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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD PHILLIP RITCHIE, Defendant and Appellant.	B262575 (Los Angeles County Super. Ct. No. BA259634)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta,[1] Judge. Affirmed as modified with directions.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

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[1] The trial was conducted by the Honorable Sam Ohta. For clarity's purpose, he will be referred to as the trial court. Other judges will be referred to by name.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, William H. Shin, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Richard Phillip Ritchie, of conspiracy to commit murder with express malice and first degree murder. (Pen. Code, §§ 182, subd. (a)(1), 187.)[2] The jury further found defendant committed the murder by lying in wait and because of the victim's race (§ 190.2, subds. (a)(15), (a)(16)). Defendant admitted a prior felony conviction allegation within the meaning of sections 667, subdivisions (a)(1) and (d), and 1170.12, subdivision (b) was true. The trial court imposed and stayed (§ 654, subd. (a)) a sentence of 5 years plus 50 years to life on count 1, the conspiracy to commit murder conviction. The trial court sentenced defendant to 5 years plus life without the possibility of parole on count 2, the first degree murder count. We modify the judgment to impose 10 years plus 2 consecutive terms of life without the possibility of parole on count 2. We direct the superior court clerk, upon remittitur issuance, to amend the abstract of judgment.

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[2] Further statutory references are to the Penal Code except where otherwise noted.

II. THE EVIDENCE

A. Prosecution Case

1. Background

Defendant's younger brother is Justin Ritchie (Justin). Justin's friend is 19-year-old Kelly Sorrell. On July 18, 1997, defendant, Justin and Ms. Sorrell engaged in a course of events that ended with the death of Howard McClendon, a 22-year old African-American man. Defendant, Ms. Sorrell and Justin were all White supremacists. Mr. McClendon's skeletal remains were discovered three months later, on October 22, 1997, near the Palmdale Moose Lodge. The cause and manner of death could not be determined.

Mr. McClendon's death likely would have remained classified as accidental. But on December 31, 2002, more than five years after the murder, defendant told Sheriff's Detective Frank Gonzales about the crime. Defendant implicated Justin and Ms. Sorrell. Defendant admitted only that he had driven the car. Defendant expressed a desire to bring closure to Mr. McClendon's family. Detective Gonzales began an investigation. In June 2003, Justin also contacted Detective Gonzales to talk about Mr. McClendon's death. Justin implicated defendant and Ms. Sorrell.

On May 1, 2006, Ms. Sorrell pled guilty to first degree murder pursuant to an agreement with the prosecution. In exchange for her truthful testimony against defendant and Justin, she was to receive a sentence of 29 years to life. In 2009, a jury acquitted Justin of the murder. Justin testified in his own

defense. He denied culpability for the crime. He implicated defendant and Ms. Sorrell in the killing. Neither defendant nor Ms. Sorrell testified at Justin's trial. Despite her plea agreement, Ms. Sorrell refused to testify against Justin. Defendant's trial commenced on December 3, 2014. Both Ms. Sorrell and Justin testified for the prosecution in the present case. As of the filing of the notice of appeal, Ms. Sorrell had not yet been sentenced.

2. Ms. Sorrell's testimony

Ms. Sorrell was admittedly a methamphetamine addict at the time of the murder. She testified that on July 18, 1997, she wanted to earn a lightning bolt tattoo. A lightning bolt tattoo symbolizes that the bearer has killed a non-White individual. It garners the individual respect from fellow White supremacists. Ms. Sorrell knew defendant had just gotten out of prison where he had joined a Nazi gang. Ms. Sorrell sought defendant's assistance and he agreed. Ms. Sorrell testified they lured the victim into her car by promising him cocaine. Defendant and Ms. Sorrell agreed they would take Mr. McClendon to an area in the dessert where they would assault him. Ms. Sorrell, accompanied by defendant, Justin, and Mr. McClendon, then drove into the desert to a spot near the Palmdale Moose Lodge. There, they attacked Mr. McClendon.

