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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARK STANISLAW MUSZYNSKI, Defendant and Appellant.	H021243 (Santa Clara County Super.Ct.No. C9917266)

I. Statement of the Case

Defendant Mark S. Muszynski appeals from a judgment entered after a jury convicted him of aggravated child endangerment (Pen. Code, § 273a, subd. (a)),[1] attempted murder (§§ 187, 664), and aggravated arson (§ 451.5, subd. (a)(3)) and found that he inflicted great bodily injury on the child (§§ 1203, subd. (e)(3); 12022.7, subd. (a)).[2] On appeal he claims the trial court erred in denying a continuance so he could be represented by retained counsel or represent himself. He claims defense counsel was incompetent for not requesting an instruction on voluntary intoxication. He claims there is insufficient evidence to support the convictions for attempted murder and aggravated arson. He also claims the court erred in failing to appoint new counsel for the purpose of filing a motion for new trial on the ground of ineffective assistance of trial counsel.

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* Pursuant to rules 976(b) and 976.1 of the California Rules of Court, the opinion is certified for partial publication with the exception of parts III, V, VI, and VII.

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

[2] Defendant was acquitted of a second count of attempted murder.

We conclude that there is insufficient evidence to support the conviction for aggravated arson, reverse the judgment, and remand for resentencing.

II. Facts

The primary witness against defendant was Anna Owczarska. At the time of trial, she was in custody for having left a drug treatment program. She admitted having a prior misdemeanor conviction for auto theft. She testified that in 1998, she was living with her baby daughter and defendant in an apartment on Magliocco Drive in San Jose. She said he hit her and would disconnect the phone and once pulled a knife on her. He also told her he had hired somebody to kill her and that she would not live to her 22nd birthday on February 25, 1999.[3]

Owczarska testified than on February 5, 1999, she and defendant smoked crack cocaine and argued. Later, she left to buy some baby formula, leaving defendant angry and alone with the baby. Owczarska first drove to see her mother Renata Pilichowski and her husband Wieslaw to ask them for money. They had none to give her so she went to a friend's house to smoke some more crack. From there, she drove to a store to buy formula. When she returned home, she found the front door lock jammed with a piece of metal. She knocked, but no one answered. The windows were also locked. After a while, she freed the lock and opened the door. Inside, she smelled gas and noticed that everything was dark and closed up, even the bathroom window, which was usually kept open.

When Owczarska mentioned the smell of gas to defendant, he grabbed the baby, handed her to Owczarska, and told her to leave. However, Owczarska put the baby down and decided to have a cigarette. Defendant told her not to light it " 'cause the house is

[3] Defendant admitted disconnecting the phone and telling Owczarska she would not live past her birthday but denied hitting her or threatening to kill her. He felt her life was threatened by her drug abuse and the company she kept.

going to blow-up.' " He then went into the bathroom. Owczarska lit her cigarette, and the apartment exploded.

Owczarska screamed, defendant grabbed the baby, and the three fled. As they drove away, defendant told her he was trying to kill himself. He told her not to tell the police because they would think he was crazy.[4] They did not go to the hospital for fear that defendant might be arrested on outstanding warrants and instead drove to a friend's apartment. However, the friend insisted they take the baby to the hospital. They drove to the parking lot at Santa Clara Valley Medical Center, where Renata and her husband Wieslaw were parked. Owczarska and Renata then took the baby to the emergency room. The baby suffered extensive and serious burns and respiratory injury. Owczarska suffered first and second degree burns, mostly on her hands and face.

Later, Renata returned to the parking lot, and she and Wieslaw took defendant to get some money, cigarettes, and a bottle of liquor, which he drank in the car. They then drove to a friend's apartment. Renata and Wieslaw entered, but defendant stayed in the car and fell asleep. Police found him there and arrested him. According to Renata, defendant was depressed because he had closed his business and was not working.

Jeffrey Weber, an investigator for the San Jose Fire Department, testified as an expert in determining the origin and cause of fires. He went to the scene of the explosion and found six heavily damaged apartments and others with moderate damage.[5] He traced the origin of the explosion to defendant's apartment, number 4. He explained that gas lines had been cut or forcibly broken, and the other parts of the heater had been

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[4] According to defendant, he had sarcastically said, " '[I]t's not like I was trying to kill myself, you know, something like that."

[5] Ed Zapata and his family, Sean Trenery and his family, and Kim Soon and her husband lived in other apartments in the building. They testified that the explosion destroyed or substantially damaged their apartments. The Zapatas and Trenerys were also injured by the blast.

dismantled, allowing gas to flow freely into the apartment. He noted that attached to the heater were printed instructions in case the pilot light went out. They do not require that the gas lines be cut or the heater dismantled.

Weber explained that an accumulation of gas could be ignited by a refrigerator or a light switch cycling on but opined that here it was probably ignited by the cigarette lighter found near the heater. According to Weber, the safest place in the apartment was the bathroom.

Owczarska, Renata, and Wieslaw testified that there had always been problems with the wall heater and the pilot light. Renata said she had on occasion smelled gas in the apartment. Wieslaw testified that after the explosion, defendant told him about the smelling gas but did not mention trying to fix the heater.

The Defense

Defendant testified that he had his own business for three years but sold it in January 1999 because he was losing money. He had money in the bank and decided to take several weeks off. He said he was not happy about his employment situation but denied being depressed about it. He also denied that he jammed the door lock and filled the apartment with gas to harm Owczarska or the baby or destroy the apartment.

