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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
JIMMY RAY BRADLEY,  
  
Defendant and Appellant.

C064726  
  
(Super. Ct. No.  
09F01534)

After four unsuccessful attempts to have his appointed counsel removed and new counsel appointed pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), defendant Jimmy Ray Bradley advised the trial court, on the eve of trial, that he wanted to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*). The trial court granted his request on the condition the trial would not be continued. Defendant agreed, but later asked the court to

continue the trial so that he could prepare. The trial court denied his request, and thereafter defendant sought to have new counsel appointed. The trial court denied defendant's request for new counsel, but advised him that it was willing to reappoint previously appointed counsel. Defendant stated that he would not "accept[]" previously appointed counsel, and thus, continued to represent himself. After jury selection commenced, defendant refused to return to court, and the trial proceeded in his absence.

The jury found defendant guilty of possession for sale of methylenedioymethamphetamine (MDMA or Ecstasy) (Health & Saf. Code, § 11378)<sup>1</sup> and possession for sale of marijuana (§ 11359). It also found true allegations defendant had four prior strike convictions (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), served one prior prison term (*id.* § 667.6, subd. (b)), and had three prior drug convictions (§ 11370.2, subd. (c)).

After the jury rendered its verdict, defendant moved for new counsel and an investigator to assist him with the judgment and sentencing phase of the proceedings. The trial court denied the motions and sentenced defendant to an aggregate term of 35 years to life in state prison, consisting of 25 years to life for possession of MDMA for sale, plus a consecutive three years for each of the prior drug convictions, plus a consecutive one year for the prior prison term. Defendant was sentenced to a

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<sup>1</sup> Further undesignated statutory references are to the Health and Safety Code.

concurrent 25 years to life for possession of marijuana for sale.

Defendant appeals, contending the trial court erred in (1) denying his four *Marsden* motions; (2) granting his untimely *Faretta* motion, denying his reverse-*Faretta* motion, failing to reappoint attorney Clemente Jimenez after defendant elected not to attend trial, failing to appoint new counsel to assist defendant with his new trial motion; (3) failing to appoint an investigator and acting in concert with the pro per coordinator to mislead defendant regarding the failure; and (4) allowing the trial to proceed in defendant's absence. We granted defendant's request to file a supplemental brief on the issue of whether his conviction for possession of MDMA for sale is supported by substantial evidence. We shall conclude that substantial evidence supports that conviction, and that defendant's remaining claims likewise lack merit. Accordingly, we shall affirm the judgment.

#### FACTUAL BACKGROUND<sup>2</sup>

On the afternoon of February 27, 2009, two undercover police officers observed defendant and another man loitering inside an apartment complex and asked two uniformed officers to make contact with the two men. The uniformed officers made contact one to two minutes later. After observing that defendant had his left hand in his left pocket, one of the

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<sup>2</sup> Relevant portions of the procedural history are set forth below in our discussion of defendant's various claims.

officers asked defendant to remove it. When defendant failed to respond, the officer asked him to state his name. When defendant again failed to respond, the officer asked defendant "if he had anything illegal on him." Defendant said he had "weed and E," which are common street names for marijuana and Ecstasy. The officer searched defendant and found a plastic bag containing 49 yellow pills and a plastic bag containing nine one-inch by one-inch baggies of what appeared to be marijuana in defendant's right front pocket, and a cell phone in his pant pocket. Defendant was placed under arrest.

Thereafter, the two undercover officers arrived at the scene. After defendant was given and agreed to waive his *Miranda*<sup>3</sup> rights, he told one of the undercover officers, "[T]here's just 20 something pills, and then however much marijuana. It's possession for sale." He also stated, "I'm out here just trying to get by. What am I supposed to do for money?"

The uniformed officers drove defendant to jail in their patrol car. During the ride, defendant stated generally that "he was out there to sell the pills, that he was selling them for \$5 apiece, that it would take him anywhere from two to three days to sell the quantity that [the officers] recovered, and that he was doing so because he only worked part-time as a telemarketer, and that his rent was around \$400."

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].

It was later determined that the 49 pills possessed by defendant were MDMA, and the nine small baggies contained a total of 3.15 grams of marijuana.

In addition, the cell phone found in defendant's pocket contained recent outgoing text messages that appeared to relate to drug sales. For example, one message read, "Yes, just wait. You can buy your bag from me and I'm going to smoke one." Another recent outgoing text message read, "I got E pills now, too." There were also recent incoming text messages of a personal nature addressed to "Jimmy B."

Defendant did not testify or present any defense at trial. Rather, after jury selection commenced, he elected not to attend trial.

## DISCUSSION

### I

The Trial Court Properly Denied Defendant's *Marsden* Motions

Defendant first contends the trial court abused its discretion in denying each of his four *Marsden* motions. We disagree.

#### A. Procedural History

##### 1. July 10, 2009, *Marsden* Motion

On March 25, 2009, Clemente Jimenez was appointed to represent defendant. On July 10, 2009, defendant moved to relieve Jimenez and have new counsel appointed. Defendant complained that Jimenez was disrespectful and refused to listen; did not have time to work on his case; failed to investigate

defendant's proposed witnesses or have the drugs allegedly found on defendant analyzed; failed to provide him with "paperwork" from his "strike review" or preliminary hearing; and told the prosecutor defendant "would take anything but a life sentence." Defendant told the trial court this was "a simple drug case that might be a possession case, if [Jimenez] does his job correctly. Maybe I can get a drug program . . . ."