Justin was armed with a baseball bat. Either defendant or Justin had placed the baseball bat in the back seat. Ms. Sorrell had a hunting knife under the driver's seat of her car. She did not specifically inform defendant or Justin that she was armed with the knife. But they both knew she owned it and that she

kept it in her car. Defendant never had a weapon. Ms. Sorrell saw Justin grab the baseball bat from the car. She heard the sounds of an assault outside the car. She did not see Justin use the baseball bat to assault Mr. McClendon, but she heard it. When Mr. McClendon started to run, Ms. Sorrell—armed with the hunting knife—chased him. She stabbed him multiple times including in the throat. Defendant had followed Ms. Sorrell when she ran after Mr. McClendon.

Defendant and Ms. Sorrell walked back to the car together. Because Ms. Sorrell was "in a daze," defendant drove her car back to his house. During the drive, defendant kissed Ms. Sorrell and smiled at her "like a proud big brother." Back at the house, defendant gave Ms. Sorrell lightning bolt and swastika tattoos. Several days later, defendant complained that his hand was sore. Defendant explained that "the guy," Mr. McClendon, had a hard head. Ms. Sorrell admitted having lied about the events on prior occasions.

3. Justin's testimony

Justin had previously implicated defendant in the killing of Mr. McClendon. Justin made all these statements prior to his acquittal. But according to Justin, these statements were all lies. The truth was that Justin and Ms. Sorrell had agreed to assault and rob Mr. McClendon. But Justin had *not* agreed to help Ms. Sorrell kill anyone. Justin testified to attacking Mr. McClendon with a baseball bat. Ms. Sorrell stabbed Mr. McClendon. A few days later, Justin gave Ms. Sorrell lightning bolt and swastika tattoos. Some time after that, Justin also got a lightning bolt

tattoo in recognition of Mr. McClendon's murder. Defendant did not have any lightning bolt tattoos.

Justin further testified defendant never entered into any agreement to help Ms. Sorrell earn a lightning bolt tattoo by killing a Black person. According to Justin, defendant did not know anything about the plan to assault Mr. McClendon, defendant was unarmed and never attacked Mr. McClendon and did not drive Ms. Sorrell's car that night. In fact, defendant tried to stop Justin and Ms. Sorrell. According to Justin, when Ms. Sorrell started to chase Mr. McClendon, defendant said: "Stop. That's enough. Stop." Defendant ran after Ms. Sorrell. When Justin saw them again, defendant was dragging Ms. Sorrell back toward the car. Justin testified that Ms. Sorrell was holding the knife and had blood on her.

B. Defense Testimony

1. Defendant's testimony

Defendant testified in his own defense. Defendant admitted he had witnessed the murder. But he denied any prior knowledge of a plan to kill a Black person in order to earn Ms. Sorrell a lightning bolt tattoo or to assault Mr. McClendon. Defendant was not armed with any weapon. He did not see the baseball bat until Justin hit Mr. McClendon with it. Defendant denied having any knowledge of a knife until Ms. Sorrell stabbed Mr. McClendon. Defendant chased Ms. Sorrell into the desert to try to stop her from further harming Mr. McClendon. Defendant testified he repeatedly screamed at her to stop. Defendant denied ever hitting, assaulting or restraining Mr. McClendon.

2. Michael Garcia's testimony

Mr. Garcia also testified for the defense. Mr. Garcia had been in the county jail with Justin during the summer of 2009. After Justin was acquitted, he said he had gotten away with murder. Mr. Garcia testified: "He told me that he got away with the murder, that he's the one that did it and that he ratted on his brother and -- but he did that to lie to save his own ass. . . . [¶] . . . [¶] . . . [H]e told me that he wanted to earn his lightning bolts and there was a [B]lack guy that came up in the car, he wanted to buy crack, so he got in the car. He said his brother was not aware what his action was. He just wanted to prove to his brother . . . but without his brother's knowledge. And I guess they took him to the desert . . . in Palmdale, and he said he hit him with a bat and killed him." In other words, Justin wanted to impress his brother without his brother knowing what was going to happen. Justin told Mr. Garcia defendant had been driving that night, but defendant had no knowledge of any plan to assault Mr. McClendon and did not participate in the crime. Mr. Garcia testified: "It was all [Justin]. . . . And I think there was somebody else, . . . a girl." According to Mr. Garcia, Justin was not remorseful or upset. Justin, in Mr. Garcia's opinion, was celebrating. Justin told Mr. Garcia, "I beat that shit."