Defendant testified that on February 5, 1999, he had four or five brandies, starting at about 6:00 p.m.[6] At around 8:00 p.m., the heater would not start, but Owczarska was able to light it. At 11:00 p.m., he fell asleep, and at 2:00 a.m., Owczarska woke him up. She asked for money and left. Defendant noticed that the heater was off again, and when he tried to light it, it blew up. He smelled gas, heard a "hissing sound," and decided to fix it. As he tried to tighten a gas line fitting, his wrench slipped and cracked the pipe. Fearing another explosion, he ripped out gas lines, wires, and a valve and stuffed a plastic

[6] Defendant admitted using powered cocaine on February 4 but denied smoking crack with Owczarska on February 5. A blood test taken on February 6 revealed that .12 blood-alcohol level and the presence of cocaine and cocaine metabolites.

bag in the pipe to plug the gas leak. Defendant decided to wait for Owczarska rather than disturb the landlord. He opened the doors and windows to air out the apartment, but when he got cold, he closed everything. He then returned to the couch and fell asleep.

Defendant woke up when he heard Owczarska yelling and pounding on the door. She seemed paranoid, and defendant thought she was on drugs. Both smelled gas, and defendant picked up the baby, gave her to Owczarska, and told her to leave. However, Owczarska put the baby down and pulled out a cigarette lighter. Defendant "freaked" and told her the place could blow up. He then went into the bathroom and was there when the apartment exploded.

Defendant and Owczarska fled with the baby to a friend's house and then to the hospital parking lot to see Renata and Wieslaw. Renata and Owczarska took the baby to the emergency room, and defendant and Wieslaw waited outside. Later, Renata and Wieslaw took defendant to the bank and then to the store, where he bought cigarettes and a pint of schnapps. From there, they drove to a friend's apartment so Renata and Wieslaw could freshen up. Defendant stayed in the car, drank the pint of schnapps, and fell asleep.

After his arrest, defendant wrote to Owczarska. In one letter he told her to tell the truth, saying, "Look where you got me with those lies . . . ." He also told her not to "look good at [his] expense." At trial, he explained that " . . . I just told her, you know, not to lie because she wants to look good, you know, for the family court to get her baby back. She makes all those lies up."

In another letter he wrote in Polish, he asked her to forgive him for "[a]ll the bad things I have caused you." He disagreed that the Polish words he used meant "evil things" rather than simply "bad things." In another letter, he warned her not to volunteer information and not to incriminate herself or the people she cares for. He testified that his advice was directed toward Owczarska's dealings with social workers, who were trying to take the baby away from her. In another letter, he told Owczarska to destroy the

letters and documents he sent her because he was afraid the district attorney would subpoena "all incriminating paper." Defendant testified that there was nothing incriminating in his letters and that his advise to destroy them was "[j]ust a figure of speech."

III. Denial of Continuances

Defendant contends that the trial court abused its discretion twice, first in denying a continuance so he could be represented by retained counsel and later in denying a continuance so he could represent himself.

A. Retained Counsel

Counsel was appointed for defendant, and he was arraigned on August 9, 1999. Trial was set for September 7. Both parties asked for and received continuances, and trial was rescheduled for November 8. It apparently trailed after that date. On November 17, the parties appeared and said they were ready. The court ordered a subpoenaed witness to appear on November 29 and announced that it would rule on the in limine motions. At that point, defendant made a *Marsden*[7] motion to substitute appointed counsel. After a closed hearing, the court denied the motion. Defendant then said he wanted to substitute retained counsel. The court asked defendant, "Is this somebody that you've retained? Did you tell him about the hearing today?" Defendant responded, "I didn't have enough time, I just found out last Thursday that this is going to be happening yesterday. You know, I don't get access to telephone in the place where I am, so I didn't have a chance to contact him."

The court advised appointed counsel to call the other attorney, and, after a brief recess, Zaheer Zaidi appeared. The court asked if he was prepared to start trial, noting that "[t]his matter has been sent to this department and we actually started the trial." Zaidi said he would not be ready until January.

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[7] *People v. Marsden* (1970) 2 Cal.3d 118.

The prosecutor was surprised by defendant's request and skeptical that Zaidi could be ready for trial by January. She noted that the case had been on the master calendar for a while, she had subpoenaed witnesses, the in limine motions were ready to be ruled on, and she was prepared to begin trial immediately.

The court explained to Zaidi that he could represent defendant but, for the reasons stated by the prosecutor, would have to go forward with motions and voir dire the next morning. Zaidi declined for ethical reasons, and the court denied defendant's motion.

Defendant now claims that in refusing to grant a continuance, the court prevented Zaidi from representing him and there by violated his right to counsel of his choice.

In general, the grant or denial of a motion to continue rests within the sound discretion of the trial court. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) In exercising its discretion, the court must consider the benefit the moving party anticipates, the likelihood that such benefit will result, the burden on the other witnesses, jurors, and the court, and, above all, whether substantial justice will be accomplished or defeated by granting the motion. (*Ibid*.)

In reviewing the trial court's exercise of discretion in this case, we are guided by *People v. Courts* (1985) 37 Cal.3d 784 (*Courts*) and *People v. Jeffers* (1987) 188 Cal.App.3d 840 (*Jeffers*).

In *Courts*, trial was scheduled for October 26. The defendant tried to retain counsel in September, but he was unable to pay the attorney's retainer at that time, and the attorney left on vacation until October 18. On that date, defendant sought a continuance so he could hire the attorney. The court summarily denied the request as untimely. On October 21, the defendant paid the retainer, and retained counsel immediately tried, without success, to calendar motions to substitute and continue. On October 26, the trial date, appointed counsel sought a continuance. Retained counsel appeared and said he would take the case but needed more time to prepare. The court again denied a continuance. (*Courts*, *supra*, 37 Cal.3d at pp. 787-789.)

