Filed 8/27/19 P. v. Robbins CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GARTH ALLEN ROBBINS, Defendant and Appellant.	B283582 Los Angeles County Super. Ct. No. GA088055 ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING (NO CHANGE IN JUDGMENT)

THE COURT:

It is ordered that the opinion filed herein on July 31, 2019, be modified as follows:

On page 29, the third sentence of the first full paragraph is deleted, and the following is inserted in its place:

"We do not believe the sealed transcript, taken as a whole, shows that Robbins unequivocally concluded he wanted to enter a plea of NGI, and that counsel refused to do so in response to Robbins's demand."

Footnote 9 remains the same.

There is no change in the judgment.

Appellant's petition for rehearing, filed on August 7, 2019, is denied.

EGERTON, J. EDMON, P. J. LAVIN, J.

Filed 7/31/19 P. v. Robbins CA2/3 (unmodified opinion)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GARTH ALLEN ROBBINS, Defendant and Appellant.	B283582 Los Angeles County Super. Ct. No. GA088055

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Stan Blumenfeld, Judge. Affirmed.

David Andreason, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brenan and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Garth Allen Robbins appeals from a jury verdict finding him guilty of two first degree murders with special circumstances and two counts of arson. He argues his statements to an undercover police officer should have been suppressed, trial counsel was ineffective when he conceded during closing argument that Robbins had set the fire, he was denied his right personally to enter a plea of not guilty by reason of insanity, and the court should have granted his motion to replace his counsel. We affirm.

BACKGROUND

An information filed August 30, 2013 charged Robbins with the murders of Clif Clark (count 1) and Paul Boyd (count 2) under Penal Code[1] section 187, subdivision (a); one count of arson causing great bodily injury to Perry Simons (count 4) under section 451, subdivision (a); and one count of arson of an inhabited building (count 19) under section 451, subdivision (b). The information also charged 15 counts of attempted murder, which were dismissed before trial. The information alleged arson and multiple-murder special circumstances for the murders, and alleged the use of an accelerant on the arson counts.

Robbins's counsel entered a plea of not guilty. After Robbins's counsel stated he believed Robbins was incompetent to stand trial, the trial court held a competency hearing on November 18, 2014, and relied on two doctors' reports to find Robbins competent to stand trial. The court later held an evidentiary hearing and denied Robbins's motion to suppress

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[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

a recorded conversation he had with an undercover police detective while in jail.

The case went to trial in April 2017, and we summarize the evidence below.

1. *The November 1, 2012 fire at 1385 El Sereno*

When Pasadena firefighters responded to a report of a structural fire at 1385 El Sereno in the early morning of November 1, 2012, they found the house ablaze. They searched inside for victims, leading out twelve men. Three men were carried out: Clif Clark and Paul Boyd were dead, and Perry Simons was badly burned.[2] Everyone who lived in the building was accounted for except for Robbins, and all uniformed patrol officers were advised to be on the lookout for him.

A fire investigator arrived at the scene that night when the fire was nearly out and the two dead bodies were on the lawn covered in sheets. As he walked down the driveway, he saw and photographed a green Scripto disposable barbecue lighter wedged between the driveway and a chain-link fence gate.

The investigator examined the outside of the house, and then went inside. The 3,000 square foot house had 20 bedrooms, and he walked through all three floors. After examining smoke patterns and the severity of the fire damage, he concluded that the fire began in a first floor bedroom near the front entrance of the house (Room No. 1). The room had gone to "flashover," meaning that it had gone "from . . . a fire in a room to a room on fire," with the entire space burning.

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[2] Simons was taken to the hospital. He was treated with skin grafts, and spent six months in a convalescent center. He lost everything he had when the house was cleaned out after the fire.

Sifting through the remains of a pile of clothing in the room, the investigator was met with an overwhelming smell of gasoline. Using a combustible gas detector, he found combustible gas in the pile and on other areas of the floor. He also found at least three aerosol cans with the bottom ends blown out. Fire overpressurizes such cans until they release and explode with a very loud bang, like a firework. After the floor was cleaned and rinsed, he observed a prominent "pour pattern," as if someone had poured an ignitable liquid (such as gasoline) on the floor on his way out of the room.

The investigator concluded that the fire had been set intentionally, and the first fuel was gasoline vapor ignited with an open flame device. The clothing taken from Room No. 1 tested positive for gasoline.

Robbins lived in Room No. 1. Robbins's "cooking buddy" Thurman Johnson lived on the second floor in Room No. 4, directly over Robbins's room. The house had a front entrance and a back entrance, both on the main floor. Johnson kept his electric bike in Robbins's room, and Robbins got around on a little red moped with a basket on the front, which he kept outside behind the driveway gate by the garage.

Robbins was something of a hoarder, and never cleaned. The house had a cockroach problem, and the bugs hid in the stuff stacked in Robbins's room. Three or four days before the fire, Johnson helped Robbins clear out his room so the building manager could spray for cockroaches. Some of Robbins's things were stored in the garage, and the rest were loaded onto a truck and taken somewhere else. Robbins's room was cleaned, recarpeted, and painted, and a bed, a chair, and a table were moved back in.

On Halloween night 2012, Johnson came home from his cleaning job around 12:30 a.m., and began to cook chili for himself in the kitchen. Robbins came in the back entrance, walked through the kitchen and said hello, and then went to the bathroom and into his room, closing his door. Robbins, who was usually quiet, was a "coward"; Johnson had seen him take a whipping without fighting back. After five minutes, Robbins left his room carrying two bags, closed the door, said " '[s]ee you later' " to Johnson, and left by the front door. Robbins got on his moped and left, closing the driveway gate, which had a padlock to which Robbins had a key.