Jimenez responded that he had been in trial on another case for the past three and one half weeks and did not have time to work on defendant's case during that time. Jimenez had drafted a *Romero*<sup>4</sup> motion seeking to vacate defendant's prior strike convictions but had not yet filed it because he wanted to review reports concerning defendant's prior convictions to determine if there were any mitigating factors. Jimenez had recently received those reports but had not had time to review them because he had been in trial. Jimenez characterized defendant's expectations regarding the case as "unrealistic." Jimenez advised defendant that given the severity of his prior convictions, it was unlikely the court would strike them. Jimenez also told defendant that getting a drug program was not a realistic possibility. As for the paperwork defendant requested, Jimenez explained that the strike review is an "informal process that the district attorney's office has" and that there is no paperwork. Jimenez also stated that he would

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<sup>4</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

be happy to provide defendant with a copy of the preliminary hearing transcript if defendant did not already have one. With respect to a possible resolution of the case, Jimenez explained that the prosecutor had sent him an email asking to "discuss resolution," and he responded, "My client will consider anything that doesn't involve 25 to life." In Jimenez's experience, deputy district attorneys, including the prosecutor in this case, generally lack the "authority to realistically negotiate," thus he did not take the message to mean much. Indeed, the prosecutor responded, "Yeah, it's 25 to life. It has to be." Jimenez did not believe that his relationship with defendant had broken down such that he could not effectively assist defendant. Rather, he stated that if defendant "gives me an opportunity to do my job, I will do it."

The trial court denied the *Marsden* motion. It found Jimenez had responded to most of defendant's complaints, and while there was some dispute over tactics, such decisions rested with counsel.

## 2. October 13, 2009, *Marsden* Motion

Three months later, on October 13, 2009, defendant again requested the court remove Jimenez and appoint new counsel. Defendant complained that Jimenez waived time without defendant's permission; had yet to file or provide him with a copy of the *Romero* motion; and had yet to interview defendant's proposed witnesses "Michelle" and "Tiffany." Defendant also claimed that Jimenez had provided him with conflicting information. In particular, defendant asserted that when he

first met Jimenez, Jimenez told him, "I can get the marijuana case dismissed, but you're looking at . . . the [E]cstasy case doubled up, with a year prison prior. That's the most you're looking at. I can get the strike struck." Later, however, he told defendant he could no longer get him seven years. Rather, he said defendant was looking at 25 to life.

Jimenez responded that he had "thoroughly investigated this case to the extent that [he] believe[d] it's pertinent." He explained that defendant's proposed witnesses were people whose texts, which were suggestive of drug transactions, were found on the cell phone recovered from defendant. While Jimenez questioned whether they would make good witnesses, his investigator was attempting to locate them. He also explained that the timing of the *Romero* motion was a strategic decision to be made by counsel. As for the waiver of time, he stated that he never had the trial date reset or waived time without defendant's consent. Finally, with respect to a possible plea, he indicated that "the offer from day one in this case has been 25 to life," and that he had suggested to defendant that a reasonable counter-offer would be to offer "to plead upper term to the charges . . ., if they are striking two of the strikes. And then in addition to that, have them amend to include a three-year drug sale prior. And that would get us approximately 11 or 12 years." Defendant rejected this suggestion and instructed Jimenez to tell the prosecutor he would take a year in county jail and a drug program. Although Jimenez believed that was "completely far-fetched and an impossibility," he did

discuss it with the prosecutor. Jimenez denied telling defendant he could get him seven years.

The trial court denied the *Marsden* motion, concluding there was nothing to indicate Jimenez was ineffectively defending defendant, and that there were no irreconcilable differences that precluded Jimenez from effectively representing defendant.

### 3. November 9, 2009, *Marsden* Hearing

One month later, on November 9, 2009, defendant again asked the court to remove Jimenez and appoint new counsel. Defendant claimed Jimenez lied to the court during the first *Marsden* hearing by stating that defendant had "sold drugs to an undercover officer" in an attempt to discredit him; waived time without defendant's consent; refused to answer defendant's questions; walked out of meetings with defendant; had yet to file a *Romero* motion; drafted a *Romero* motion that omitted important facts; said it was not his job to determine whether the patrol car in which defendant was alleged to have made various inculpatory statements contained any audio or video recording devices; and asked defendant to allow him to make a plea offer for something defendant did not do.

Jimenez responded that the last few times he had spoken to defendant they were unable to discuss anything of substance because defendant spent the entire conversation complaining about what Jimenez had not done on defendant's behalf. Jimenez denied telling the court defendant sold drugs to an undercover agent. He had not yet filed the *Romero* motion for tactical reasons, explaining that "who hears the motion is very

important." With respect to the possible existence of audio or video tapes, Jimenez explained that while he did not believe they existed, he had requested any such tapes and had not received anything in response. Jimenez believed defendant was being "incredibly unreasonable about his situation" given defendant's prior convictions and the fact he possessed [49] Ecstasy pills and a small amount of marijuana divided into individual baggies at the time of his arrest. Jimenez asked defendant to waive time so that he could get the police reports concerning the prior convictions. Unfortunately, those reports showed that the prior convictions involved gangs and guns and contained no evidence of mitigation. Jimenez agreed that there had been an irremediable breakdown in communication insofar as he could no longer speak to defendant about the case without defendant complaining about his performance.