On appeal, the California Supreme Court concluded that trial court abused its discretion in denying a continuance. The court found that the defendant had made a diligent, good faith effort to substitute counsel before the scheduled trial date and that his motion for a continuances was as timely as possible under the circumstances. On the other hand, the court found no state interest sufficiently compelling to outweigh the defendant's right to counsel of choice. (*Courts, supra*, 37 Cal.3d at pp. 791-796.) The court explained that the constitutional right to effective assistance of counsel includes the right to counsel of one's own choosing. Thus, trial courts have a responsibility to protect a financially able individual's right to appear and defend with counsel of his own choosing. This includes affording a defendant reasonable time to employ and consult with counsel and retained counsel sufficient time to prepare for trial. (*Id*. at pp. 789-790.) The court stated, "Any limitations on the right to counsel of one's choosing are carefully circumscribed. Thus, the right 'can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citations.] The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' [Citation.]" (*Id*. at p. 790, original italics.) The court further explained that "[l]imitations on the right to continuances in this context are similarly circumscribed. Generally, the granting of a continuance is within the discretion of the trial court. [Citations.] A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*Courts, supra*, 37 Cal.3d at pp. 790-791.) However, the court cautioned that " 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' [Citation.] For this reason, trial courts should accommodate such requests—when they are linked to an

assertion of the right to retained counsel— 'to the fullest extent consistent with effective judicial administration.' [Citation.]" (*Id.* at p. 791.)

In *Jeffers, supra*, 188 Cal.App.3d 840, the court appointed a law firm to represent the defendant. Robinson, an attorney from the firm, represented defendant from August 9 through October 25, then confirmed the November 13 trial date. Thereafter, Robinson obtained a continuance until January 14. On that date, Robinson informed the court she had a conflict and that a different lawyer from the firm would proceed. However, she told the court that the defendant wanted to substitute a lawyer named De Pento, whom he had retained. The court told the defendant, " 'You have a trial date set for today. If you wished to retain counsel, it should have been done weeks ago and certainly not the day of trial. I have a trial court for you.' " (*Id.* at p. 848.) On January 15, appointed counsel said he was ready to proceed. De Pento said he had agreed to represent the defendant but only if there were a continuance. The defendant told the court he would be " 'happier' " with De Pento, who had " 'more time to be interested in the case.' " The court denied the motion to substitute counsel and the matter proceeded to trial. The defendant renewed his motion the next day, and again the court denied it. (*Id.* at p. 848.)

On appeal, the court found no abuse of discretion. (*Jeffers, supra*, 188 Cal.App.3d at p. 851.) The court concluded defendant had not made a good faith, diligent effort to retain counsel before the trial date, and there was no evidence he had been financially unable to do so. Thus, the court found the motion for a continuance to be untimely. (*Id.* at p. 850.) Citing *Courts*, the court explained, "Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary. [Citation.] Here [the defendant] did not present the trial court with compelling circumstances supporting his late request for continuance. [A different attorney from the appointed law firm] told the court he was 'prepared to take this case out.' [The defendant] made no contrary showing [a different attorney from the appointed law firm] was unprepared or otherwise unable to provide

adequate representation. Further, the fact [the defendant] may have felt happier with Robinson or De Pento than with [a different attorney from the appointed law firm] was an inadequate reason for a continuance on the day of trial. [The defendant] was on notice five months before trial of the possibility someone from [the law firm] other than Pat Robinson might handle his defense. A '[d]efendant's right to counsel does not include the right to be represented by a particular deputy public defender.' [Citation.] Similarly, [the defendant's] right to appointed counsel did not include the right to be represented by a particular member of the [lawfirm]. [Citation.] Although [the defendant's] personal relationship with Pat Robinson was important [citation], the Sixth Amendment does not guarantee a ' "meaningful relationship" between an accused and his counsel.' [Citation.] Moreover, during the five months before trial [defendant] had the opportunity to substitute retained counsel if he desired, but he did not do so." (*Id.* at pp. 850-851.)

The court also noted that the prosecutor had "expressed a valid concern about the inconvenience to [a witness] who had to travel from the east coast to testify. The trial court could reasonably find a continuance here would adversely affect the orderly administration of justice. [Citations.]" (*Jeffers, supra*, 188 Cal.App.3d at p. 851.)

Here, appointed counsel began to represent defendant in August. Although statements made during the *Marsden* hearings reveal some preliminary effort to engage retained counsel, nothing came of it, and defendant did not express his dissatisfaction with appointed counsel or purport to have retained counsel until the court was ready to rule on *in limine* motions and commence jury voir dire.[8] There is no evidence defendant had been financially unable to retain counsel until that time. Nor did defendant suggest

[8] Although Zaidi referred to defendant as his "client," statements made during the *Marsden* hearings raise some question concerning whether defendant had formally retained him by the first day of trial.

that he had been unable to seek substitution before that time.[9] Moreover, in denying defendant's *Marsden* motion, the court implicitly rejected the reasons defendant was dissatisfied with appointed counsel and sought retained counsel. Defendant does not now claim that the trial court erred in denying the *Marsden* motion. We further note that Zaidi sought more than a month continuance and did not dispute the prosecutor's view that he might need even more time. Last, we note that one witness—Wieslaw—had been subpoenaed and ordered to appear on November 29.