Johnson left the kitchen five to ten minutes later and went upstairs to his room. Just as he began to eat, he heard a loud boom from downstairs, and all the lights in the house went out. He went downstairs to investigate and saw orange fire coming from under Robbins's closed door. He grabbed a fire extinguisher and sprayed around the door, and when it ran out he went back upstairs to get another extinguisher. Another boom blew the door open and fire shot out of Robbins's room. Johnson hollered for everyone to get out of their rooms and ran down the hallway hitting doors. The front exit was blocked by the fire shooting out of Robbins's room, so he had to leave by the back entrance.

Johnson climbed over the driveway gate, which was locked, to get to the front of the house. He grabbed the water hose in his hand and threw rocks at the upstairs window to wake up his friend Clif, until the police told him to go to the other side of the street. The fire department arrived as tenants were coming out of the house. Johnson saw the two dead men brought out of the house in bags; his friend Clif was one of them. Johnson lost everything in the fire.

Ricky Kindred, who lived in a room two doors away from Robbins, also heard the loud bang at around 2:00 a.m. on November 1, 2012. He went with Johnson to Robbins's room and saw a small fire on the carpet when Johnson opened the door. Johnson went to get the fire extinguisher. When the fire got out of control, Johnson shouted for everyone to leave and Kindred left through the back entrance. The driveway gate was open. Kindred was able to reclaim most of his possessions when, weeks later, he was allowed back into the house.

A second-floor resident said he stopped interacting with Robbins after Robbins stopped bathing and had an unpleasant smell. He woke up to smoke alarms on the morning of the fire, and the hallway was full of smoke. He pulled his air conditioner out of his window, climbed out, and clambered down drain pipes to the ground.

Laurence White, the resident manager of the boarding house, explained that the cockroach problem was mainly in Robbins's room because he kept dishes in there. Robbins did not leave his door open for the exterminators but they cleaned his room out and sprayed it anyway; Robbins never said he was upset about that. Johnson's yelling woke him up on the morning of the fire. White grabbed a fire extinguisher and headed from his room in the back of the house to Robbins's room, but it was too hot to even look in, so he went down to the basement to wake people up and then headed out the back door.

2. *The investigation*

At around 5:45 a.m. on the morning of the fire, police arrested Robbins after they found him asleep in a pancake restaurant; he was courteous and cooperative. His red scooter was parked behind the restaurant. In a Rite Aid bag in the

storage compartment on the back of the scooter was empty packaging from a Scripto lighter, which perfectly fit the lighter found outside the house. Robbins's wallet held money and receipts, including one from a transaction at 7:00 p.m. on October 31, 2012 at a Bank of America near a Rite Aid store. The clothing he was wearing tested negative for gasoline.

After Robbins was booked and placed in custody at the police station, he was moved to an interview room where detectives read him his rights under *Miranda v. State of Arizona* (1966) 384 U.S. 436 (*Miranda*). He invoked his right to counsel and the detectives stopped questioning him.

The next day, a Pasadena police detective who worked undercover was placed in Robbins's jail pod dressed like a construction worker, with a digital recorder attached to his forearm under his long-sleeved shirt. This was the first time he had been undercover inside a jail. He had been told that a suspect had been arrested, and was in jail after invoking his *Miranda* rights. Only he and Robbins, who was seated at a table, were in the room. The detective sat on the other side of the table with his tray of food, and began a 40-minute recorded conversation; the recording was played to the jury at Robbins's trial.

The detective asked if he could sit down and Robbins said sure. The two men discussed the food and their health. The detective asked why Robbins was in a prison jumpsuit, and Robbins explained the police took all his clothes for evidence. The detective said "What'd they say you did?" and Robbins answered: "Uhm, killed a bunch of people. . . . I set a bunch of people on fire and I killed them." When the detective expressed disbelief, Robbins insisted "It's true. . . . Well, I just got—I just

got kind of mad that night. I set the house on fire. . . . The house I was living in," with people inside. Asked what had made him mad, Robbins answered: "[S]ooner or later, I just—I just couldn't stand it. I just gave in to it." People had been "[m]aybe picking on me a little." He explained he had been renting a room in the house: "I don't know if anybody actually died or anything. I didn't stick around."

The detective asked how Robbins did it, and he answered: "I had a lawnmower in the back. And it had a can of gasoline. So, I just spread it around in the living room and . . . I poured the gas out. And then, I lit it. . . . I never tried it before. I just, uh, kind of leaned over and lit it with the barbecue lighter thing. Anyway, I didn't stick around to see how it turned out." The fire "went up all around me" but he managed to get away unburnt. "It made me happy." It was early morning and he had been awake thinking, while people were sleeping. There were 20 people living in the house. The detective said, "I hope you didn't tell the cops that," and Robbins answered: "No. I asked to see my lawyer first."

The detective asked if Robbins was trying to hurt the other people in the house, and he said no: "I've been trying to work that out. It's kind of like I just wanted like everything to go away." It was "the whole situation. The whole—I don't know. . . . I don't know. But, what the—I've been trying to work it out why I did this. Uh . . . resisting the impulse has left me depressed in the past. . . . I thought about doing it a lot of times, yeah. But, I had always run away and gone someplace else. And I'll check myself. And then, *** get over the memory." Asked "[w]hat d[id] you tell them in there?"—Robbins answered: "I don't know. I haven't really told them anything. Uhm, they asked me if

I'd been to the mental hospital. And I told them I had. But, that's no secret, 'cause, I mean, I'm on Disability for—for—for depression and alcoholism. Uh, I've been to the—the mental hospital a couple of times in the last couple of years, while—while living at that house." Asked who was picking on him, Robbins replied: "You know, different people picking on me. I get depressed. And I just stop taking care of myself. And my room gets bugs. And people complain that I don't shower enough. And it's little things. And I—and I can't work it out. I reacted so big to—to such little—little things."