The trial court denied the *Marsden* motion. While it did not know whether there had been an irremediable breakdown in communication, it found that Jimenez had responded to defendant's complaints, had not acted inappropriately, and had defendant's best interests at heart. The court noted that there was no reason defendant and Jimenez could not discuss what needed to be discussed, and to the extent there had been a breakdown in communication, the court suggested defendant focus his conversations with Jimenez on the case and not on what he thought Jimenez should have done.

4. March 30, 2010, Marsden Motion

On March 30, 2010, the date trial was set to commence, defendant again asked the court to remove Jimenez and appoint new counsel. Defendant complained that Jimenez failed to send an investigator to talk to witnesses who would testify that they got high with defendant but that defendant was not a drug seller; did not have a strategy for defendant's case; and had yet to file a *Romero* motion or do anything to defend the case. Defendant also stated that he was not comfortable having Jimenez represent him and that he did not trust Jimenez.

Jimenez responded that one of defendant's proposed witnesses was the individual who was with defendant at the time of his arrest. Jimenez advised defendant that he "did not believe that somebody else that was facing charges of possession or possession for sale of drugs would make a credible witness . . . ." Jimenez had repeatedly discussed his trial strategy with defendant and advised defendant that "[h]e's got a bad case. It is not a triable case. . . . I think this case should have been resolved for some type of determinate term." Assuming the case did go to trial, Jimenez's strategy was for defendant to admit he possessed the drugs for personal use. He explained that if they were able to convince the jury that the drugs were solely for defendant's personal use that would lessen defendant's exposure dramatically. "That possession for sale of marijuana then turns into possession of less than an ounce of marijuana. Nonissue for the strike purposes. [¶] The possession of [E]cstasy for sale then becomes a straight

possession, which is a wobbler. And at that point, we can request . . . the Court consider a [section] 17(b) motion.”<sup>5</sup> Jimenez had filed a *Romero* motion with the trial court earlier that day. As for defendant’s claim that Jimenez had done nothing to defend the case, Jimenez explained that in addition to the *Romero* motion, he had filed a *Pitchess*<sup>6</sup> motion, retrieved records concerning defendant’s prior convictions, and confirmed that there were no recording devices in the patrol car in which defendant was alleged to have made inculpatory statements to police. Jimenez felt he had done more than was necessary to prepare the case.

The trial court denied the *Marsden* motion, finding Jimenez appeared to be doing everything he could to effectively represent defendant and that Jimenez and defendant could work out their differences and continue to work together. The court explained that it was Jimenez’s job to provide defendant with an honest assessment of the case and to advise a course of action, even if defendant did not like it.

#### B. Analysis

“A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate

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<sup>5</sup> Penal Code section 17, subdivision (b) allows the trial court to designate certain offenses misdemeanors rather than felonies.

<sup>6</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245.) "However, 'a defendant may not force the substitution of counsel by his own conduct that manufactures a conflict.' [Citation]." (*People v. Leonard* (2000) 78 Cal.App.4th 776, 786; see also *People v. Smith* (1993) 6 Cal.4th 684, 696.) "A *Marsden* motion is addressed to the discretion of the trial court, and a defendant bears a very heavy burden to prevail on such a motion. . . . The defendant . . . cannot rest upon mere failure to get along with or have confidence in counsel. [Citations.]" (*People v. Bills* (1995) 38 Cal.App.4th 953, 961; see also *People v. Roldan* (2005) 35 Cal.4th 646, 681-682, disapproved on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

On appeal defendant argues the trial court abused its discretion in denying his *Marsden* motion because Jimenez was "aggressively demeaning and disrespectful of [defendant] from the beginning" which resulted in a "nearly 100-percent communications breakdown and lack of trust," Jimenez attempted to discredit defendant by erroneously advising the court that defendant sold drugs to an undercover officer, and Jimenez failed to prepare a defense. As detailed below, there was no abuse of discretion.

Jimenez and defendant disagreed on a number of issues, and Jimenez plainly was frustrated by defendant's second-guessing and reluctance to waive time to allow him to do his job. We

reject, however, defendant's assertion that Jimenez's attitude or conduct toward defendant resulted in an irreconcilable conflict. As the trial court properly advised defendant at the last *Marsden* hearing, Jimenez's job included providing defendant with an honest assessment of the case and formulating a strategy even if defendant did not like or agree with the assessment or strategy. (See *People v. Welch* (1999) 20 Cal.4th 701, 728-729 ["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.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.'"])

Moreover, the record reflects that Jimenez provided defendant with adequate and competent representation, which included preparing a defense case. As previously discussed, he attempted to negotiate a plea deal, filed a *Pitchess* motion, requested reports concerning defendant's prior convictions, and requested any in-car recordings to bolster defendant's claim that he did not make certain statements attributed to him during the ride from the scene to the jail. In the event the case went to trial, Jimenez's strategy was for defendant to admit he possessed the drugs for personal use and not for sale. Jimenez explained that if they were able to convince the jury that the drugs were solely for defendant's personal use that would

dramatically lessen defendant's exposure. As for Jimenez's alleged failure to act on defendant's repeated and urgent requests for an investigation of potential witnesses, the decision of whether to contact or call certain witnesses at trial is a tactical decision left to counsel. (See *People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729.) In any case, Jimenez's investigator was attempting to locate two of the three witnesses identified by defendant.