Under the circumstances, we consider this case closer to *Jeffers* than *Courts* and find no abuse of discretion in denying defendant's last-minute request for a lengthy continuance. The request was untimely, and there were no compelling circumstances to justify its lateness. (See *Courts*, *supra*, 37 Cal.3d at p. 792, fn. 4; cf. *People v. Rhines* (1982) 131 Cal.App.3d 498 [untimely request for continuance properly denied]; *People v. Blake* (1980) 105 Cal.App.3d 619; *People v. Doebke* (1969) 1 Cal.App.3d 931; *People v. Brady* (1969) 275 Cal.App.2d 984.)

Defendant's reliance on *People v. Butcher* (1969) 275 Cal.App.2d 63 is misplaced. There, the defendant initiated efforts to retain counsel one week before trial was scheduled to commence. Defendant had not previously sought a continuance. Appointed counsel said he would not be ready by the trial date. The prosecutor did not object to a short continuance. And in denying a continuance, the court did not exercise its discretion; rather it denied the continuance because " to grant them 'would be contrary to the general principles of the presiding judge and the calendar department.' " (*Id.* at p. 68.) In our view, *Butcher* is distinguishable.

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[9] At a later hearing, defendant asserted that he did not have a chance to request a substitution of counsel or self-representation before November 17. However, defendant does not explain why he was unable to have appointed counsel bring such matters before the court at an earlier time. Nor does he suggest that he attempted to do so but appointed counsel refused to cooperate.

B. Self-Representation

On November 22, defendant renewed his *Marsden* motion. Again, the court denied it. Defendant then said he wanted to represent himself. The court agreed to hear defendant's *Faretta*[10] motion the next day. At that time, defendant informed the court he was ready to proceed immediately and did not need time to prepare the case, stating, "I had nine or ten months to prepare myself." The court discussed the charges, explained the risks of self-representation, warned defendant against defending himself, and questioned him about his knowledge of legal procedures and evidence and planned defense. The court emphasized that "if I allow you to represent yourself that the case will go forward immediately?" Defendant acknowledged this and indicated that he was not asking for a continuance. Defendant also acknowledged that if he changed his mind, the court might not allow him to substitute Zaidi. The court indicated that because voir dire had already begun, defendant's request was untimely. The court also expressed concern about whether defendant was prepared to proceed immediately. Defendant responded, "I'll get myself prepared as best for the next procedure which is going ahead with jury in selecting the jurors for the jury trial, and we'll just go ahead and see how things will go. I think I'm capable and confident and this is my life and my defense and only I can do the best. I'm really dissatisfied with the public appointed attorney in this matter. And, you know, I think I can do better than him. That's my case, and I have the right." After further discussion, the court granted defendant's motion for self-representation. Then, on its own motion, it recess trial until November 29.[11]

On that date, the parties appeared, and the prosecutor asked defendant for his witness list. Defendant stated, "I didn't have a chance to subpoena the witnesses and I

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[10] *Faretta v. California* (1975) 422 U.S. 806.

[11] The *Faretta* hearing took place on a Tuesday. The six day recess occurred over the Thanksgiving holiday weekend.

need a disposition [*sic*], I need to interview those witnesses, so I wouldn't say they're listed as ready yet. That's why I need to address the Court, because due to the fact that my status as a pro per starts today, in jail I didn't have access to the library." The court corrected defendant, noting that his motion was granted the previous week. Defendant responded, "But the jail, the way they organize and put me in their schedule, I was informed it starts today. That's why I wasn't allowed to use the library. I wasn't allowed to use the telephone and I'm not really ready, Your Honor. I don't know the legal procedure of how to address the jury. I got all the documents from the Public Defender's office, I went through all that. I found out some very disturbing allegations and stuff in those records that I don't think they're legal, and I will bring that out. There are also a couple of documents that are missing that are on the record, and I can bring this out and explain why and how they are missing. There's also evidence I would like to present, but I didn't have a chance to go in the library and find out how do I do that in the proper way."

The court reminded defendant that he had been warned he would not receive special treatment and that he had told the court he was already prepared to go forward. However, defendant explained that when he had previously said he was ready, he meant that he was ready as a "citizen" and not "in the terms of an attorney." He then said he was not ready to proceed as an attorney. The court pointed out that the jury panel had been waiting since the previous week and told defendant that the case was going forward at this time. Defendant said he did not feel competent to do so and indicated that he wanted to file a motion to remove the judge The court offered to reinstate appointed counsel and told defendant to decide then whether to proceed himself or with appointed counsel. Defendant said he had no choice but to accept appointed counsel. After a brief recess, the court reinstated appointed counsel.

Defendant claims that once the court granted him pro per status, it was obligated to grant him a continuance based on his inability to use the phone or law library in jail during the recess. We disagree.

A criminal defendant has a constitutional right of self-representation. (U.S. Const., 6th Amend.; *Faretta v. California*, *supra*, 422 U.S. at pp. 818-836; *People v. Bradford* (1997) 15 Cal.4th 1229, 1365.) When a defendant knowingly and unequivocally makes a *Faretta* motion within a reasonable time before the commencement of trial, the court must grant the request. (*People v. Welch* (1999) 20 Cal.4th 701, 729; *People v. Windham* (1977) 19 Cal.3d 121, 127-128.) However, if the motion is not timely, the court has discretion to deny it or grant it, and may grant it on condition that the defendant proceed *without* a continuance. (*People v. Windham, supra,* 19 Cal.3d 121*; People v. Clark* (1992) 3 Cal.4th 41, 110; *People v. Rudd* (1998) 63 Cal.App.4th 620, 626.)

