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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRELL WHITFIELD,

Defendant and Appellant.

A131344

(Alameda County
Super. Ct. No. C164487)

Defendant Terrell Whitfield appeals from a judgment after a jury convicted him of second degree robbery (Pen. Code, § 211¹), and found true an allegation that he personally used a firearm during the robbery (§§ 12022.5, subd. (a), 12022.53, subds. (b), (g)). The court sentenced defendant to an aggregate term in state prison of 13 years. On appeal defendant raises a single issue. He contends reversal is required because the trial court erred by denying his requests for a continuance to retain counsel. We conclude defendant's contention is without merit, and accordingly, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the issue raised on appeal, we set forth the facts briefly. On August 10, 2010,² Vishan Dimri was robbed by four men. Defendant held Dimri at gunpoint and the other three men were unarmed. The men took Dimri's wallet containing \$150, two iphones, and a gym bag, and then fled in a car. Between an hour and two hours later,

¹ All further unspecified statutory references are to the Penal Code.

² Unless other specified, all dates refer to the 2010 calendar year.

Dimri identified defendant and the three other men who were then in police custody. Dimri identified defendant as the armed robber. The police returned Dimri's stolen property; one of Dimri's iphones was found in the robbers' car.

On August 27 and August 30, a preliminary examination was held at which defendant and his assigned counsel were present. The court heard testimony from the robbery victim and a police officer. The court issued an order holding defendant to answer for the charge of robbery in the second degree with a "personal use of a firearm clause." On September 9, the district attorney filed an information charging defendant with second degree robbery with an allegation that he personally used a firearm. His three codefendants were charged with second degree robbery with an allegation that a principal was armed with a firearm.

On September 13, defendant appeared in court with new assigned counsel for arraignment on the information. He entered a plea of not guilty and denied the personal use of a firearm allegation. Although defendant's codefendants were arraigned at the same time and would not waive time for trial, defendant was willing to waive time for trial so that his counsel could adequately prepare for trial. However, the court stated that regardless of whether all defendants later waived time for trial, the trial would be set for October 25 because the district attorney would be assigning the case for preparation, and the court wanted to be sure that a courtroom would be available for trial.

On Monday, October 18, a week before the scheduled trial date, the court held a hearing on defendant's oral motion to relieve assigned counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Defendant described his problems with his receipt of copies of discovery from his assigned counsel. In response to the court's query, assigned counsel explained her responses to defendant's request for discovery, and stated "maybe there's a trust issue." Counsel noted she had not yet received the transcript of the preliminary examination testimony of the robbery victim,³ and she shared

³ The 21-page transcript of the testimony of a police officer presented on the second day of the preliminary examination was filed on September 8, 2010. At the time of the October 18, 2010, hearing, the 73-page transcript of Dimri's testimony presented on the

defendant's concern that she needed the transcript before trial. However, if counsel got the transcript before trial, she would not need a continuance because she could review it and be prepared to try the case on the scheduled date. Counsel described her preparation for trial consisting of her investigations of defendant's purported alibi defense and a purported discrepancy regarding the victim's description of the armed robber, her discussions with defendant regarding the case, his sentence exposure, and the district attorney's plea offer. In response, defendant asked the court if he could have "a little bit of time to get [his] own lawyer" The court asked if defendant had money to pay an attorney, who would probably want at least six or eight thousand dollars as a deposit. Defendant replied he knew how much an attorney would cost, and he had money and a job before his incarceration. The court told defendant he could hire an attorney. However, the case would be sent out for trial on the following Monday, and if defendant could get an attorney "by Monday, that's fine." The court denied the *Marsden* motion, finding that assigned counsel was representing defendant "very well."

On the following Monday, October 25, the date set for trial, defendant and assigned counsel were present. The court noted that motions in limine were to be filed that afternoon, jury selection would be scheduled for Wednesday and Thursday of that week, and the actual trial would start on the following Monday, November 1. The court discussed with defendant the district attorney's most recent plea offer, and defendant indicated he wanted to go to trial. Defendant stated he did not think his counsel was working in his best interest. The court said he could make another *Marsden* motion. Defendant did not then indicate he wanted to make another *Marsden* motion. The case was continued to the next day.