III. DISCUSSION

A. Accomplice Testimony Corroboration

At the close of the prosecution's case-in-chief, defendant unsuccessfully sought a judgment of acquittal under section 1118.1. Defendant argued there was insufficient evidence corroborating the accomplice testimony of Justin and Ms. Sorrell. On appeal, defendant asserts it was error to deny the judgment of acquittal motion. We find no error.

Our Supreme Court has held: "'In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, "'whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of'" the elements of the charged offense. [Citations.] Substantial evidence is defined as 'evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.' [Citations.] "'Where the section 1118.1 motion is made at the close of the prosecution's case-in-chief, [as here,] the sufficiency of the evidence is tested as it stood at that point." [Citation.]' [Citation.] 'We review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction.' [Citation.]" (*People v. Whalen* (2013) 56 Cal.4th 1, 55, disapproved on another point in *People v. Romero* (2015) 62 Cal.4th 1, 44, fn. 17; accord, *People v. Hajek* (2014) 58 Cal.4th 1144, 1182-1183, disapproved on another point in *People v. Rangel* (2016) 62 Cal.4th 1192, 1215-1216.)

Pursuant to section 1111: "A conviction can not [*sic*] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Our Supreme Court discussed the necessary corroboration in *People v. Whalen, supra,* 56 Cal.4th at page 55: "The testimony of accomplices must be corroborated by 'such other evidence as shall tend to connect the defendant with the commission of the offense.' [(§ 1111.)] Such evidence may not come from, or require '"aid or assistance"' from, the testimony of other accomplices or the accomplice himself. (*People v. Davis* (2005) 36 Cal.4th 510, 543; *People v. Perry* (1972) 7 Cal.3d 756, 769.) The evidence, however, need not corroborate every fact to which the accomplice testifies. (*People v. Davis, supra,* [36 Cal.4th] at p. 543; *People v. Gurule* (2002) 28 Cal.4th 557, 628.) '"Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" [Citation.] The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." [Citation.]' (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)" (Accord, *People v. Avila* (2006) 38 Cal.4th 491, 563 [""[T]he corroborative evidence may be slight and entitled to little consideration when standing alone"""].)

The corroborating evidence need not establish the corpus delicti. (*People v. Fauber* (1992) 2 Cal.4th 792, 834; *People v.*

Wade (1959) 53 Cal.2d 322, 329, disapproved on another point in *People v. Carpenter* (1997) 15 Cal.4th 312, 381-382.) In the context of section 1111, "testimony" includes an accomplice's out-of-court statements made under police questioning or other suspect circumstances. (*People v. Rangel, supra*, 62 Cal.4th at p. 1229; *People v. Carrington* (2009) 47 Cal.4th 145, 190-191; *People v. Maciel* (2013) 57 Cal.4th 482, 527.) And one accomplice's testimony cannot be corroborated by that of another perpetrator. (*People v. Rangel, supra,* 62 Cal.4th at p. 1222; see *People v. Fauber, supra,* 2 Cal.4th at p. 834.)

Justin and Ms. Sorrell were both accomplices. The trial court so instructed the jury. Substantial evidence independent of Ms. Sorrell's and Justin's testimony connected defendant to Mr. McClendon's murder. First, defendant's own statements and admissions afforded sufficient corroborative evidence to sustain the conviction. It is well established that a defendant's own statements, admissions and testimony may be corroborative. (*People v. Whalen, supra,* 56 Cal.4th at p. 56; *People v. Avila, supra,* 38 Cal.4th at pp. 562-563; *People v. Brown* (2003) 31 Cal.4th 518, 556; *People v. Williams* (1997) 16 Cal.4th 635, 680; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1208, fn. 9, disapproved on another point in *People v. Diaz, supra,* 50 Cal.4th at p. 1190; *People v. Wade, supra,* 53 Cal.2d at p. 329; *People v. West* (1935) 4 Cal.2d 367, 371; *People v. Negra* (1929) 208 Cal. 64, 69-70; *People v. Sullivan* (1904) 144 Cal. 471, 473; *People v. Armstrong* (1896) 114 Cal. 570, 573-574; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1022; *People v. Rippberger* (1991) 231 Cal.App.3d 1667, 1684.)