Robbins said he just emptied the gasoline can on the floor; they probably knew he did it, and "I have no idea how it turned out." The detective told Robbins he saw on the news two days ago there was a fire in Pasadena, and two older guys died. Robbins said the fire was on El Sereno.

Robbins said he used to work as a chemist but it was too stressful.

He explained how he poured the gasoline out of the valve on the can, "just on the floor. I don't think I was thinking very clearly. . . . 'Cause it was . . . impulsive." He used a "barbecue lighter thing."

Right after, "I got hungry. I went and had breakfast." "I did various things. I drove around. I just, I was feeling happy. . . . Yeah, I was feeling very happy. I drove around. I went to the book store and I read for a little while."

He had moved into the house on El Sereno after he got out of the mental hospital. The detective suggested that he could have told the landlord or someone that the other tenants had been mean to him, and Robbins responded: "[T]hey don't care. That's the way *** I mean. I mean, there was bugs coming out.

And I—I knew that. And I didn't blame them for—for, uh, complaining. But, I don't know. I just, uh—the thought just popped into my head. And before I knew it, I was doing it. Yeah. I don't know." The detective suggested he could have warned the good residents and just gone after the bad ones, but Robbins explained: "I feel this is like—I don't think it was really about them. I think it was just getting rid of my old life. Just like . . . burning bridges. I could have just easily just gone out the door and just never come back and not done anything to anyone, I suppose." He continued: "Actually, it surprised me it made me happy. I—you know, my—they say everyone has dark thoughts, every once in a while. You know, and you resist them. And I always—I always resisted them and tried to get over them. But, then, when I—one time I gave in to it, I—just it made me really happy. And I mean, I—I spent the next day and this morning, and all day today, kind of happy, even though I'm—I mean, I'm going to be in some place like this for the rest of my life. Oh, well."

The detective testified that Robbins never cried or acted sad during the conversation.

Robbins waived his right to testify in his own defense.

After deliberating for just over an hour, the jury convicted Robbins of all counts, finding both murders to be first degree, and finding true all the allegations and special circumstances. The court sentenced Robbins to two consecutive terms of life without parole on the murder convictions, with an additional consecutive term of 14 years for arson causing great bodily injury (including a five-year enhancement for the use of an accelerant). The court imposed 13 years for arson of an inhabited building, staying the sentence under section 654. Robbins was ordered

to pay fines and fees, and received presentence custody credit. He filed a timely appeal from the judgment.

DISCUSSION

1. *The motion to suppress was properly denied*

Defense counsel moved to suppress on due process grounds Robbins's statements in jail to the undercover officer, based on his earlier invocation of his right to counsel. The court conducted an evidentiary hearing at which the court heard testimony (including from Robbins and the undercover officer) and argument. Robbins's counsel argued that Robbins was vulnerable, and his will was overborne when the physically imposing undercover detective engaged in the recorded conversation with him.

The court denied the suppression motion in a written opinion. The court noted that Robbins's counsel acknowledged that under California case law the statements were not in violation of *Miranda*, given that Robbins had been unaware he was speaking to a police officer. The due process clause was not violated because Robbins's statements were voluntary. The audiotape showed that Robbins was unguarded and open with the friendly undercover officer, showed significant insight into his actions and emotions, and never showed any signs that he was intimidated. The court concluded that Robbins was not coerced into confessing, and denied the motion to suppress.

On appeal, Robbins argues that despite California case law, the jail pod conversation was an interrogation subject to *Miranda*'s requirement that officers not engage in custodial interrogation after a suspect has invoked his right to counsel. We disagree.

In *Illinois v. Perkins* (1990) 496 U.S. 292, 296-297 (*Perkins*), the Supreme Court held that a conversation between an incarcerated suspect (who had not been given *Miranda* warnings) and an undercover agent posing as a fellow inmate was not custodial interrogation, and therefore did not require warnings under *Miranda*. "It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. . . . When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners." (*Perkins*, at p. 297.) Although custodial questioning by a suspect's captors who appear to control the suspect's fate may create "mutually reinforcing pressures" weakening the suspect's will, "where a suspect does not know that he is conversing with a government agent, these pressures do not exist." (*Ibid*.) *Miranda* "forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner. . . . [¶] *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates." (*Perkins*, at pp. 297-298.)

Robbins argues that *Perkins* does not apply to him because unlike the defendant in *Perkins*, he had already received *Miranda* advisements and had invoked his right to counsel before he would answer questions. Relying on *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*) and its prohibition of further custodial interrogation of a suspect who has invoked his *Miranda* rights (absent waiver), he argues that the conversation with the undercover detective in the jail pod was inadmissible because he had asserted his *Miranda* rights and had not waived them.

The First District rejected precisely this argument in *People v. Guilmette* (1991) 1 Cal.App.4th 1534 (*Guilmette*). The defendant had invoked his right to remain silent and his right to an attorney before police recorded a phone call he made to his rape victim, who was acting as a police agent and asking questions suggested by the police. (*Id.* at p. 1538.) The court held the recording was admissible under *Perkins*, regardless of the defendant's earlier invocation of his *Miranda* rights: "It is true, as appellant contends, that in *Perkins* there was no *Miranda* warning, no invocation of *Miranda* rights, and that the issue presented to the court was whether the undercover agent was required to give Perkins a *Miranda* warning. These distinguishing facts, however, do not change or alter the basic nature of the respective conversations by Perkins and appellant herein. . . . Statements made under these circumstances simply do not implicate *Miranda*, and a noncoercive atmosphere is not transformed into a coercive one because one suspect is warned and the other is not." (*Guilmette*, at p. 1541.)