Here, as the trial court found, defendant's *Faretta* motion was untimely. (Cf. *People v. Moore* (1988) 47 Cal.3d 63, 78-79 [motion on Friday; trial to commence on Monday]; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1397 [two days before trial].) Thus, the court had the discretion to deny it or grant it on condition that trial proceed immediately without a continuance.[12] After a thorough discussion of the risks of self-representation, his duties and obligations, and the various rules and procedures he would have to follow, defendant accepted this condition. Under the circumstances, the court did not abuse its discretion in denying a continuance after defendant, in essence, indicated that he could and would proceed without one. Although denial of a continuance and the

[12] For this reason, defendant's reliance on *People v. Maddox* (1967) 67 Cal.2d 647 is misplaced. Although *Maddox* holds that when a court grants a motion for self-representation, the court must grant a continuance if reasonably necessary, *Maddox* does not prohibit the court from initially exercising its discretion over an untimely *Faretta* motion to grant it on condition that there be no continuance.

ultimate reinstatement of appointed counsel operated in effect as a revocation of defendant's pro per status, such a revocation was well within the court's discretion. (Cf. *People v. Rudd*, *supra*, 63 Cal.App.4th 620.)

Given the lengthy discussions about self-representation before defendant agreed to proceed immediately, he cannot reasonably claim he did not really understand what would be expected of him, and we consider his effort to back away from his statement of readiness to be essentially doubletalk. Indeed, defendant appeared to be trifling with the court.

Defendant's representation that he had been unable to use the phone or law library during the six-day recess also does not establish an abuse of discretion. Again, defendant represented that he was ready to proceed immediately on November 23, and the court granted him pro per status on condition there be no continuance. Thus, defendant's inability to use the phone and/or law library during the recess were not grounds for a further continuance. Moreover, November 29 was devoted to jury selection, and defendant did not suggest that as of November 29, he was unable to use the phone or law library.

Given our discussion, we conclude that defendant has not demonstrated that the court abused its discretion.

IV. Aggravated Arson

Defendant contends there is insufficient evidence to support a conviction for aggravated arson under section 451.5, subdivision (a)(3).

This section requires proof that the defendant was responsible for a fire that "caused damage to, or the destruction of, five or more inhabited *structures*."[13] (§ 451.5,

[13] The section 451.5 provides, in relevant part, "(a) Any person who willfully, maliciously, deliberately, with premeditation, and with intent to cause injury to one or more persons or to cause damage to property under circumstances likely to produce injury to one or more persons . . . sets fire to, burns, or causes to be burned . . . any residence . . . is guilty of aggravated arson if one or more of the following aggravating

subd. (a)(3), italics added.) Section 450, subdivision (a) defines "structure" as "any *building*, or commercial or public tent, bridge, tunnel, or powerplant." (§ 450, subd. (a), italics added.)

Weber's testimony is substantial evidence that the explosion and fire damaged at least six apartments. The record also contains photographs of defendant's apartment complex. As these photographs reveal, defendant's apartment was one of several virtually identical units in a two-story structure. The upper units share a common roof, an exterior covered walkway, and stairways to the ground floor. The upper-unit floors are connected to the ceilings of the lower units. All units are connected to neighboring units by common walls. Each unit has an exterior front door and windows that face a central courtyard with a swimming pool.

Defendant claims that an apartment in his complex is not a *building* and therefore does not come within the definition of "structure" in section 450, subdivision (a). Thus, the damage to five or more apartments does not establish "damage to, or the destruction of, five or more inhabited structures" as required by section 451.5, subdivision (a)(3).

The People argue that to effectuate the purpose of the statute and avoid absurd results, *building* must be construed broadly and expansively to include individual units in an apartment complex.

In construing statutes, our fundamental goal is to "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) To find intent, we first turn to the words of the statute. Viewing them in context and in light of the nature and purpose of the statute, we give the words their plain, everyday, commonsense meaning. However, because legislative intent ultimately prevails over statutory language, we do not adopt the literal meaning of words if it would lead to absurd results. Rather, we will, if possible, read the words so as to conform to the

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factors exists: [¶] . . . [¶] (3) The fire caused damage to, or the destruction of, five or more inhabited *structures*." (Italics added.)

spirit of the statute. (*People v. Murphy* (2001) 25 Cal.4th 136, 142; *People v. Pieters* (1991) 52 Cal.3d 894, 898-899.)

"The Penal Code does not define 'building' for purposes of arson; we therefore apply the plain meaning of the word." (*People v. Labaer* (2001) 88 Cal.App.4th 289, 292.) In *People v. Moreland* (1978) 81 Cal.App.3d 11, 18, footnote 4, the court addressed the meaning *building* as used in section 246, which proscribes discharging a firearm into, among other things, an "occupied building." Quoting a variety of dictionaries, the court noted that "[t]he word 'building' commonly has been defined as: [¶] '[A] constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure—distinguished from structures not designed for occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy' [italics omitted] (Webster's New Internat. Dict. (3d ed. 1961) p. 292, col. 1); [¶] '[A] relatively permanent essentially boxlike construction having a roof and often windows and enclosing within its walls space, usually on more than one level, for any of a wide variety of activities, as living, entertaining, manufacturing, etc.' (Random House Dict. of the Eng. Language (unabridged ed. 1973) p. 194, col. 3); [¶] 'An edifice for any use; that which is built, as a dwelling house, barn, etc.' (Funk & Wagnalls Standard Comprehensive Internat. Dict. (Bicentennial ed. 1973) p. 175, col. 1); [¶] 'Something that is built; a structure; an edifice' (American Heritage Dict. of the Eng. Language (1960) p. 174, col. 1); [¶] 'That which is built; a structure, edifice: now a structure of the nature of a house built where it is to stand' (1 Oxford Eng. Dict. (1933) p. 1162, col. 2)." (*People v. Moreland*, *supra*, 81 Cal.App.3d at p. 18, fn. 4.)