On December 31, 2002, while in custody on an unrelated case, defendant spoke with Detective Gonzales. Defendant said a murder had occurred near the Palmdale Moose Lodge in mid to

late 1997. Defendant said he drove the car the night of the murder. At trial, defendant denied admitting he drove the car. Defendant drew a map of the murder location. The map accurately reflected the area where Mr. McClendon's body was found. Defendant described the victim as a Black male in his mid-30s. Defendant said the victim was "stabbed" to death. Defendant told Detective Gonzales, "It was 'awful how they did that[.]'" Defendant's statements and admissions to Detective Gonzales corroborated the date and location of Mr. McClendon's death. Defendant placed himself at the scene of the murder. He implied there were other people present. Defendant identified the mode of killing consistent with the accomplices' testimony.

Second, there was evidence defendant had a motive to assault or kill a Black person and to help Ms. Sorrell earn a lightning bolt tattoo. The motive evidence also corroborated the testimony of Justin and Ms. Sorrell. (*People v. McDermott* (2002) 28 Cal.4th 946, 986 [motive to obtain home held in joint tenancy and life insurance proceeds]; *People v. Manson, supra*, 61 Cal.App.3d at p. 141 [defendant's pronouncements pertaining to Helter Skelter]; *People v. Hanks* (1939) 35 Cal.App.2d 290, 299, disapproved on another point in *People v. DeLouize* (2004) 32 Cal.4th 1223, 1233, fn. 4 [motive to burn building].) Defendant was an admitted White supremacist. He had joined a Nazi prison gang. Defendant had been released from prison just prior to Mr. McClendon's murder. He had swastika and other tattoos indicating his allegiance. At the time of trial, defendant had a swastika and "NLR," referring to the Nazi prison gang, tattooed on the back of his head. The tattoos were visible when defendant's head was shaved. Defendant also had a swastika tattoo on his leg. Defendant understood that earning a lightning

bolt tattoo, as Ms. Sorrell sought to do, would garner her respect among other White supremacists. And, as discussed below, in August 1996, a year before Mr. McClendon was killed, defendant had burned a cross in a public place. The foregoing was substantial evidence corroborating the accomplice testimony. The trial court properly denied defendant's section 1118.1 motion for judgment of acquittal. (*People v. Avila, supra,* 38 Cal.4th at p. 569; *People v. Bailey* (1927) 82 Cal.App. 700, 707, 709-710.)

B. The Cross-Burning and White Supremacist Beliefs Evidence

The prosecution opened its case-in-chief by presenting evidence of defendant's White supremacist beliefs and his participation in a cross-burning. Prior to trial, defendant had argued unsuccessfully to exclude this evidence. The evidence was largely in the form of defendant's January 1998 testimony in an unrelated case. Defendant testified as follows. He had been a member of a White supremacist prison gang for two years. He had also aligned himself with a local White supremacist clique. The gang members believed that Whites were superior to other races. They respected Adolf Hitler "because of the things that he carried out" and "because of the power" that he held. They did not like Blacks, Jews or Hispanics. Gang members were not allowed to have Black, Jewish or Hispanic friends. A lightning bolt tattoo signified a stabbing or other violent crime against a non-White. It garnered respect from other gang members. In August 1996, defendant had burned a cross on a hilltop at the Little Rock Dam Recreation Campsite. After setting the cross afire, defendant and his cohorts—"a bunch of [W]hite supremacists"—ran down the hill yelling and laughing. The fire

got out of control and spread to many acres. The group chose to burn a cross because it was consistent with their beliefs as White supremacists, like the Klu Klux Klan. There was also evidence that a handwritten note found near the site of the cross-burning stated: "14 words. We must secure the existence of our people and the future for [W]hite children." "Fourteen words" is "a statement of the beliefs of the [W]hite supremacists," "[W]hite superiority." In 1996, defendant pled guilty to arson and was sentenced to state prison. He was released from prison on July 7, 1997, eleven days prior to Mr. McClendon's murder.