On Tuesday, October 26, defendant's assigned counsel asked the court if jury selection could start the following Monday because she had a doctor's appointment. The prosecutor opposed the request because he did not know his witnesses' availability beyond the following Monday and Tuesday. The court rescheduled jury selection to

first day of the preliminary examination had not yet been filed; it was later filed on October 21, 2010.

accommodate counsels' requests, noting that the actual trial would start on either Monday, November 1 or Tuesday, November 2. Defendant's assigned counsel then made a motion to continue the trial at defendant's request. Counsel reported that defendant had spoken to his aunt the night before and his aunt was "looking to hire an attorney for him that should be coming to North County to visit him today." The court denied the continuance motion, explaining: "Well, I don't see anybody in here today and this is in here for trial. And that's very uncertain because we don't know if the attorney is going to take the case, be able to proceed on the case or what's going on." Defendant stated he would like to waive his speedy trial rights because he did not want to go to trial with assigned counsel. "So I talked to my aunt last night and she's pretty sure that she's going to hire me an attorney." The court again indicated a continuance would not be granted because defendant had had a lot of time to retain an attorney, the case had been assigned out for trial, a new attorney would not know anything about the case, and there was no indication a new attorney was going to assist defendant. The court would have permitted defendant to substitute a new attorney who was ready to take over the case at that time, but there was no new attorney present in court. When defendant asked if he could get a continuance "for at least a couple of weeks," the court denied the request on the ground that defendant had not demonstrated there was going to be a new attorney. Defendant indicated he wanted another hearing on his *Marsden* motion. At the *Marsden* hearing, the court asked defendant to state the basis for his request to relieve assigned counsel. Defendant described his complaints, which were refuted by assigned counsel. Defendant then asked for a continuance and the court indicated it had already denied a continuance. The court denied the renewed *Marsden* motion, stating it was satisfied that assigned counsel was properly representing defendant. Defendant stated he did not want assigned counsel working for him. The court replied he did not have a choice unless defendant brought in another attorney to take over the case. When defendant stated, "they're coming," the court replied that when a new attorney came, the court would "work on that." When the case resumed in open court, defendant stated he did not want

assigned counsel to work on his case and he was hiring his own attorney. The court replied it would deal with the situation if a new attorney came into court.

The trial was held on November 1 and 2, at which time defendant was represented by assigned counsel. On November 3, the jury found defendant guilty of second degree robbery and it found true the personal use of a firearm allegation. On February 25, 2011, defendant was sentenced to state prison for an aggregate term of 13 years. He timely appealed.

DISCUSSION

Defendant argues that a reversal is required because the trial court refused to grant his requests for a continuance to retain counsel. We disagree.

“Generally the trial court has discretion whether to grant a continuance to permit a defendant to be represented by retained counsel. [Citation.] [However,] ‘[t]he right of a defendant to appear and defend with counsel of his own choice is not absolute.’

[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.]’ [Citation.] In deciding whether the trial court’s denying a continuance was so arbitrary as to deny due process, this court ‘looks to the circumstances of each case,

“ ‘particularly in the reasons presented to the trial judge at the time the request [was] denied.’ ” [Citations.]’ [Citation.]” (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850 (*Jeffers*)).

Defendant argues the timeliness of his requests for a continuance to retain counsel must be assessed in light of the following circumstances: (1) he had been forced to an early trial date by his codefendants’ insistence on that date, (2) a week before the trial assigned counsel was still attempting to obtain and review basic discovery, and (3) his need to retain an attorney was not apparent until the court denied his *Marsden* motion on October 18. However, defendant’s right to retain an attorney was not impeded by the setting of an early trial date or the trial court’s refusal to appoint substitute counsel at the October 18 *Marsden* hearing. Defendant could have retained an attorney any time after his arraignment, but he chose not to do so. The trial court could reasonably find that

defendant had sufficient time and the financial ability to retain an attorney, but he did not do so even though his alleged problems with assigned counsel apparently began before October 18. (See *Jeffers, supra*, 188 Cal.App.3d at pp. 850, 851; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1367.) Defendant argues his request to retain an attorney was based on his sincere belief that assigned counsel was not prepared for the pending trial scheduled for October 25. However, the trial court could accept assigned counsel's persuasive arguments that she was prepared and ready to try the case on the scheduled date. Given assigned counsel's assurances regarding her preparation and ability to try the case on the scheduled date, the trial court reasonably rejected defendant's concerns and found there was no compelling reason justifying a continuance on October 18. We see no abuse of discretion in the trial court's ruling.

At the October 26 proceeding, defendant again offered no compelling reason that justified a continuance at that time to allow him to retain counsel. Defendant made no showing that assigned counsel was not prepared or able to try the case, and the trial court found assigned counsel was providing effective representation. Defendant's request for a continuance was based on his representation that his aunt was going to hire an attorney for him. However, the trial court reasonably found the "participation by a particular private attorney was still quite speculative at the time" of the request. (*People v. Courts* (1985) 37 Cal.3d 784, 791, fn. 3.) We are not persuaded by defendant's argument that the prosecutor did not object to the continuance or argue that a continuance would prejudice the prosecution or inconvenience witnesses. It was unnecessary for the court to make any inquiries as to the effect of granting a continuance on the prosecution or witnesses. On the day after the scheduled date for trial, defendant requested a continuance for at least a couple of weeks for the speculative purpose of "eventually be[ing] able to hire counsel." (*Ibid.*) Given the uncertainty as to if and when a retained attorney would appear in court and be able to try the case, we conclude the trial court reasonably denied defendant's request for a continuance on October 26. We see no abuse of discretion in the trial court's ruling.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.