Contrary to defendant's assertion, Jimenez did not tell the trial court that defendant sold drugs to an undercover officer. Defendant takes issue with the following statement made by Jimenez during the first *Marsden* hearing: "[T]he underlying case here involves a consensual contact by an undercover officer." The evidence adduced at trial showed that two officers approached defendant, one of whom asked defendant if he had anything illegal, and defendant responded that he had Ecstasy and marijuana. So, at least in that sense, the case involved consensual contact with an officer, albeit a uniformed one. In any event, Jimenez did not advise the trial court that defendant sold drugs to anyone, much less an undercover officer, and the context in which the challenged statement was made -- in support of Jimenez's belief that this would be a difficult case for defendant to win at trial -- does not support defendant's assertion that Jimenez intended to discredit defendant before the court.

In sum, the record does not reflect that Jimenez was providing defendant with ineffective representation but only

that Jimenez was not conducting the case in the manner defendant would have liked. This did not require a substitution of counsel. (*People v. Welch, supra*, 20 Cal.4th at p. 728.)

In any event, any possible error in denying defendant's *Marsden* motions was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36 [17 L.Ed.2d 705, 717]; *People v. Chavez* (1980) 26 Cal.3d 334, 348-349 [*Marsden* does not establish a rule of per se reversible error].) The evidence indicating defendant possessed the MDMA and marijuana for sale was overwhelming. He was caught red handed with 49 MDMA pills and nine one-inch by one-inch baggies of marijuana and admitted to police that "[i]t's possession for sale." More particularly, he told them "he was out there to sell the pills," "he was selling them for \$5 a piece," "it would take him anywhere from two or three days to sell the quantity that [the officers] recovered, and "he was doing so because he only worked part-time as a telemarketer, and . . . his rent was around \$400." Furthermore, a cell phone found in defendant's pocket contained recent outgoing text messages that appeared to relate to drug sales, as well as recent incoming text messages of a personal nature addressed to "Jimmy B." On this record, we have no trouble concluding that any possible error in denying defendant's *Marsden* motions was harmless beyond a reasonable doubt.

## II

### The Trial Court Did Not Err In Granting Defendant's *Faretta* Motion, Refusing to Continue the Trial, Or Thereafter Failing to Appoint Defendant Counsel

Defendant next contends the trial court erred in granting his *Faretta* motion, failing to grant him a continuance after granting his *Faretta* motion, and denying his "reverse-*Faretta*" motion. He further asserts that the trial court violated his Sixth Amendment right to counsel by failing to reappoint Jimenez at trial after defendant chose to absent himself from the proceedings, and erred in refusing to appoint new counsel to assist him with his new trial motion. Each of his contentions lacks merit.

#### A. Procedural History

On March 30, 2010, defendant advised the trial court that he wished to represent himself, explaining that his "hands are . . . tied" given the court's denial of his *Marsden* motion. The trial court cautioned defendant against making what it termed "a significant decision" because he was "disappointed with the outcome of the *Marsden* motion." The court advised defendant that should it grant his motion, "we would still be on schedule to . . . go through the pretrial motions and [begin] jury selection on Thursday [April 1, 2010].<sup>[7]</sup> Do you understand that?" Defendant said he understood. The court then provided defendant with a copy of the *Faretta* warnings for his review and

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<sup>7</sup> March 31, 2010, was Caesar Chavez Day, a court holiday.

signature. Defendant indicated he had "[o]ne last question before I sign this" and asked, "I have to be ready by Thursday? [¶] . . . [¶] I could not get a waiver -- no time, maybe get a week to be prepared?" The court again advised defendant that it would not continue the trial, and defendant said, "Okay. Well, I'm still going pro per . . . ." The court granted defendant's request and "order[ed] that an investigator be assigned to [him] as well." Jimenez advised the trial court that he would immediately turn over everything he had related to defendant's case to the indigent defense panel.

After the court reconvened on April 1, 2010, defendant complained that he "didn't get proper time to prepare for this. . . . I'm being forced into trial without no [sic] type of preparation. I still don't have my paperwork from the pro per officer. I still don't have any type of defense." The court reminded defendant, "I told you when you made that decision [to represent yourself] that I would not continue the case, that we would be preceding to trial, and you said you wanted to represent yourself in any event." The court then announced that it would be in recess for 15 minutes while defendant changed into civilian clothes and thereafter jury selection would commence.

When the court reconvened, it observed that defendant had refused to change into civilian clothes and initially had refused to return to court. The court advised defendant that "we are going forward with this trial. . . . If you tell me in the future that you don't want to come to court, we would

continue the trial in your absence. [¶] . . . [¶] But I would appoint an attorney to be here and represent you, that would be Mr. Jimenez, if you are not going to join us for any of the proceedings. Do you understand that?" Defendant informed the court that he would no longer participate in the proceedings and refused to address the court. Thereafter, jury selection commenced.

Later that afternoon, defendant again complained that he did not feel prepared for trial because, among other things, he had been denied access to an investigator and did not have certain pieces of evidence that he had provided to Jimenez. Sheila Ramos, the pro per coordinator, who was present in court, explained that defendant had provided her with a list of items missing from his file, she had contacted Jimenez, and Jimenez would have the items ready for her to pick up that afternoon. She also explained that defendant had provided her with a list of three witnesses and that she was attempting to secure them for defendant. She had contact information for one of the witnesses, another was in state prison, and a third witness's phone had been disconnected. As to the person with the disconnected phone, defendant told Ramos that he had an address for that witness with his belongings at the jail. Ramos said that if that person was local, she could serve him or her the following day. When defendant complained that he did not have all the police reports and investigation in his case, the coordinator stated that she had been given the entire case file and offered to copy the reports and provide them to defendant

before the presentation of evidence the following week. When defendant responded that he nevertheless did not feel "like [he'd] had the proper amount of time to do anything," the court asked how much time he was asking for. He said he did not know.