Defendant argues admission of the cross-burning and White supremacist beliefs evidence was prejudicial error. He asserts this evidence violated his state and federal Constitutional due process rights. Defendant does not challenge its relevance to motive and intent. He argues its prejudicial effect outweighed its probative value. He asserts the evidence of his affiliation with a Nazi prison gang and his swastika tattoos sufficed to show motive. According to defendant, the cross-burning evidence together with references to Mr. Hitler and the Klu Klux Klan served only to inflame the jury. Defendant argues the defense never disputed that the killing occurred for purely racial reasons. Defendant asserts the only issue at trial was whether he took part in the fatal attack.

A trial court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by its prejudicial effect. (Evid. Code, §§ 352, 1101, subd. (b).) With respect to undue prejudice, our Supreme Court has explained: "'Evidence is prejudicial within the meaning of Evidence Code section 352 if it "'uniquely tends to evoke an emotional bias against a party as an individual'" [citation] or if it would cause

the jury to ‘“‘“prejudg[e]” a person or cause on the basis of extraneous factors.’” [Citation.]’ (*People v. Cowan* (2010) 50 Cal.4th 401, 475.)” (*People v. Foster* (2010) 50 Cal.4th 1301, 1331; accord, *People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) As our Supreme Court has observed, however: “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. ‘[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is “prejudicial.”’” (*People v. Karis* (1988) 46 Cal.3d 612, 638; accord, *People v. Merriman* (2014) 60 Cal.4th 1, 60.) Our review is for an abuse of discretion. (*People v. McCurdy, supra,* 59 Cal.4th at p. 1095; *People v. Riggs* (2008) 44 Cal.4th 248, 290.)

No abuse of discretion and no due process violation occurred. The prosecution sought to prove defendant conspired to and committed the murder because of Mr. McClendon’s race, a special circumstance allegation. The cross-burning and White supremacist beliefs evidence was highly relevant to defendant’s motive and intent. (*People v. Bivert* (2011) 52 Cal.4th 96, 117; cf. *People v. Walker* (2006) 139 Cal.App.4th 782, 804, 805 [animus towards prostitutes].) Without abusing its discretion, the trial court could conclude the challenged evidence tended logically to explain why defendant would participate in a racially-motivated assault and murder. The cross-burning and prior testimony occurred close in time to the present murder. Defendant burned the cross in August 1996. He pled guilty to arson and was sentenced to state prison later that year. It was during that incarceration, according to defendant, that he joined the Nazi prison gang. Mr. McClendon was murdered in July 1997, shortly

after defendant was released from prison. Defendant testified about his White supremacist beliefs in the unrelated case in January 1998. Hence, the challenged evidence was probative of defendant's beliefs, and his willingness to act on those beliefs, around the time of the murder. The trial court could reasonably conclude the challenged evidence, the cross-burning and White supremacist belief evidence was particularly relevant to our case. The challenged evidence demonstrated defendant was willing to act upon his White supremacist beliefs by participating in the cross-burning, a highly abhorrent act. That is, defendant's beliefs were not mere abstract opinions, they were opinions that could lead to racist acts. The trial court could further reasonably conclude the jury would evaluate the evidence for its stated purpose and not to punish defendant based on its emotional reaction. (*People v. Bivert, supra,* 52 Cal.4th at p. 118.) As the trial court observed, the cross-burning act and White supremacist views defendant expressed were not more egregious than the charged offense. There was no abuse of discretion. And, because there was no abuse of discretion, there was no violation of defendant's due process rights. (*People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31; *People v. Benavides* (2005) 35 Cal.4th 69, 95.)