Division Two of this appellate district recently agreed. In *People v. Orozco* (2019) 32 Cal.App.5th 802 (*Orozco*), the father of a baby who died from blunt trauma while under his care voluntarily went to the police station. Police read him his *Miranda* rights and he said he understood them, and then gave an account absolving himself. After an officer asked him to take a polygraph test, he asked for an attorney five times. The officers then arrested him, promising not to take him to jail if he would tell them the truth without his attorney present. He again asked for an attorney, and the officers jailed him. He had not made any incriminating statements. (*Id.* at pp. 807-808.)

Police officers then placed the baby's mother in an interview room with the defendant, after telling the mother she had a right to know what happened, and suggesting she could get a full explanation. Police recorded the conversation. An officer interrupted to report autopsy results indicating the baby had died from a beating; later, the officer briefly pulled the mother out of the room to ask her to take a polygraph test because defendant had refused, to "stimulate conversation"; and after the defendant broke down and confessed to the mother that he struck the baby once and it killed her, the officer returned, said " '[t]ime's up,' " and escorted the mother from the room. (*Orozco*, *supra*, 32 Cal.App.5th at pp. 808-809.)

The defendant moved to suppress the confession as in violation of *Miranda*, and the trial court invoked *Perkins* in allowing the confession into evidence. (*Orozco*, *supra*, 32 Cal.App.5th at p. 810.) On appeal, the defendant argued (among other arguments) his confession should have been suppressed because he invoked his *Miranda* right to counsel, and the police violated *Miranda* when they sent the baby's mother to speak to him. (*Id.* at p. 812.) As in this case, the mother was an agent of the police, and the defendant did not know this. (*Ibid.*) And as here, the squarely presented question was: "When a suspect invokes his *Miranda* right to counsel and law enforcement subsequently orchestrates a conversation between the suspect and someone the suspect does not know is an agent of law enforcement, which decision controls—*Edwards* or *Perkins*?" (*Ibid.*)

The *Orozco* court pointed out that *Edwards* prohibits only further *interrogation* by the authorities once the suspect invokes his *Miranda* rights. (*Orozco*, *supra*, 32 Cal.App.5th at p. 813.)

"Interrogation" for *Miranda* purposes means " 'express questioning' " or " 'words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response,' " requiring " ' a measure of compulsion above and beyond that inherent in custody itself.' " (*Orozco*, at p. 813.) Whether a conversation is interrogation "is judged by what the suspect perceives, not what the police intend." (*Ibid*.) As a result, "there is no 'interrogation' when a suspect speaks with someone he does not know is an agent of the police," and "there is also no basis to apply *Edward*'s restrictions on further 'interrogation.' " (*Id*. at p. 814.) In addition, like *Miranda*, *Edwards* intended to dispel the coercive pressures inherent in custodial interrogation. (*Orozco*, at p. 814.) Lacking a police-dominated atmosphere and compulsion, when " 'an incarcerated person speaks freely to someone' that he thinks is a lover, a family member, a friend or *even a fellow criminal*" (italics added), the purpose of *Miranda* and *Edwards* "is simply not implicated in such situations." (*Orozco*, at p. 815.) California cases such as *Guilmette*, *supra*, 1 Cal.App.4th at pp. 1540-1541, and *People v. Plyler* (1993) 18 Cal.App.4th 535, 544-545, have uniformly come to the same conclusion. (*Orozco*, at p. 815.)

Robbins cites Justice Brennan's concurrence in *Perkins*, *supra*, 496 U.S. at p. 300, to argue that *Perkins* does not apply when a defendant has invoked his *Miranda* rights before he makes incriminating statements to someone he does not know is a police agent. But Justice Brennan's concurrence is dicta, and we agree with *Orozco* that the seven-justice majority opinion controls. (*Orozco*, *supra*, 32 Cal.App.5th at p. 815.) We therefore reject Robbins's argument that *Guilmette* misreads *Perkins*. (See *Orozco*, at pp. 815-816.)

The trial court correctly denied Robbins's motion to suppress his statements.[3]

2. *Defense counsel's closing argument was not structural error or ineffective assistance of counsel*

In his brief opening statement, defense counsel characterized Robbins's admission to the undercover detective, "I killed a bunch of people," as responding to a question about what the police *said* Robbins did, and pointed out that Robbins "at that point had no idea anybody died." Counsel then urged the jury to listen carefully to the evidence, and at the end of the case "we'll have a discussion about why it is that Garth Robbins is not guilty of murder."

In closing argument Robbins's counsel asked the jury to keep an open mind even "after hearing such tragedy, evidence of pointless death, probably painful death." Counsel continued: "And in exchange, I won't stand here and tell you that Garth Robbins is innocent. He's not innocent. Garth Robbins is guilty and responsible for the deaths of Paul Boyd, Clif[ ] Clark. He's responsible for the fire at 1385 El Sereno. He's responsible for Perry Simons' injuries. I won't stand here and pretend that's not true." He repeated: "[T]his is not in dispute. There was a fire. Garth Robbins set that fire. Two men died, one was injured. The place was destroyed. I'm not disputing that."