In ordinary usage and consistent with the above definitions, *building* usually describes a covered structure that stands predominately by itself and appears more

separate and distinct from any other structure than connected to and a part of another structure.

This understanding of *building* supports defendant's position. None of the individual apartments in defendant's complex projects an identity that is more separate and distinct from the complex than connected to it. Indeed, photographs indicate that the apartments were not separately constructed and later joined together. Rather, the entire complex appears to have been built as a single entity, comprising multiple units. Each unit constitutes an integral part of the whole complex. None could be removed without compromising the integrity of the complex because the fundamental elements of each unit—walls, ceilings, floors—are structurally inseparable from the whole. Moreover, none of the units has an external shape or identity that is independent of the shape and identity of the entire complex.

As noted, the People argue that the Legislature intended *building* to have a broad and expansive meaning in order to effectuate the purpose of the aggravated arson statute. This view is not unreasonable.

The Legislature enacted sections 450 (definitions) and section 451 (simple arson) in 1979, replacing former sections 447a through 450a. (Stats. 1979, ch. 145, §§ 1-8, pp. 338-339.) The former arson statutes listed several different types of structures. For instance, former section 447a applied to "the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto . . . ." Section 451, subdivision (b) basically replaced former section 447a, but used the phrase "inhabited structure" rather than the term "dwelling house." (*People v. Green* (1983) 146 Cal.App.3d 369, 378.) It is reasonable to infer that the Legislature intended the broadest definition of the phrase "inhabited structure," and intended that a "dwelling house" would qualify as such. Moreover, in analogous contexts, courts have concluded that an apartment is a "dwelling house." (*People v. Jischke* (1996) 51 Cal.App.4th 552, 556 [defendant convicted of discharging a firearm at

an inhabited dwelling house, per section 246, where he shot through his own apartment floor and thereby shot at the apartment below]; *People v. Cruz* (1996) 13 Cal.4th 764, 778 [apartment qualifies as a dwelling house for purposes of burglary statutes, sections 459 and 460].)

We also note that section 459, the burglary statute, provides, in relevant part, "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse *or other building*, tent, vessel . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (§ 459, italics added.) The phrase "or other building" suggests that at least for the purposes of burglary, the Legislature considers houses, rooms, apartments, tenements, shops, warehouses, stores, mills, barns, stables, and outhouses to be buildings.

Furthermore, the Legislature has provided a range of punishment for arson, depending on the harm caused.[14] In 1994, the Legislature enacted section 451.5 (the aggravated arson statute) out of concern that the existing penalties for arson did not take into account "the extent of the damage inflicted." (Assem. Com. on Public Safety, Analysis of Sen. Bill No. 1309 (1993-1994 Reg. Sess.) as amended Aug. 10, 1994, p. 4.)[15] The enactment was designed to "increase the penalties for the worst arsonists who . . . inflict serious damage." (*Ibid.*) Given this purpose, the People argue that section 451.5, subdivision (a)(3) in general and the term *building* in particular must be construed to promote the Legislature's intent to punish more severely those whose

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[14] For example, arson causing great bodily injury is punishable by terms of five, seven, or nine years (§ 451, subd. (a)); arson of an inhabited structure or property is punishable by terms of three, five, or eight years (§ 451, subd. (b)); arson of a structure or forest land is punishable by terms of two, four, or six years (§ 451, subd. (c)); arson of property is punishable for terms of 16 months, two, or three years (§ 451, subd. (d)); aggravated arson is punishable by a term of 10 years (§ 451.5, subd. (b)).

[15] We have taken judicual notice of the legislative history of the statute. (Evid. Code, § 452, subd. (c).)

conduct creates a greater risk of danger to life and property. For example, in causing a fire in a multi-unit complex, defendant's conduct posed a far greater risk of damage to property and injury to life than if he had caused a fire to a single, detached home. According to the People, "[i]t simply is more consistent with the legislative intent . . . to recognize that each occupied apartment unit in an apartment building itself is a 'structure' within the contemplation of the statute." Conversely, it would be incongruous with the expressed legislative intent to impose the same punishment in a case involving damage to a single-family house as in a case involving damage and/or injury to numerous conjoined apartments and their inhabitants.

The People further argue that giving *building* its ordinary meaning would lead to absurd results. They argue that in terms of the danger posed to human life, it is irrational to distinguish a fire that damages five apartments in a single building from a fire that damages five separate homes in a housing tract. Thus, *building* must be interpreted to include individual apartments so that section 451.5 covers both situations.

The People's analysis has persuasive force. However, it does not completely convince us that the Legislature intended *building* to include individual units in an apartment complex. Indeed, under the People's interpretation, building would also include individual rooms in a hotel. Nor do we find that giving *building* its ordinary meaning necessarily leads to absurd results.

We point out that the Legislature used the term *building* to define the much broader term *structure*: a building is a structure, but not all structures are buildings. Thus the purpose of defining *structure* was to narrow the scope of the section 451.5, subdivision (a)(3). This purpose, however, undermines the People's view that the Legislature intended for *building* to have a broader more expansive meaning than it normally conveys. In this regard, we further point out that unlike the burglary statute noted above, section 450, subdivision (a) does not expressly list apartments or rooms in defining "structure" or otherwise suggest that *building* includes apartments and rooms.