The trial court declined to continue the trial. It observed, "I have asked you to tell me how much time you need and you have said that you don't really know. I'm not inclined to give you a continuance for an indefinite period of time." It further observed that "it sounds to me like the investigator that has been assigned to work with you, Miss Ramos, has made sure [you] will get the necessary folks here . . . if they are able to. Sounds like that can be done in relatively short order, so I don't really see a need for the continuance." At that point, defendant asked to be excused from the proceedings, and the court granted his request.

The following day defendant filed a reverse-*Faretta* motion, seeking the appointment of "new counsel." The trial court advised defendant that it was willing to reappoint Jimenez, explaining that "we've had a *Marsden* motion. You're not entitled to new counsel." Defendant indicated he would not "accept[]" Jimenez, and the trial court denied his request for new counsel. After the trial court denied or struck several other motions filed by defendant, defendant indicated that he did not wish to be present and elected not to be present for the remainder of the trial.

After the jury rendered its verdict, defendant brought a series of motions requesting the appointment of counsel to

assist him with his *Romero* motion and at the judgment and sentencing phase of the proceedings. The trial court denied defendant's initial request as untimely but four days later indicated it was willing to reappoint Jimenez to assist him. Defendant again stated that he would not accept Jimenez because his prior representation was ineffective. The trial court explained that it had already determined that Jimenez was "not ineffective" when it denied defendant's *Marsden* motions. Thereafter, defendant indicated he wished to remain pro per, and the trial court denied his request for counsel.

B. Analysis

1. The trial court did not err in granting defendant's *Faretta* motion.

Defendant first asserts that the trial court erred in granting his *Faretta* motion because it "failed to undertake the required *Windham*<sup>8</sup> analysis" and "forced [defendant] to choose between non-viable alternatives . . . ." Both claims lack merit.

"A trial court must grant a defendant's request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently." (*People v. Lynch* (2010) 50 Cal.4th 693, 721, abrogated in part on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.) Where, as here, the motion is not made

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<sup>8</sup> *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).

within a reasonable time prior to the commencement of trial, whether to grant or deny the motion "is 'addressed to the sound discretion of the court.'" (*People v. Lynch, supra*, 50 Cal.4th at p. 722, quoting *Windham, supra*, 19 Cal.3d at p. 128, fn. omitted.) "In assessing an untimely self-representation motion, the trial court considers such factors as 'the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.'" (*Windham, supra*, 19 Cal.3d at p. 128.)" (*People v. Lynch, supra*, 50 Cal.4th at p. 722, fn. 10.)

As our Supreme Court explained in *People v. Clark* (1992) 3 Cal.4th 41, 109 (*Clark*), "'The *Windham* factors primarily facilitate efficient administration of justice, not protection of defendant's rights.' [Citation.]" Thus, where, as here, the court *grants* a defendant's motion for self-representation at his own insistence, he may not complain of any error in the court's failure to weigh the *Windham* factors. (*Ibid.*) Accordingly, defendant's claim that the trial court erred in failing to consider the *Windham* factors before granting his motion fails.

Defendant also asserts that the trial court erred in granting his *Faretta* motion because he had no choice but to represent himself after the trial court denied his repeated requests to replace Jimenez. "Where a court thoroughly inquires, on the record, into a defendant's specific allegations of attorney misconduct or inadequacy and, exercising discretion,

denies substitution, a defendant's subsequent *Faretta* waiver, though partially induced by that denial, will not be defective." (*People v. Hill* (1983) 148 Cal.App.3d 744, 763.) That is precisely what happened here. As detailed above, before denying each of defendant's four *Marsden* motions, the trial court thoroughly inquired on the record into defendant's allegations of misconduct and inadequacy. Accordingly, even assuming defendant's decision to represent himself was induced by the trial court's denial of those motions, defendant's waiver was not defective. Accordingly, this claim also fails.

In any event, even assuming for argument's sake that the trial court did err in granting defendant's *Faretta* motion, any error was harmless under any standard given the overwhelming evidence against him. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050 [erroneous denial of *Faretta* motion subject to harmless error analysis].)

2. The trial court did not err in refusing to continue the trial.

Defendant next contends that once the trial court granted defendant's *Faretta* motion, it was required to grant him a continuance to prepare for trial. We are not persuaded.

