro* (1995) 11 Cal.4th 786, 863.) The jury could have reasonably concluded that, during the time defendant went to and demanded the Kershaw knife from Juliano, defendant had considered his options and had purposefully obtained the weapon, with the intent to kill, before pursuing Mendez and then stabbing Arriola. (Cf. *People v. Thomas* (1992) 2 Cal.4th 489, 517 [defendant returned to his car to get gun and ammunition before committing murder].) In addition, Arriola suffered deep stab wounds to vital areas, the abdomen and chest. The jury could reasonably conclude that the manner of killing was indicative of a deliberate intent to kill. (Cf. *People v. Koontz, supra,* 27 Cal.4th at p. 1082 [defendant fired a shot at victim's abdomen, a vital area of the body, at close range and then prevented witness from calling ambulance].) "A violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation. [Citation.]" (*People v. Pride* (1992) 3 Cal.4th 195, 247 [numerous stab wounds to victim's torso].)

While the evidence of deliberation and premeditation is not entirely clear-cut, a rational trier of fact could have been persuaded beyond a reasonable doubt that the killing was willful, deliberate, and premeditated.

B. *Equal Protection Claim*

Defendant asserts that California's murder jurisprudence violates equal protection because an aider and abettor of an assault may be convicted of murder, without any finding of malice, under the natural and probable consequences doctrine[2] while the actual

---

[2] "An aider and abettor . . . must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' (*People v. Beeman* (1984) 35 Cal.3d 547, 560 . . . , original italics.)" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123.) "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was

killer who assaults the victim may be convicted of murder only if there is a finding of malice. He cites *People v. Sarun Chun* (2009) 45 Cal.4th 1172, which held that "[w]hen the underlying felony is assaultive in nature, . . . the felony merges with the homicide and cannot be the basis of a felony-murder instruction."[3] (*Id*. at p. 1200.) Defendant asserts that "[t]he disparate treatment of direct perpetrators and aiders and abettors has no rational basis, and, therefore violates equal protection."

Defendant lacks standing to raise such equal protection claim. (See *People v. Garcia* (1999) 21 Cal.4th 1, 11-12 [defendant "lacks standing to assert the equal protection claims of hypothetical felons"].) The general rule is that " 'a charge of unconstitutional discrimination can only be raised in a case where this issue is involved in the determination of the action, and then only by the person or a member of the class of persons discriminated against.' [Citations.]" (*Rubio v. Superior Court* (1979) 24 Cal.3d 93, 103.)

Defendant was not a member of the aggrieved class and suffered no injury based upon the allegedly unconstitutional law. The trial court instructed the jury regarding finding defendant guilty of a crime based upon aiding and abetting. It instructed that, to prove murder, the People were required to prove that the defendant committed an act that caused death and the defendant acted with malice aforethought, either express or implied, and without lawful excuse. It told the jury that "[t]he defendant acted with express malice if he unlawfully intended to kill." It also instructed as to first degree murder: "The defendant is guilty of first degree murder if the People have proved that he acted

---

reasonably foreseeable. (*People v. Prettyman, supra,* 14 Cal.4th at pp. 260-262 . . . .)" (*Id*. at p. 1133.)

[3] "First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is 'an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189. . . .' [Citation.]" (*People v. Sarun Chun, supra*, 45 Cal.4th at p. 1182.)

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 committing the act that caused the death. . . . [¶] All other murders are murders of the second degree." The jury convicted him of first degree murder. Impliedly, the jury found that defendant committed the act causing Arriola's death and he acted with the intent to kill and it did not find defendant guilty of murder as an aider and abettor of assault.

The judgment is affirmed.

_____

ELIA, J.

WE CONCUR:

_____

RUSHING, P. J.

_____

PREMO, J.