Defense counsel then argued that Robbins was guilty only of involuntary manslaughter. The instructions told the jury that

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[3] Robbins does not reassert his due process argument at trial that his statements to the undercover detective were not voluntary. He also does not argue that it makes a difference that the person to whom he made his statements was an undercover police detective, rather than an agent of the police.

specific intent was necessary for murder and manslaughter, including felony murder, but "involuntary manslaughter is when you cause a death without intending to [kill]. That's not what's on your mind." Robbins was criminally negligent in lighting the fire with gasoline, aware that his actions presented a substantial risk of burning an inhabited structure, and ignored that risk. The evidence showed he lacked the specific intent for murder, and he committed involuntary manslaughter in the deaths of the two men. What Robbins said to the undercover detective in the jail pod showed that he had no intent to hurt anyone; he was not thinking about burning down the house, but was depressed and "focused on what's going on in here and you want it to go away." His focus on his own pain made him criminally negligent. Robbins's statement " 'I wasn't thinking very clearly' " was consistent with an impulsive act and a lack of specific intent. "[T]he evidence is pretty clear that involuntary manslaughter fits exactly."

Toward the end of the defense closing argument, counsel stated that what Robbins said was consistent with a lack of intent and the prosecution had not proven specific intent. The prosecutor objected that defense counsel had misstated the law, and the court overruled the objection and told the jury to read the instructions.

Out of the presence of the jury and before rebuttal argument, the prosecutor told the court she thought she heard defense counsel say "that I had to prove intent to kill for it to be murder." Defense counsel responded that he had "focused entirely on state of mind, which is the key question in this case," and did not focus on felony murder: "I personally am not sure that that is the best way to present this case." The court stated,

"I'm not criticizing . . . in any way, shape or form in terms of your strategy," and pointed out that the thrust of counsel's argument was to focus on "one aspect of a murder theory," which was the reason the court overruled the objection.

In rebuttal, the prosecutor pointed out that the jury did not need to find Robbins had an intent to kill to find him guilty of felony murder. The evidence showed that Robbins "lit that house on fire and that he intended to light that house on fire," which was all the intent required for first degree felony murder.

a. McCoy *does not require reversal*

Robbins argues his counsel unreasonably conceded all the facts required to find him guilty as charged, resulting in a breakdown of the adversarial system.

In *McCoy v. Louisiana* (2018) __ U.S. __ [138 S.Ct. 1500] (*McCoy*),[4] defense counsel concluded that the evidence against McCoy on three counts of first-degree murder was overwhelming, and unless the defense conceded that McCoy was the killer, it would be impossible to avoid a death sentence. McCoy was " 'furious' " when counsel informed him of the planned concession, told counsel not to concede, and pressed him to seek acquittal. (*Id*. at p. 1506.) Nevertheless, during opening statement and closing argument, counsel told the jury the evidence unambiguously showed that defendant committed three murders. The jury convicted McCoy on all three counts. After counsel argued at the penalty phase that McCoy had mental and

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[4] The Supreme Court decided *McCoy* after Robbins filed his opening brief and before respondent filed its brief (which discussed the case). Robbins's reply brief argues *McCoy* applies to his case.

emotional issues and urged mercy, the jury returned three death verdicts. (*Id.* at pp. 1506-1507.)

Emphasizing " '[t]he right to defend is personal,' " the Court concluded the Sixth Amendment right to counsel entitled a defendant to assistance of counsel, but "[t]o gain assistance, a defendant need not surrender control entirely to counsel." (*McCoy*, *supra*, 138 S.Ct. at pp. 1507-1508.) While counsel is in charge of trial management, "[s]ome decisions, however, are reserved for the client . . . . [¶] Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category." (*Id*. at p. 1508.) The Court concluded: "[C]ounsel may not admit her client's guilt . . . over the client's intransigent objection to that admission." (*Id*. at p. 1510.) "Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence." (*Id*. at pp. 1510-1511.) As "counsel's admission of a client's guilt over the client's express objection is error structural in kind," the defendant did not need to show prejudice to be entitled to relief. (*Id*. at p. 1511.)

Here, there is no evidence that Robbins continually maintained his factual innocence, much less that he expressly and intransigently objected to counsel's decision to concede that he started the fire. Division Four of this appellate district recently declined to extend *McCoy*'s analysis to cases in which the defendant has not expressly objected to counsel's plan to concede guilt. (*People v. Lopez* (2019) 31 Cal.App.5th 55, 66 (*Lopez*).) The court of appeal explained: "*McCoy* explicitly distinguished *Florida v. Nixon* [(2004)] 543 U.S. [175,] 186, in which defense counsel several times explained to the defendant a proposed concession strategy, but the defendant

was unresponsive. The *Nixon* court held that 'when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, [citation] "[no] blanket rule demand[s] the defendant's explicit consent" to implementation of that strategy.' " (*Ibid.*) We agree that *McCoy* does not extend to a case in which the defendant does not expressly disagree with counsel's decision relating to the objective of his defense. (*Lopez*, at p. 66.)

Robbins points out that the record does not demonstrate whether his counsel ever told him he intended to concede that Robbins started the fire that killed the victims. He does not claim that his counsel did *not* tell him, however, and in the absence of a claim that he was blindsided, we will not assume that counsel kept him in the dark. He also argues that after the verdict, he told the court "he'd wished to pursue an innocence-based defense to the charges." He refers, however, not to a claim of factual innocence, but to his after-verdict claim that he had wished to pursue a plea of not guilty by reason of insanity (which we address below). (See *People v. Eddy* (2019) 33 Cal.App.5th 472, 481 [*McCoy* applies to claims of "absolute" or "factual" innocence].)