Contrary to defendant's assertion, there is no per se rule that a trial court must always grant a continuance after granting an untimely request for self-representation. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1039 [*Jenkins*]; *Clark*, *supra*, 3 Cal.4th at p. 110; *People v. Valdez* (2004) 32 Cal.4th 73, 102-103 (*Valdez*).) In *Clark* and *Jenkins*, both capital

cases, our Supreme Court explained that a trial court has discretion to condition the grant of an untimely *Faretta* motion on the defendant's agreement that there will be no delay in the proceedings. (*Clark*, at p. 110; *Jenkins*, at pp. 1039-1040.) While the court acknowledged earlier decisions holding or suggesting that a continuance must be granted whenever a court grants an untimely *Faretta* motion,<sup>9</sup> it held those cases were not controlling where the trial court made clear its intent to deny the *Faretta* motion if a continuance would be necessary. (*Ibid.*)

More recently, in *Valdez* our Supreme Court held, in factual circumstances similar to those presented here, that a trial court acted within its discretion by conditioning the granting of a *Faretta* motion, made "moments before jury selection was set to begin," on the defendant's agreement that the trial would not be delayed. (*Valdez*, *supra*, 32 Cal.4th at pp. 102-103.) The court reasoned that a trial court's authority to deny a *Faretta* motion on the ground that it is untimely necessarily includes the authority to condition the grant of the motion on the

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<sup>9</sup> Prior to the court's decisions in *Jenkins* and *Clark*, a number of courts had held or suggested that once a trial court grants an untimely motion for self-representation, it must then grant "a reasonable continuance for preparation by the defendant." (*People v. Fulton* (1979) 92 Cal.App.3d 972, 976; see also *People v. Bigelow* (1984) 37 Cal.3d 731, 741, fn. 3; see also *People v. Wilkins* (1990) 225 Cal.App.3d 299, 307; *People v. Hill*, *supra*, 148 Cal.App.3d at p. 756; *People v. Cruz* (1978) 83 Cal.App.3d 308, 324-325; *People v. Maddox* (1967) 67 Cal.2d 647.)

defendant's agreement that a grant of the motion would not result in delay. (*Id.* at p. 103.)<sup>10</sup>

That is exactly what occurred here. On more than one occasion, the trial court told defendant in no uncertain terms that it would grant his *Faretta* motion only if it would not result in a delay in the proceedings, and defendant agreed. Having granted defendant's *Faretta* motion on the express condition that no continuances would be granted, the trial court was permitted to hold defendant to his agreement. (See *Jenkins, supra*, 22 Cal.4th at p. 1039.) Moreover, on this record, the trial court reasonably could conclude that there was no need for a continuance. Each of the reasons given by defendant for the continuance was addressed by the trial court. Ramos advised the court that she (1) was attempting to secure the witnesses defendant requested, (2) would copy the police reports from defendant's file and provide them to defendant before evidence was presented the following week, and (3) had arranged to obtain the certain pieces of evidence identified by defendant from Jimenez later that afternoon.

3. The trial court did not err in denying defendant's reverse-*Faretta* motion.

Defendant next asserts that the trial court erred in denying his reverse-*Faretta* motion for reappointment of counsel. Again, he is mistaken.

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<sup>10</sup> The defendant in *Valdez* ultimately chose not to pursue his *Faretta* motion on the terms offered. (32 Cal.4th at pp. 101-103.)

"When a criminal defendant who has waived his right to counsel and elected to represent himself under *Faretta*[ ] . . . seeks, during trial, to revoke that waiver and have counsel appointed, the trial court must exercise its discretion under the totality of the circumstances, considering factors including the defendant's reasons for seeking to revoke the waiver, and the delay or disruption revocation is likely to cause the court, the jury, and other parties." (*People v. Lawrence* (2009) 46 Cal.4th 186, 188.)

Here, the trial court advised defendant that while he was not entitled to new counsel, it was willing to reappoint Jimenez, and defendant refused. The trial court correctly determined that defendant was not entitled to new counsel, having previously determined that Jimenez effectively represented defendant. On this record we have no trouble concluding that the trial court did not abuse its discretion in denying defendant's post-*Faretta* motion for "new counsel."

Moreover, any possible error was harmless under any standard given the overwhelming evidence indicating defendant possessed the MDMA and marijuana for sale. (See *People v. Smith* (1980) 109 Cal.App.3d 476, 486 [erroneous denial of reverse-*Faretta* motion subject to harmless error analysis]; see also *People v. Elliott* (1977) 70 Cal.App.3d 984, 998 [same].)

4. The trial court did not err in failing to reappoint Jimenez after defendant chose not return to court.

Defendant next contends the trial court violated his Sixth Amendment right to counsel by "failing to follow through with its intention to reappoint Jimenez when [defendant] failed to show for trial . . . ." Again, he is mistaken.

Generally speaking, "the *involuntary* exclusion from the courtroom of a defendant who was representing himself, without other defense counsel present," constitutes error. (*People v. Carroll* (1983) 140 Cal.App.3d 135, 142, italics added; see also *People v. Soukamlane* (2008) 162 Cal.App.4th 214, 234-235.) On the other hand, in non-capital cases, where a defendant voluntarily absences himself from trial, the court is free to continue with the trial without appointing defendant counsel. (See *People v. Parento* (1991) 235 Cal.App.3d 1378, 1381-1382.) "The choice of self-representation preserves for the defendant the option of conducting his defense by nonparticipation. [Citation.] A competent defendant has a right to choose "simply not to oppose the prosecution's case."" [Citation.]" (*Id.* at p. 1381.)

Here, defendant was never involuntarily excluded from the courtroom. Rather, he chose not to attend trial, despite being given every opportunity to return. As former Presiding Justice Robert K. Puglia observed, "Respect for the dignity and autonomy of the individual is a value universally celebrated in free societies and uniformly repressed in totalitarian and authoritarian societies. Out of fidelity to that value

defendant's choice must be honored even if he opts foolishly to go to hell in a handbasket. At least, if the worst happens, he can descend to the netherworld with his head held high. It's called, 'Doing It My Way.'" (*People v. Nauton* (1994) 29 Cal.App.4th 976, 981.) Defendant's way, in effect, was to default by walking out of the trial. Defendant cannot now fault the trial court for honoring his voluntary choices about self-representation.