Given the specificity of the burglary statute, we question whether the Legislature would have relied on the word *building* to include structures—apartments, hotel rooms—that are not ordinarily referred to as buildings. Indeed, we doubt that a reasonable person would, or could, know from section 450, subdivision (a) that *building* included apartment units and hotel rooms. For this reason, the People's interpretation, if adopted, could raise serious constitutional questions in this case concerning whether the statute provided defendant with adequate and reasonable notice concerning the proscribed conduct. (See *United States v. National Dairy Corp*. (1963) 372 U.S. 29, 32-33; *People v. Superior Court (Caswell)* (1988) 46 Cal.3d 381, 389.) As a rule, however, we must avoid constructions that raise such constitutional concerns unless there is no other reasonable alternative. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1139.)

Next, we point out that the People's analysis is based in part on the increased risk of *injury* posed by causing a fire in a multi-dwelling apartment complex. However, it is the damage to *property* that makes arson in violation of section 451.5, subdivision (a)(3) different from simple arson and other forms of aggravated arson. Moreover, the arson statutes, as noted, provide a range of punishment depending on, among other things, the consequences of the fire—Did it damage real or personal property; did it damage a building, or commercial or public tent, bridge, tunnel, or powerplant; did it damage an inhabited structure; did it damage more than five inhabited structures; did it cause great bodily injury? In our view, the Legislature could reasonably choose to punish a person whose fire damaged five separate homes more severely than a person whose fire damaged five units in an apartment building or rooms in a hotel. Although in each situation, the potential danger to inhabitants may be equivalent, the magnitude of the danger and harm to *property* is rationally distinguishable. Furthermore, if one causes a fire that damages more than one unit in an apartment building or room in a hotel, he or she is punishable even if apartments and hotel rooms are not considered *buildings.* (See § 451, subd. (b).) Thus, although it does seem incongruous to punish a person who, for

example, destroys an entire, multi-dwelling apartment building, the same as a person who destroys a single house, we cannot say that such a result is absurd.

Finally, the People's reliance on *People v. Green, supra,* 146 Cal.App.3d 369 to support their interpretation of *building* is misplaced. In *Green*, the defendant set fire to one apartment that had previously been vacated by the tenant. The defendant was convicted of simple arson of an inhabited structure, but on appeal, he claimed the recently vacated apartment did not constitute an *inhabited* structure. The court disagreed, noting that the defendant "was convicted of 'arson of an inhabited structure' *because he started a fire in a large apartment building*, thus endangering the lives of all of the building's occupants." (*Id*. at p. 379, italics added.) *Green* does not suggest that an individual apartment, whether occupied or not, constitutes a *building.* If anything, it suggests that the entire apartment complex, and not individual units, constituted the *building* for the purposes of the arson statute.

Given our discussion of the opposing interpretations of *building*, we consider the term to be ambiguous and reasonably susceptible of either interpretation, neither of which would necessarily frustrate the purpose of a statute, render it nugatory, or lead to an absurd result. We urge the Legislature to resolve this ambiguity by clarifying the meaning of *building* and the scope of the aggravated arson statute. Here, however, we resolve the conflict under the settled rule that where the language of a penal statute is susceptible to alternative reasonable interpretations, we give the defendant the benefit of a doubt and interpret it as favorably to him or her as is reasonably possible. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192; *People v. Alvarado* (2001) 87 Cal.App.4th 178, 185-186.) Under the circumstances, we adopt the common and ordinary meaning of *building.* Under this meaning, an apartment in defendant's complex

is not a *building*. Thus, we conclude that there is insufficient evidence to support defendant's conviction for aggravated arson under section 451.5, subdivision (a)(3).[16]

Our conclusion does not mean, however, that no conviction for arson may stand. Under section 1260, a reviewing court is not restricted to the remedies of affirming or reversing a judgment of conviction. " 'Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial. [Citations.]' " (*People v. Edwards* (1985) 39 Cal.3d 107, 118; *People v. Kelly* (1992) 1 Cal.4th 495, 528; *People v. Moretto* (1994) 21 Cal.App.4th 1269, 1278; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1596.)

We note that simple arson under section 451, which involves the willful and malicious burning of any structure, is a lesser included offense of aggravated arson, and the trial court so instructed the jury.[17] In convicting defendant of aggravated arson, the jury necessarily found that defendant willfully, maliciously, deliberately, with premeditation, and with intent to cause injury to one or more persons or to cause damage to property under circumstances likely to produce injury to one or more persons, caused the explosion and fire in his apartment. (§ 451.5, subd. (a).) The undisputed evidence conclusively established that defendant caused great bodily injury and damaged an inhabited structure.

Here, principles of double jeopardy preclude a retrial for aggravated arson. (*People v. Shirley* (1982) 31 Cal.3d 18, 71 [no retrial where reversal due to insufficiency of evidence].) However, the evidentiary insufficiency went only to the degree of the offense. Under the circumstances, we consider it proper and appropriate to reduce

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[16] Given our conclusion, we need not address defendant's alternative claim that there is insufficient evidence that the apartments damaged by the explosion were "*inhabited* structures." (§ 451.5, subd. (a)(3), italics added.)

[17] The court also instructed on attempted aggravated arson. (§§ 664, 451.5.)

defendant's conviction to arson causing great bodily injury, a lesser included offense. (§ 451, subd. (a).)

V. Attempted Murder

Defendant contends there is insufficient evidence to support the conviction for attempted murder of the baby. We disagree.