Robbins also argues that *McCoy* was a capital case and the California Supreme Court has not held a concession tactic may be employed in a non-capital case, even if the defendant has been informed. We agree with *People v. Flores* (2019) 34 Cal.App.5th 270, 282, that *McCoy* "did not limit its holding to trials for capital offenses," and thus applies outside of capital trials.

b. *Robbins has not shown his counsel was ineffective*

Robbins also argues that counsel's concessions constituted ineffective assistance of counsel. The familiar requirements for

a successful claim are: "First, a defendant must show his or her counsel's performance was 'deficient' because counsel's 'representation fell below an objective standard of reasonableness . . . under prevailing professional norms.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 610 (*Gurule*), quoting *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "Second, he or she must then show prejudice flowing from counsel's act or omission. [Citations.] We will find prejudice when a defendant demonstrates a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] 'Finally, it must also be shown that the [act or] omission was not attributable to a tactical decision which a reasonably competent, experienced criminal defense attorney would make.' " (*Gurule*, at pp. 610-611.)

In *Gurule*, defense counsel in his opening statement admitted that Gurule robbed the victim. He also told the jury that a murder during the course of a robbery is a first degree murder, regardless of who did the killing, so Gurule would be guilty of first degree murder. The identity of the murderer and Gurule's intent did matter, however, for the special circumstances.[5] (*Gurule*, *supra*, 28 Cal.4th at p. 611.)

The court stated a concession of guilt by counsel is ineffective assistance only if counsel "lack[ed] any reasonable tactical reason to do so." (*Gurule*, *supra*, 28 Cal.4th at p. 611.)

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[5] The court sustained the prosecutor's objection to counsel's oblique reference to the prior-murder special-circumstance allegation. (Gurule had pleaded guilty to a different second-degree murder.) (*Gurule*, *supra*, 28 Cal.4th at pp. 611, 633.)

The concession of guilt was not unreasonable, as Gurule told the police that he participated in the robbery, although claiming it was his codefendant who slit the victim's throat. Counsel correctly admitted to the jury that Gurule's role in the crimes "constituted first degree murder on a felony-murder theory at the least." (*Id*. at pp. 611-612.) "As in other cases where the evidence of guilt is quite strong, 'it is entirely understandable that trial counsel, given the weight of incriminating evidence, made no sweeping declarations of his client's innocence but instead adopted a more realistic approach' " in the hope of avoiding " 'the most severe punishment . . . . "[G]ood trial tactics demanded complete candor" with the jury. [Citation.] Under the circumstances we cannot equate such candor with incompetence.' . . . [¶] [C]ounsel was not ineffective for admitting to the jury defendant's guilt of robbery and first degree murder. " (*Id*. at p. 612.)

"As we previously have recognized, '[t]o the extent defendant is arguing that it is necessarily incompetence for an attorney to concede his or her client's guilt of murder [or burglary and murder as in this case], the law is otherwise,' " (especially when the record does not show defendant's express wish to actively defend those counts). (*People v. Cain* (1995) 10 Cal.4th 1, 30-31.) In *Gurule*, *supra*, 28 Cal.4th 557, counsel had a tactical reason to be candid with the jury and to concede first-degree felony murder in the hope of avoiding a true finding on a special circumstance and the prospect of the death penalty. In *People v. Samayoa* (1997) 15 Cal.4th 795, 846, defense counsel's concession that defendant was guilty of first-degree murder because of the felony-murder rule, although he had no intent to kill, was a "considered tactical determination" because intent was required

for three special circumstances. In *Lopez*, *supra*, 31 Cal.App.4th at p. 67, the concession of guilt on a hit-and-run charge was a reasonable tactical decision given much undisputed evidence on that charge, and the seriousness of a murder charge.

Here, respondent admits "the record does not contain an explicit explanation for why defense counsel conceded that appellant started the fire," other than the obvious reason that in the recorded conversation from jail, Robbins told the undercover officer he had intentionally started the fire and it made him happy. Robbins's admission was consistent with the arson investigator's testimony that the physical evidence in Robbins's room showed the fire had been set intentionally, using gasoline.

The evidence that Robbins started the fire was overwhelming. In the face of similarly strong evidence of intent, counsel chose to admit that Robbins recklessly started the fire, and to argue that Robbins had not intended to harm anyone and was therefore guilty only of involuntary manslaughter. This attempt to argue that Robbins was guilty of a lesser offense was quixotic, given that the jury had been instructed that even unintentional, accidental, or negligent killings would make Robbins guilty of felony murder. But the jury had also been instructed that Robbins was guilty only of involuntary manslaughter if he caused the fire with criminal negligence, and his act caused the death of another person. Counsel could reasonably believe that candidly conceding that Robbins set the fire had a realistic chance of strengthening his argument that Robbins's state of mind supported only a conviction of involuntary manslaughter. This is not a case in which defense counsel "conceded in his argument to the jury that there was no reasonable doubt regarding *the only factual issues in dispute*" on

the single count charged. (*U.S. v. Swanson* (1991) 943 F.2d 1070, 1071-1072, 1074, italics added.) Robbins's intent was in dispute, and counsel argued that Robbins acted recklessly to avoid convictions for murder rather than involuntary manslaughter. Robbins "was tried on multiple counts, and counsel decided to focus on the charges on which [the defendant] had a chance." (*U.S. v. Thomas* (2005) 417 F.3d 1053, 1058.) Robbins has not shown counsel's tactical decision was ineffective assistance.