To the extent defendant suggests that the trial court's admonition that it would appoint Jimenez "to be here and represent you . . . if you are not going to join us for *any of the proceedings*," somehow gave rise to a right to have Jimenez appointed, he is mistaken. The trial court made this statement *before* defendant advised the court that he would not "accept" Jimenez when the court indicated it was willing to reappoint him when defendant moved to withdraw his *Faretta* waiver and have new counsel appointed. Moreover, the trial court's admonition was contingent upon defendant failing to attend "any of the proceedings." As discussed below in section IV, defendant was present for a portion of the proceedings, namely the commencement of jury selection. Accordingly, the trial court was under no obligation to reappoint Jimenez or any other attorney to represent defendant after he voluntarily chose to absent himself from the proceedings.

5. The trial court did not err by failing to appoint new counsel to assist defendant with his new trial motion.

Finally, defendant contends his Sixth Amendment right to counsel was violated by the trial court's refusal to appoint new counsel to assist him with his motion for a new trial. Not so.

The trouble with this contention is that defendant never requested counsel for that purpose. Rather, on April 13, 2010, he filed a motion for the appointment of "new counsel" to assist him with his *Romero* motion and "at the J&S [judgment and sentencing] phase on 5-4-10 . . . ." The motion was heard on May 4, 2010, the date initially set for judgment and sentence. At the hearing, the trial court asked defendant if he wished to be heard any further on the motion, and he said he did not. The trial court denied the motion as untimely. Defendant asserts that the trial court should have construed his motion for appointment of counsel as "a motion to appoint new counsel to evaluate the prospects of a motion for a new trial" because defendant filed a motion for a new trial the day after he filed his motion for appointment of new counsel. Defendant, however, cites no legal authority in support of his assertion, and we conclude that it is supported neither by law nor logic.

### III

#### The Trial Court Acted Properly With Respect To The Appointment of An Investigator

Defendant next claims his "Sixth Amendment, due process, and California constitutional rights to effective legal assistance in preparation of his defense were violated by the

trial court's failure to appoint an investigator to work with [defendant] to interview and secure the appearance of his designated defense witnesses." He further argues that the trial court committed misconduct by "act[ing] in concert with pro per coordinator Ramos to mislead [defendant] by informing him that Ramos was his investigator," "allow[ing] Ramos, not a trained or licensed investigator, to attempt to locate and interview [defendant's] witnesses, and then permit[ing] Ramos to discuss the results, as well as [defendant's] offer of proof regarding a key witness, in the presence of the prosecutor." We discern no error and find that any possible error was harmless under any standard.

A. Background

On March 30, 2010, the trial court granted defendant's *Faretta* motion and "order[ed] that an investigator be assigned . . . ." On April 1, 2010, the next court day, the trial court stated that "the pro per coordinator, Miss Ramos, . . . has indicated to me that [defendant] would like to address the Court." Defendant complained that he was not prepared to proceed because, among other things, he "never had a chance to any access to . . . an investigator . . . ." The trial court responded, "You have been appointed an investigator. Miss Ramos is here from the pro per coordinator, who is the person that coordinates the investigator assigned to your case." The court also indicated that it had been advised that defendant had provided Ramos with a list of proposed witnesses, and that she was attempting to secure those witnesses for him. The trial

court declined to continue the trial, explaining that "it sounds to me like the investigator that has been assigned to work with you, Miss Ramos, has made sure [you] will get the necessary folks here . . . if they are able to."

After the prosecution rested, the court considered how to proceed in defendant's absence. The court confirmed that defendant had provided Ramos with the names of three witnesses, and Ramos detailed her efforts to secure those witnesses. One of the witnesses was in St. Louis and was not willing to appear at defendant's trial. The telephone for another witness had been disconnected, and defendant had not provided Ramos with an address for that witness. The third, Mr. Fletcher, was serving a 19 year and four month prison term at Deuel Vocational Institution in Tracy. Ramos indicated that defendant wanted to call Fletcher for two reasons: "One is to say that the cell phone was not [defendant's], nor was it the witness's. It would be another party's phone. [¶] And that he would also say that the items [defendant] possessed were not possessed for sale." According to defendant, Fletcher knew these things because he was present when defendant was arrested. Ramos informed the court that she had advised defendant that she "could not present the witness for him" at trial, and defendant still refused to come to trial. Hearing that, the trial court found it would be futile to make any further attempts to secure Fletcher, a state prisoner, if defendant, who was representing himself, was unwilling to come to court and participate in his defense.

After the jury rendered its verdict, defendant filed numerous motions, including a motion for an investigator to be appointed to investigate "mitigating circumstances prior to sentencing." At the hearing on the motion, defendant complained that while the court appointed Ramos to facilitate defendant getting an investigator, "she decided to do all the investigative work on her own." Because Ramos was not an investigator, defendant claimed he had been denied an investigator despite his numerous requests for one and had not "had a chance to do anything . . . [to] challenge this judgment and sentencing." Defendant claimed that he provided Ramos with a written request for an investigator on April 24, 2010, and verbally advised her at that time that he wanted the investigator to contact his boss and family members to speak for him at his sentencing hearing.