When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320.) In making this determination, we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (See *People v. Jones* (1990) 51 Cal.3d 294, 314.) Moreover, because it is the jury, not the reviewing court, that must be convinced of the defendant's guilt beyond a reasonable doubt, we are bound to sustain a conviction that is supported by only circumstantial evidence, even if that evidence is also reasonably susceptible of an interpretation that suggests innocence. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

To convict defendant of attempting to murder the baby, the jury had to find that defendant specifically intended to kill her and performed a direct but ineffectual act toward its commission. A conviction could not be based on a finding of implied malice. (*People v. Osband* (1996) 13 Cal.4th 622, 692; *People v. Collie* (1981) 30 Cal.3d 43, 62.)

The testimony and circumstantial evidence supports a finding that on the night of the explosion defendant was depressed about his employment situation and angry at Owczarska. Knowing that he and the baby were alone in the apartment, he dismantled the gas line of the heater. He then closed the windows and jammed the lock on the front door. In our view, the jury could reasonably conclude that defendant specifically

intended to kill himself and the baby either by asphyxiation or explosion.[18] Indeed, Owczarska testified that immediately after the explosion defendant said he was trying to kill himself. Moreover, in convicting defendant of aggravated arson, the jury found that defendant willfully, maliciously, deliberately, with premeditation, and with intent to cause injury and/or damage dismantled the heater to release gas and thereby caused the explosion.

Defendant notes that the jury acquitted him of attempting to kill Owczarska. He argues that having done so, the jury could not reasonably find that he intended to kill the baby. This is especially so because both he and Owczarska testified that when she entered the apartment, defendant grabbed the baby, handed her to Owczarska, and told her to leave because the apartment might explode if she lit a cigarette. We are not persuaded.

The jury was not required to believe that defendant did, in fact, attempt to save the baby. Indeed, Owczarska's testimony was undermined by the fact that at the preliminary hearing, she did not say that defendant grabbed the baby and told her to leave the apartment. Owczarska could not explain the discrepancy and said she did not think her version at trial helped defendant. Moreover, the acquittal does not rationally preclude a conviction for attempting to kill the baby. Given the preparations defendant took to seal the apartment *after* Owczarska left, the jury could have entertained a reasonable doubt concerning whether defendant specifically intended to kill Owczarska.

VI. Ineffective Assistance of Counsel

Defendant contends that defense counsel rendered ineffective assistance in failing to request instruction on voluntary intoxication. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [in absence of request, court has no duty to instruct on voluntary intoxication].) He points to evidence that he had consumed numerous drinks before the

[18] The prosecutor asserted this theory during his closing argument.

explosion and that his blood alcohol content on February 6 was .12. He argues that the instruction would have permitted defense counsel to argue that due to intoxication, he lacked the specific intent necessary for attempted murder and aggravated arson.

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., 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.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Pope* (1979) 23 Cal.3d 412, 426.)

The record does not reveal counsel's reasons for not requesting an instruction, and we do not find that his failure was unreasonable as a matter of law.

First, although defendant said he drank several glasses of brandy, he did not suggest that it interfered with his ability to think or function. Indeed, he testified that although he felt sleepy, he was tired. He expressly denied that he was drunk. Moreover, defendant said he had his first drink at 6:00 p.m., the night before the explosion, and had his last long before the explosion. On the other hand, he admitted drinking a pint of schnapps just before he was arrested.

Under the circumstances, defense counsel could reasonably conclude that the evidence of intoxication before the explosion would not substantially enhance the defense that the explosion was an innocent accident and thus decide to forego argument that

although defendant specifically intended to fix the heater he did not formulate a specific intent to commit any crime because of the brandy he had consumed.[19]

In short, we reject defendant's claim on appeal of ineffective assistance.

VII. Appointment of New Counsel

Defendant contends that the trial court erred in failing to appoint independent counsel to investigate his posttrial claim of ineffective assistance and bring a motion for new trial. We disagree.

At the sentencing hearing, defendant asserted his third *Marsden* motion, reasserting the same complaints about appointed counsel he had raised in his two previous motions and urging the court to appoint another attorney to investigate the bases of his complaints and bring a motion for new trial. The court denied the motion and refused to appoint independent counsel.

"When, after trial, a defendant asks the trial court to appoint new counsel to prepare and present a motion for new trial on the ground of ineffective assistance of counsel, the court must conduct a hearing to explore the reasons underlying the request. [Citations.] If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a 'colorable claim' of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 573-574; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 346.)

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[19] We point out that voluntary intoxication is not a defense to the general intent crime of arson, a lesser included offense of aggravated arson. (*People v. Atkins* (2001) 25 Cal.4th 76.)

Here, as noted, defendant sought the appointment of outside counsel to investigate claims of ineffective assistance he had previously raised in his *Marsden* motions and which, after hearing from appointed counsel, the court rejected. Under the circumstances, we find no abuse of discretion in failing to appoint counsel. The trial court witnessed the performance of appointed counsel. The court heard appointed counsel explain that he had rejected defendant's trial suggestions for tactical purposes. And defendant made no colorable claim that any of the alleged complaints individually or collectively would have amounted to ineffective assistance of counsel—i.e., omissions that were prejudicial. (Cf. *People v. Bolin, supra,* 18 Cal.4th at p. 346; *People v. Diaz, supra,* 3 Cal.4th at pp. 573-574.)

VIII. Disposition

The judgment is reversed. Defendant's conviction for aggravated arson under section 451.5, subdivision (a)(3) is reduced to simple arson causing great bodily injury in violation of section 451, subdivision (a). The matter is remanded to the trial court for resentencing.

Wunderlich, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Rushing, J.

Trial Court:	Santa Clara County Superior Court No. C9917266
Trial Judge:	Hon. James C. Emerson
Attorney for Defendant and Appellant: (Under appointment by the Court of Appeal)	J. Frank McCabe GOORJIAN & McCABE
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