C. The Substitution of Counsel Motions

1. The five motions: September 14, 2006-March 12, 2012

The case was initially filed in 2004 and dismissed on April 11, 2011. Throughout this time frame, defendant was represented by Halvor Miller and Lewis Sepe. Defendant was held to answer on July 20, 2011. On March 12, 2012, defendant made a self-representation motion which was granted. On March 18, 2012, Daniel Nardoni, with defendant's consent, was appointed as defense counsel. No substitution of counsel motion was ever made by defendant as to Mr. Nardoni.

Defendant made five substitution of counsel motions on: September 14, 2006; March 29, 2007, March 7 and 12, 2008; July 8, 2011; and March 12, 2012. The substitution of counsel motions were heard by Judge Michael Johnson and the trial court. (See fn. 1, *infra*.) Defendant's complaints were largely the same and all relate to Mr. Miller and Mr. Sepe. Defendant had asked Mr. Miller to interview specific witnesses and that had not occurred. Defendant also complained that, despite his requests to do so, particular opinion witnesses had not been appointed. This included witnesses qualified to testify concerning prison gangs, forensic and pathology related issues and a mitigation professional. Further, defendant wanted specific questions asked of Justin and Ms. Sorrell and Mr. Miller had failed to do so. And, defendant wanted photographs taken of Justin's tattoos. And a dispute had arisen between Mr. Miller and Angela Mason who was assisting the defense in developing mitigation evidence. On March 12, 2012, at the last substitution of counsel motion, defendant accused Mr. Miller of lying and making misleading

statements. Also on March 12, 2012, defendant claimed to have lost trust in Mr. Miller. Mr. Miller and Mr. Sepe responded to defendant's complaints to the satisfaction of Judge Johnson and the trial court citing: the ongoing nature of the defense investigation; identifying the retention of witnesses to provide opinion testimony; specifying what witnesses had been interviewed; the amount of time being spent working on the case; and explaining that any disagreements related to defense strategies. Mr. Miller repeatedly stated that no embroilment or irreconcilable differences existed with defendant.

2. discussion

Our Supreme Court has held: "Settled principles guide our resolution of defendant's claim that the [trial] court erred in denying his . . . *Marsden* motions. Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion '"unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel."' (*People v. Taylor* [(2010)] 48 Cal.4th [574,] 599; see *People v. Crandell* (1988) 46 Cal.3d 833, 859[, abrogated on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365].) Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when 'the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].'

(*People v. Smith* (1993) 6 Cal.4th 684, 696; see *People v. Crandell, supra,* [46 Cal.3d] at p. 854.)" (*People v. Clark* (2011) 52 Cal.4th 856, 912; accord, *People v. Myles* (2012) 53 Cal.4th 1181, 1207.) But as our Supreme Court has observed, lack of trust in an attorney is not grounds, in and of itself, to compel substitution of counsel: "'"[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment . . . ."'" (*People v. Berryman* (1993) 6 Cal.4th 1048, 1070[, disapproved on another point in *People v. Hill* (1998) 17 Cal.4th 800, 822-823]; see *People v. Memro* [(1995)] 11 Cal.4th 786, 857.)" (*People v. Jackson* (2009) 45 Cal.4th 662, 688.) Nor do strategy disagreements without more constitute an irreconcilable conflict: "'A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an "irreconcilable conflict" " . . . [C]ounsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant." [Citation.]' (*People v. Welch* (1999) 20 Cal.4th 701, 728-729; see *People v. Nakahara* (2003) 30 Cal.4th 705, 719.)" (*People v. Jackson, supra,* 45 Cal.4th at p. 688; accord, *People v. Clark, supra,* 52 Cal.4th at p. 912.) Our review is for an abuse of discretion. (*People v. Streeter* (2012) 54 Cal.4th 205, 230; *People v. Taylor, supra,* 48 Cal.4th at p. 599.)

