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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DOUGLAS JEROME STEVENSON,

Defendant and Appellant.

A130788

(Alameda County  
Super. Ct. No. C163420)

Appellant Douglas Jerome Stevenson was convicted by jury of four counts of spousal abuse (Pen. Code, § 273.5, subd. (a)),<sup>1</sup> and four counts of assault with a deadly weapon (§ 245, subd. (a)(1)). Deadly weapon use enhancements as to the spousal abuse charges (§ 12022, subd. (b)(1)) were found to be true, and Stevenson admitted sentencing enhancements for prior felony convictions (§ 667.5, subd. (b)). He does not challenge here the sufficiency of the evidence to sustain those convictions, but argues that the trial court committed *Marsden*<sup>2</sup> error in failing to adequately inquire into his alleged presentence dissatisfaction with appointed counsel. We disagree and affirm.

**I. BACKGROUND**

The charges against Stevenson were based on incidents in 2009 and 2010, in which Stevenson hit and kicked his wife, Lisa. On February 17, 2009, Stevenson became angry because Lisa had allowed strangers into their home in Oakland. He said that he

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

was going to teach her a lesson. Stevenson beat Lisa with his belt, kicked her with steel-toed boots, and punched her with his fists over a period of three hours. Later while staying with her parents, Lisa reported the incident to the Modesto police, who photographed her injuries, showing bruises and cuts all over her body. Around Thanksgiving of the same year, they had an argument in an apartment Stevenson had moved into in Oakland. Stevenson threw a frozen turkey and ham at Lisa, just missing her. He then threw a coffee table at her, which landed on her legs. The next day, as Lisa was walking to the entrance of a Wal-Mart store, Stevenson slapped her to the ground. When people started to gather, Stevenson fled in his car. When Lisa did not return to the apartment, Stevenson left threatening messages on her voice mail, demanding that she return to cook Thanksgiving dinner.

On February 13, 2010, Stevenson was at home with Lisa, their young daughter and a niece. Stevenson again became angry. He grabbed Lisa's phone and threw it against the front door. He then grabbed Lisa, beat her with his fists and hit her with an electrical extension cord. As she lay on the floor in a fetal position, he kicked her with steel-toed boots. He continued to beat her throughout the night. The following day, Stevenson woke from a nap and found Lisa sending a text message to a friend. Stevenson yelled at her, saying she had not "learned her lesson" from the previous night. He again beat her with his fists, whipped her with an extension cord, and kicked her with his steel-toed boots.

On February 15, 2010, Stevenson again beat Lisa with his fists, whipped her with the extension cord, and kicked her with his boots. Stevenson said she was a "stupid bitch" and was going to pay. He picked up a trash can and threw it on top of her, telling her she belonged with the trash.

On February 18, 2010, Lisa reported the beatings to the Oakland Police Department and her injuries were photographed. She also received medical treatment for her injuries. She had swelling, bruises, cuts, and scars over her entire body. She suffered headaches and had difficulty walking, sitting, sleeping, and picking up her daughter for several weeks. She took two weeks off from work because of the pain.

Stevenson elected to represent himself at trial. He testified on his own behalf, denying that he was abusive to his wife, and specifically denying that he had struck or kicked Lisa as she had described. He denied that he ever owned steel-toed boots.

On June 23, 2010, a jury returned guilty verdicts on all charged counts. On July 23, 2010, Stevenson requested appointment of counsel to assist him with a motion for new trial. After the public defender's office declared a conflict, attorney John McDougall was appointed on August 27, 2010.