Robbins argues that this case is like *People v. Diggs* (1986) 177 Cal.App.3d 958. Colbourn and his codefendant Diggs were convicted of kidnapping, multiple counts of oral copulation by force, and multiple counts of rape. (*Id.* at p. 964.) Colbourn testified at trial, and after cross-examination, his only viable defense was to deny participation in any forcible sex acts, and to deny any knowledge of such acts by his codefendant Diggs. After redirect examination in which he asked Colbourn about what music he listened to and what television he watched, Colbourn's counsel embarked on a "largely incoherent" closing argument,[6] arguing that a permissive society and rock music "produce a nihilistic attitude in young people so that society should be held responsible for [Colbourn's] conduct." (*Id.* at p. 967.) As this was not a recognized defense, "[t]he argument thus tenders a nondefense to the jury. . . . [¶] [and] implicitly concedes Colbourn's participation and asks the jury to excuse it based on the societal theories previously alluded to." (*Id.* at pp. 967-968.) Counsel did not argue the only viable defense,

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[6] The "remarkable closing argument . . . defies summary description" and is set forth in full in the opinion. (*People v. Diggs*, *supra*, 177 Cal.App.3d at pp. 967, 975-981.) It must be read to be believed.

that Colbourn did not engage in criminal activity; instead, he admitted that Colbourn participated in the crime, and "asked the jury to consider a nondefense by way of excuse," on which the jury received no instructions. (*Id.* at pp. 968, 970.) The court of appeal concluded "there is simply no plausible tactical explanation for [counsel's] bizarre argument," the error was fundamentally unfair and was a miscarriage of justice requiring reversal, and it was reasonably probable that the result as to Colbourn would have been more favorable absent the unprofessional errors. (*Id.* at pp. 970-971.) Diggs also was prejudiced, and his conviction also was reversed. (*Id.* at pp. 971-972.) The court of appeal sent a copy of the opinion to the State Bar of California so it could "promptly investigate [counsel's] aberrant conduct." (*Id.* at p. 972, fn. 15.)

By contrast, here the jury had already heard the recorded conversation in which Robbins admitted he started the fire that caused two deaths, so his counsel's concession echoed his confession. Counsel conceded the charge to which there was no viable defense. Instead of making an incoherent argument asserting a nonsensical defense which "incompetently deprived his client of a potentially meritorious defense" (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 847), Robbins's counsel coherently asserted that at most Robbins was guilty of a lesser-included offense fully described in the jury instructions. Counsel had a tactical reason for conceding that Robbins started the fire, and Robbins has not shown ineffective assistance.

3. *Robbins was not prejudiced when he was not allowed to personally enter his plea*

At Robbins's arraignment on December 5, 2013, the court asked: "Is the defense ready to proceed with the arraignment?"

Robbins's counsel answered: "We are, yes." After confirming with counsel that the name and date of birth in the information was correct, the court asked: "Waive reading of the information, advisement of rights, enter a plea of not guilty and deny any and all allegations[?]" Counsel answered: "Yes, your honor." Robbins did not answer, and counsel did not state that Robbins personally concurred with the not guilty plea.

On appeal, Robbins states that the record "suggests" that had he been asked by the court, he would have entered a plea of not guilty by reason of insanity (NGI). He argues that he was prejudiced by the denial of his statutory right to personally enter an NGI plea. He also argues this violated his Sixth Amendment right to present his chosen defense with the assistance of counsel, and we must reverse his conviction and remand for a sanity trial.

"Unless otherwise provided by law, every plea shall be entered or withdrawn *by the defendant himself or herself* in open court." (§ 1018, italics added.) "[T]he choice to enter a plea of not guilty by reason of insanity is a matter within the defendant's, rather than counsel's, ultimate control." (*People v. Clark* (2011) 52 Cal.4th 856, 893.) As a result, if the defendant wishes to plead not guilty by reason of insanity, the trial court has no discretion to reject his desired plea, "regardless of what his counsel thinks of the merits of an NGI plea." (*People v. Henning* (2009) 178 Cal.App.4th 388, 394, 397 (*Henning*).) Respondent concedes that the record shows the trial court erred when it accepted counsel's, rather than Robbins's, entry of the not guilty plea. Nevertheless, the statutory violation alone does not require us to reverse Robbins's conviction. We must assess whether the violation resulted in prejudice, and "a trial court's failure to allow a defendant to plead NGI is harmless when the

record affirmatively shows the insanity defense lacks evidentiary support." (*Id.* at pp. 398-399.)

Where there is no affirmative showing in the record that an NGI plea was baseless, however, reversal is required where a defendant unequivocally states he wishes to enter a plea of NGI. In *People v. Clemons* (2008) 160 Cal.App.4th 1243 (*Clemons*), the defendant entered a plea of not guilty to possessing a manufactured weapon (a razor blade removed from a disposable razor) while in custody, but then repeatedly stated before trial that he wanted to plead NGI, had been trying to do so for two years, and no one would listen. (*Id.* at pp. 1245-1249.) The defendant unequivocally told the trial court that he wanted to plead NGI and counsel would not let him. (*Id.* at pp. 1248-1249.) The trial court erroneously believed that defense counsel controlled whether defendant could plead NGI. (*Id*. at p. 1251.) To the contrary, "appellant had the right to enter an NGI plea, even if his counsel thought that plea was a bad tactic." (*Id*. at p. 1252.) In addition, "there was evidence from which the jury might have found that appellant was NGI if it had been presented with that issue." (*Id*. at p. 1253.) The defendant had a history of diagnoses of mental illness and hospitalizations. Even if no expert testimony supported an NGI defense, "appellant's abnormal behavior at the time of the [offense] provided some evidence for it, since he self-inflicted a wound to his arm that was deep enough to require 18 stitches and grinned sheepishly at the sheriff's deputies when they discovered what he had done." (*Ibid*.) An NGI defense was not futile, and the court of appeal held that defendant was entitled to a new trial. (*Ibid*.)

We therefore consider whether the record contains evidence to support a plea of NGI, so that Robbins was prejudiced when

he was denied his statutory right to personally enter his plea.[7] We conclude that this case is like *Henning* rather than *Clemons*.