Applying the foregoing principles to the present case, we conclude defendant has not shown any abuse of discretion. Defendant complained about attempts to resolve the case without trial, witness interviews, retention of witnesses to provide

opinion testimony, and communications with an informant. The trial court could reasonably find these matters all related to tactical decisions to be made by the attorney. Disagreements between Mr. Miller and defendant relating to tactical decisions did not warrant substitution of counsel absent a complete breakdown of the attorney-client relationship. (*People v. Myles, supra,* 53 Cal.4th at p. 1207; *People v Clark, supra,* 52 Cal.4th at p. 912.) Neither failure to locate a witness despite attempts nor an unwillingness to present testimony that might be damaging demonstrates as a matter of law cause to replace counsel. (*People v. Vines* (2011) 51 Cal.4th 830, 878; *People v. Williams* (1970) 2 Cal.3d 894, 905-906.) Without abusing their discretion, Judge Johnson and the trial court could rule that defendant's frustration with Mr. Miller was not a sufficient cause for substitution of counsel. (*People v. Streeter, supra,* 54 Cal.4th at pp. 230-231; *People v. Barnett* (1998) 17 Cal.4th 1044, 1092.) Further, Judge Johnson and the trial court could find Mr. Miller's and defendant's relationship had not completely broken down. Judge Johnson and the trial court could reasonably find appropriate steps were being taken to advance defendant's case to trial in a manner consistent with the ability to present a meritorious defense. Mr. Miller was certain he could continue to provide proper representation and was committed to doing so despite disagreements about strategy. Mr. Miller believed the case quite possibly would be resolved favorably to defendant. Judge Johnson and the trial court were entitled to accept those assertions. (*People v. Clark, supra*, 52 Cal.4th at p. 912; *People v. Abilez* (2007) 41 Cal.4th 472, 488.) Nor did defendant's claims about an absence of trust in Mr. Miller require the substitution of counsel motion be granted. Rather, the trust issue related to

defendant's disagreement with and attitude toward Mr. Miller's and Mr. Sepe's approach to the case. Here, as in *Clark,* the repeated substitution of counsel motions permitted the trial court to find that defendant's own efforts to resolve his disagreements with the defense team had been insufficient. (*People v. Clark, supra,* 52 Cal.4th at p. 913; *People v. Michaels* (2002) 28 Cal.4th 486, 523.) The trial court could reasonably conclude Mr. Miller and Mr. Sepe would continue to represent defendant effectively.

Given the foregoing, we need not address the issue of what any of this has to do with the validity of defendant's conviction. Mr. Nardoni, not Mr. Miller and Mr Sepe, represented defendant during the trial. No substitution of counsel motion was filed as to Mr. Nardoni. Suffice to note, defendant was represented by competent counsel at trial.

We also find no violation of defendant's constitutional speedy trial right. The factors to be balanced are: the length of the delay; the reasons for the delay; whether defendant asserted his speedy trial right; and whether the delay prejudiced defendant. (*Barker v. Wingo* (1972) 407 U.S. 514, 530-533; *People v. Williams* (2013) 58 Cal.4th 197, 233.) The burden is on the defendant to demonstrate a speedy trial violation. (*People v. Williams, supra*, 58 Cal.4th at p. 233; see *Barker v. Wingo, supra,* 407 U.S. at p. 532 ["failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial"].) The length of time from arrest to trial in this case was substantial. And defendant did, during in camera substitution of counsel motions, complain about his speedy trial right. But defendant never asserted any speedy trial right violation in open court.