On October 29, 2010, Stevenson filed a *Faretta*<sup>3</sup> petition, seeking to again proceed in pro per. The court (Hon. Morris Jacobson) continued the hearing on the *Faretta* motion "and the *Marsden* motion" to December 3, 2010, so that the matter could be heard by the trial judge, Judge Philip Sarkisian.<sup>4</sup>

On November 29, 2010, McDougall filed a motion for new trial on Stevenson's behalf, alleging that ineffective assistance of a court appointed investigator and denial of Stevenson's requests for continuance of the trial denied him the opportunity to present exculpatory evidence. This "potentially exonerating evidence" purportedly consisted of store surveillance tapes from a Walgreens store and a Lucky's market from February 13, 2010, which Stevenson claimed would show that he was not wearing steel-toed boots on that date.<sup>5</sup>

On the December 3, 2010 hearing date, Judge Sarkisian was apparently unavailable and the matter was called before Judge Kevin Murphy. McDougall said "I would like to know if Mr. Stevenson is going to withdraw his *Faretta* motion or *Marsden*

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<sup>3</sup> *Faretta v. California* (1975) 422 U.S. 806.

<sup>4</sup> There is nothing in the record of October 29 that reflects a *Marsden* motion made by Stevenson. In the transcript of the subsequent December 3, 2010 hearing, McDougall states, "When we were last in Department 11, Mr. Stevenson said he wanted either a *Marsden* motion or a *Faretta* motion or both . . ." (Italics added.)

<sup>5</sup> In several hand-written communications from Stevenson to the court following his conviction, Stevenson refers to his requests to his appointed investigator to retrieve such tapes. Stevenson claimed the tapes would have been available from a Walgreens store and an Albertson's market.

motion.” (Italics added.) Stevenson said that he was “trying to get my pro per status back. I got all the evidence I need to go back to trial.” He also said “I need a co-counsel.” Judge Murphy continued the matter to December 8, before Judge Sarkisian.

On December 8, 2010, Stevenson appeared before Judge Sarkisian, represented by McDougall. Judge Sarkisian was informed by McDougall of the *Faretta/Marsden* motions. When asked by the court whether Stevenson was requesting that McDougall be removed as counsel, and whether he wanted a different lawyer to represent him in connection with the motion for new trial, the following colloquy ensued:

“DEFENDANT: Yes. The motion he filed was fine, but I have more new information, and I also discovered a prosecution misconduct against [the deputy district attorney].

“THE COURT: Listen to my question: Do you want me to remove Mr. McDougall and appoint another lawyer to represent you in connection with your motion for a new trial, or do you want him to handle the matter?

“DEFENDANT: Yes. Can I ask you one question, your Honor? Could I get co-counsel where I could represent myself and have somebody help me, co-counsel or an adviser?

“THE COURT: One thing at a time. First question is, do you want another attorney appointed to represent you, other than Mr. McDougall?

“DEFENDANT: What he did what was [*sic*] what I wanted him to do.

“THE COURT: So you’re happy with Mr. McDougall, you’re just requesting another attorney be appointed as co-counsel?

“DEFENDANT: Yes, because I have more information and evidence for you.

“THE COURT: That motion is denied. Now, we can proceed with the hearing on the motion for the new trial unless there’s something you wanted to add Mr. McDougall?

“MR. MCDUGALL: No, your Honor.”

The court proceeded to hear and deny the motion for new trial. The court then said, “We’re moving on now to the sentencing, and I’m assuming that we can proceed with Mr. McDougall, right Mr. Stevenson?” Stevenson responded, “Yes, that’s cool.”

The court sentenced Stevenson to an aggregate term of five years and four months in state prison, with credit for 267 days actual custody time. Stevenson filed a timely notice of appeal.

## II. DISCUSSION

Stevenson contends the court erred in failing to make inquiry into his claimed dissatisfaction with appointed counsel. Stevenson also claims the trial court was required to inquire into his claim of new evidence and into the basis for his claim of prosecutorial misconduct. We disagree.