Two months after the verdict and on the date set for sentencing, Robbins moved for the appointment of new counsel, and the court held a confidential *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) hearing. The court denied the motion. Robbins cites to the confidential transcripts of his hearing to support his claim that he wanted counsel to enter a plea of NGI. We have thoroughly reviewed the confidential reporter's transcript of the *Marsden* hearing, the unredacted briefs filed by the parties under seal, and the confidential psychiatric reports.[8] We conclude that the record does not show that Robbins was prejudiced by the failure to allow him to enter a plea of NGI.

" 'A plea of not guilty by reason of insanity refers to the defendant's mental state at the time of the commission of the crime, a mental state which is distinguishable from that which is required of a defendant before he may be allowed to stand trial.' [Citation.] 'Insanity, under California law, means that at the time the offense was committed, the defendant was

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[7] Robbins argues that *Henning* is wrong, and when a defendant is denied his right to personally enter a plea of NGI, reversal is required regardless of whether evidence supports the defense of insanity. We disagree and follow *Henning* as valid precedent, and we note that *Clemons* also supports the conclusion that the record must show some support for an NGI plea before reversal is warranted on that ground.

[8] We granted Robbins's and respondent's motions to file their briefs under seal along with public redacted versions. We also granted respondent's application to obtain the sealed transcript of the *Marsden* hearing, in order to complete Respondent's brief.

incapable of knowing or understanding the nature of his act or of distinguishing right from wrong.' " (*Henning*, *supra*, 178 Cal.App.4th at p. 396.) A defendant who enters a plea of NGI along with his not guilty plea undergoes a bifurcated trial: first, to determine whether he committed the charged offenses, and second, to determine whether he was insane at the time of their commission. (*Ibid*.)

The record does not support a conclusion that Robbins was harmed when he did not personally enter a plea of NGI. First, Robbins states the record "suggests" that he would have entered an NGI plea if asked, and it is "open to doubt" whether he would have forgone his right to enter an NGI plea. Robbins does not point to where in the confidential transcript of the *Marsden* hearing he stated that he unequivocally told counsel he wanted to enter a plea of NGI, or that counsel refused to do so in response to his demand.[9] He also does not discuss counsel's description of his numerous conversations with Robbins, counsel's assessment that there was no evidentiary support for an NGI plea, or whether after the discussions with counsel he still wished to pursue that plea.

Our own review convinces us that the record lacks evidentiary support for a claim that, at the time of the arson fire, Robbins was unable to understand the nature of the act of lighting the fire in his room or to distinguish right from wrong.

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[9] In November 2014, at Robbins's competency hearing (more than two years before trial), defense counsel stated: "[I]t's not clear to me whether or not he was legally sane at the time of the act." This statement supports a conclusion that counsel seriously considered and investigated whether there was a basis for a plea of NGI.

In jail the day after he set the fire, Robbins lucidly described his act. He got mad that night, and set the house on fire with many people sleeping inside. Robbins went and got a can of gasoline, poured it on the floor, lit the gasoline, and got away unharmed. He knew not to tell the police this without his lawyer present. He'd thought many times about doing this, in reaction to many small things. He felt very happy that he finally did it, although he thought that he would probably spend the rest of his life in jail. Robbins's own words demonstrate that he understood the nature of his act and could distinguish right from wrong. On appeal he argues he behaved casually when he interacted with Johnson just before and after he started the fire, and his flight afterwards did not go farther than the pancake restaurant where he fell asleep. Those are not evidence that he did not understand the nature of the act of lighting the fire in the building full of sleeping residents, or that he did not appreciate that his act was wrong.

Robbins's self-reported mental health history as reflected in two 2014 confidential forensic psychiatry reports[10] consisted of psychiatric treatment and several hospitalizations for depression, anxiety, and suicidal thoughts. Robbins denied any psychotic symptoms or any substance abuse. Robbins does not claim the record contains any evidence that he ever suffered from any other mental disease or defect that would have impaired his ability to understand the nature of his acts.

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[10] The reports assessed Robbins's current mental status at the time of the interviews (September and October 2014) only to determine whether he was then competent to stand trial, without access to Robbins's medical records.

Given this record, an insanity defense would have been futile. It was not reasonably probable that Robbins would have obtained a different result at trial had he personally entered a plea of NGI. He therefore was not prejudiced when he did not personally enter his plea, and we will not reverse his conviction on that basis.

Robbins also argues that his Sixth Amendment right to present his chosen defense of NGI with assistance of counsel was violated. "[R]ejection, on the merits, of a claim that the trial court erred on the issue actually before that court necessarily leads to rejection of the newly applied constitutional 'gloss' as well. No separate constitutional discussion is required in such cases, and we therefore provide none." (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.)

4. *The trial court did not abuse its discretion when it denied Robbins's* Marsden *motion*

Robbins argues that a lawyer's refusal to enter a plea of NGI is a breakdown in the attorney-client relationship requiring the court to appoint substitute counsel at the client's request. When a criminal defendant moves to substitute counsel, he must be allowed to state specific reasons why, and the court exercises its discretion to decide whether the circumstances justify substitution. (*Clemons*, *supra*, 160 Cal.App.4th at p. 1250.) As we have concluded the record does not show that Robbins made an unambiguous request for counsel to enter an NGI defense or that in the face of such a request counsel explicitly refused, there is no basis to find that the trial court abused its discretion when it denied the *Marsden* motion.

Robbins also argues that the court failed to conduct a sufficient inquiry at the *Marsden* hearing to resolve any

ambiguity about why counsel did not enter a plea of NGI on Robbins's behalf. We have reviewed the confidential transcript of the hearing, and conclude the trial court adequately sought to clarify the issues and to seek details from both Robbins and counsel.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.