This was not a routine criminal case. This was a very serious and complex matter. There had been a five-year delay between the murder and the reopened investigation spurred by defendant's contact with Detective Gonzales. Initially, defendant faced the death penalty. Substantial time was consumed persuading the prosecution to withdraw its request to impose the death penalty. Additionally, the case involved two alleged co-perpetrators, one of whom, Justin, had been acquitted by a jury in a separate trial. While being separately tried, Justin had testified that defendant was the guilty party. The other co-perpetrator, Ms. Sorrell, had agreed to testify against defendant. Mitigating evidence had to be developed and possible defenses explored with the assistance of witnesses with specific, sometimes distinctive, areas of expertise. Defendant's pretrial incarceration was not solely attributable to this case. In other words, he was not incarcerated simply to await trial in this case. Defendant was incarcerated on another matter throughout the pendency of this case. And, notwithstanding his incarceration, he represented himself from March 12, 2012. Eventually, Mr. Nardoni began representing defendant. Defendant repeatedly waived time for trial. The trial court impliedly concluded the delay in commencing the trial was due to the fact that defendant's attorneys were preparing to try the case. Judge Johnson and the trial court heard lengthy substitution of counsel motions. Judge Johnson and the trial court concluded defendant's attorneys were acting competently in preparing a complex case for trial. Defendant has not shown the delay occasioned by his attorneys' efforts to prevent death penalty exposure and prepare a defense to a complex case resulted in prejudice to him.

D. The Sentence

As noted above, the trial court found defendant had sustained a prior felony conviction within the meaning of sections 667, subdivisions (a)(1) and (d) and 1170.12, subdivision (b). The trial court expressly declined to double the life without the possibility of parole term. The court relied on *People v. Smithson* (2000) 79 Cal.App.4th 480, 503-504, a decision of the Court of Appeal for the Third Appellate District. As the trial court recognized, however, there is a split of authority on this issue. In *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433-1434, our colleagues in Division Two of the Court of Appeal for this appellate district held a life without the possibility of parole term must be doubled. We agree with our Division Two colleagues. We further agree with our Division Two colleagues that doubling a life without the possibility of parole term is the equivalent of sentencing a defendant to two consecutive such terms. (*Id.* at p. 1433.) In addition, each such indeterminate term is subject to the five-year enhancement under section 667, subdivision (a)(1). (*People v. Williams* (2004) 34 Cal.4th 397, 400, 404-405; *People v. Thomas* (2013) 214 Cal.App.4th 636, 640.) Defendant's sentence must be modified and the abstract of judgment amended to reflect a count 2 sentence of 10 years plus 2 consecutive life without the possibility of parole terms.

E. The Abstract of Judgment

An abstract of judgment must reflect the oral pronouncement of judgment. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2.) The trial court orally imposed $1,500 in restitution pursuant to section 1202.4, subdivision (f). The abstract of judgment must be amended to reflect that order.

The trial court orally imposed a $30 court facilities assessment (criminal conviction assessment) and a $40 court operations assessment (court security fee) *as to each count*. (Gov. Code, § 70373, subd. (a)(1), § 1465.8, subd. (a)(1).) The abstract of judgment must be amended to reflect $60 in court facilities assessments and $80 in court operations assessments.

Finally, the trial court concluded defendant was not entitled to any presentence custody or conduct credit because he was a sentenced prisoner. However, the abstract of judgment reflects 4,047 days' custody credit. The abstract of judgment must be amended to omit the credit for presentence time served in this case.

IV. DISPOSITION

The judgment is modified to impose 10 years plus 2 consecutive terms of life without the possibility of parole on count 2. The judgment is affirmed in all other respects. Upon remittitur issuance, the clerk of the superior court is to amend the abstract of judgment to reflect: a sentence of 10 years plus 2 consecutive terms of life without the possibility of parole on count 2; $1,500 in restitution under Penal Code section 1202.4, subdivision (f); an $80 court operations (Pen. Code, § 1465.8, subd. (a)(1)) and a $60 court facilities (Gov. Code, § 70373, subd. (a)(1)) assessment; and to omit the presentence custody credit award. The clerk of the superior court is to deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

I concur:

KRIEGLER, J.

The People v. Richard Ritchie
B262575

BAKER, J., Concurring in Part and Dissenting in Part

I concur in the judgment, except for the holding in Part III.D of the majority opinion (and the corresponding introductory and dispositional language). I believe the trial court was correct when it declined to double the sentence of life without possibility of parole on count two of the amended information. (People v. Mason (2014) 232 Cal.App.4th 355, 367-369; People v. Smithson (2000) 79 Cal.App.4th 480, 503-504.)

BAKER, J.