### A. *Marsden Inquiry*

“When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation—i.e., makes what is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. Substitution of counsel lies within the court’s discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel. [Citation.]” (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

“The court’s duty to conduct the inquiry arises ‘only when the defendant asserts directly or by implication that his counsel’s performance has been so inadequate as to deny him his constitutional right to effective counsel.’ [Citations.]” (*People v. Lara* (2001) 86 Cal.App.4th 139, 151.) Although a formal motion is not required, the trial court’s duty to conduct an inquiry into the reasons the defendant believes his or her attorney is incompetent arises only when the defendant provides “ ‘ ‘ ‘at least some clear indication’ ” ’ ” that the defendant wishes to substitute counsel. (*People v. Dickey* (2005) 35 Cal.4th 884, 920 (*Dickey*); *People v. Mendoza* (2000) 24 Cal.4th 130, 157.)

We have no record of Stevenson’s comments to the court on October 29, 2010. At the December 3, 2010 hearing date before Judge Murphy, Stevenson’s statements to the court were clearly focused on his desire for future self-representation, and a request for cocounsel, “to go back to trial.” He did not express any dissatisfaction with McDougall, or with his representation in connection with the new trial motion. On December 8, 2010, Judge Sarkisian inquired about precisely what Stevenson was asking the court to do. He asked Stevenson very directly, “Do you want me to remove Mr. McDougall and appoint another lawyer to represent you in connection with your motion for a new trial, or do you want him to handle the matter?” With respect to the motion then pending before the court, Stevenson said that “[t]he motion he filed was fine,” and that McDougall did “what I wanted him to do.” The court then asked, “So you’re happy with Mr. McDougall, you’re just requesting another attorney be appointed as co-counsel?” Stevenson said “Yes, because I have more information and evidence for you.” “Requests under both *Marsden* and *Faretta* must be clear and unequivocal; the one does not imply the other. [Citations.]” (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051. fn. 7.)

Far from making an unequivocal request for new counsel, Stevenson never voiced any concern “directly or by implication” that his counsel’s performance was ineffective. He expressly agreed the new trial motion filed by McDougall was “fine” and that McDougall could continue to represent him. “As his expressed wishes were honored, he has no grounds for complaint now.” (*Dickey*, *supra*, 35 Cal.4th at p. 921, fn. omitted; see also *People v. Richardson* (2009) 171 Cal.App.4th 479, 484–485.)

#### B. *The New Trial Motion*

As the People correctly note, nowhere in Stevenson’s opening brief does he assert error in denial of the new trial motion. Stevenson instead suggests that the trial court’s failure to inquire about his claim that he had “new information” and evidence of prosecutorial misconduct that he wanted to present was relevant to the claimed *Marsden* error. For the first time in his reply brief, Stevenson argues that the trial court “failed to adequately rule on [the] new trial motion,” by failure to make such inquiry and that remand is required for further hearing on the motion (citing *People v. Braxton* (2004)

34 Cal.4th 798, 813–814 (*Braxton*)). We need not consider arguments raised for the first time in a reply brief. (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30.) In any event, we find no merit in the claim.

Stevenson does not bother to cite the appropriate standard of appellate review on denial of a new trial motion. “A trial court has broad discretion in ruling on a motion for a new trial, and there is a strong presumption that it properly exercised that discretion. ‘ “The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” ’ [Citation.]” (*People v. Davis* (1995) 10 Cal.4th 463, 524.) Somewhat disingenuously, Stevenson fails to acknowledge that the *Braxton* case he cites deals with review of a record where the trial court has refused or neglected to rule on such a motion at all. (*Braxton, supra*, 34 Cal.4th at p. 805.)

Here appointed counsel fully investigated and presented Stevenson’s motion for a new trial, including claims of “new evidence” (i.e., the store videotapes). Stevenson agreed that the motion was “fine.” Stevenson also completely ignores the trial court record which includes voluminous written communications by Stevenson to Judge Sarkisian discussing the purported significance of the videotapes, and his various complaints about the conduct of his trial, including his grievances with the prosecutor. Stevenson provides no authority for his claim that the trial court was required to conduct a further inquiry, and no abuse of discretion is shown.

**III. DISPOSITION**

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.