Ramos, who was present at the hearing, explained that her job was "to receive the information regarding [the] pro per, evaluate his case, and determine what, in fact, needs to be done on his case. That includes hiring an investigator when it's necessary; making sure subpoenas are written correctly and are issued, . . . and that they are served . . . ." She explained that defendant's case was unusual in that she did not receive it until after trial had commenced. She received defendant's case on April 1, 2010, met with him that same day, and provided him with a copy of the procedures for obtaining investigative services. That same day, defendant provided her with a written request indicating that he wanted some paperwork from Jimenez

and three witnesses subpoenaed. Ramos contacted Jimenez and requested the documents defendant wanted. Because trial had begun and because she felt time was of the essence, Ramos did not require defendant to write out his own subpoenas. Rather, she attempted to contact the witnesses to get addresses to subpoena them. According to Ramos, defendant never submitted any request of an investigative nature despite being advised verbally and in writing that an investigator would not be hired unless he specified what investigations he would like to have done. In fact, on May 17, 2010, after receiving defendant's motion for an investigator to be appointed, Ramos wrote to defendant and advised him that she had received his motion for appointment of an investigator. That she would be happy to hire an investigator for him as soon as she received a request for services that required an investigator." She further advised defendant that she would be at the jail on May 24, 2010, "to pick up [defendant's] requests so that I could have them completed, if it were -- needed an investigator by his sentencing date of . . . . [June] 11th." Defendant had nothing for her on May 24. Ramos further advised the court that she never informed defendant that she was his investigator, and that "[t]here has been nothing that he has requested that he has not received."

The trial court denied defendant's motion for appointment of an investigator, finding defendant had ample opportunity to have an investigation done both during the pendency of the trial and in the weeks leading up to sentencing. The court observed

that defendant had notice of the procedures necessary to secure an investigator but failed to utilize them. To the extent Ramos' version of events differed from defendant's version, the court credited Ramos.

#### B. Analysis

"An indigent defendant has a statutory and constitutional right to ancillary services reasonably necessary to prepare a defense. [Citations.] The defendant has the burden of demonstrating the need for the requested services. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1085, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 152.) The defendant must do something more than indicate "desire for the assistance . . . ." (*People v. Fixel* (1979) 91 Cal.App.3d 327, 329.) In the case of an investigator, "the defendant must indicate the general manner in which the investigator will assist the preparation of his defense." (*Ibid.*) We review a trial court's order on a motion for ancillary services for abuse of discretion. (*People v. Guerra, supra*, 37 Cal.4th at p. 1085.)

Here, the trial court reasonably could conclude, as it did, that defendant was aware that an investigator would be hired only if he specified the nature of the investigation to be performed, yet he failed to provide such information. It also could reasonably conclude that the requests he did make were carried out.

We reject defendant's assertion that the trial court engaged in misconduct by attempting to mislead defendant that

Ramos was his investigator. While the trial court mistakenly referred to Ramos as an investigator on a couple of occasions, it is clear from the record that Ramos was the pro per coordinator and that her job was to coordinate the provision of ancillary services, including the assignment of an investigator, where necessary.

Defendant fails to cite to any legal authority in support of his assertion that the trial court engaged in misconduct by allowing Ramos to make an offer of proof as to what Fletcher would testify to if called as a witness at trial in the prosecutor's presence after the conclusion of the prosecution's case-in-chief. Accordingly, we will not consider his assertion. (See *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 113.)

Finally, as detailed above, any possible error was harmless under any standard given the overwhelming evidence indicating defendant possessed the MDMA and marijuana for sale. Contrary to defendant's assertion, the question of cell phone ownership was not "crucial." Even assuming the cell phone was not owned by defendant, as Fletcher purportedly would have testified, the evidence showed that it contained incoming text messages addressed to "Jimmy B." Accordingly, Fletcher's proffered testimony, even if believed, would have done little, if anything, to undercut the prosecution's case. In any event, even without the evidence obtained from the cell phone, the evidence against defendant was overwhelming and any error

arising from the trial court's failure to appoint an investigator was harmless beyond a reasonable doubt.

#### IV

##### The Trial Court Properly Proceeded With The Trial In Defendant's Absence

Defendant next contends the trial court prejudicially erred by proceeding with the trial in his absence. Again, he is mistaken.

###### A. Background

After jury selection commenced defendant indicated he no longer wished to be present and was excused from the proceedings. The following day, Friday, April 2, 2010, the trial court conferred with a deputy at the main jail that defendant declined to come to court for trial. Jury selection continued and the jury was sworn. On Monday, April 5, 2010, defendant appeared for a hearing on his motion to withdraw his pro per status and appoint new counsel. After the court denied that motion and a number of others filed by defendant, defendant voluntarily absented himself for the remainder of the trial.

###### B. Analysis

Pursuant to Penal Code section 1043, subdivision (b)(2), "[t]he absence of the defendant in a felony case *after the trial has commenced in his presence* shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] . . . [¶] Any prosecution for an offense which is not punishable by death in which the defendant is *voluntarily absent.*" (Italics added.) In *People v. Granderson*

(1998) 67 Cal.App.4th 703, 707-708, cited with approval in *People v. Concepcion* (2008) 45 Cal.4th 77, 80, footnote 4, we held that “[a]s a matter of constitutional law, common understanding, and common sense, ‘trial’ in a criminal case includes the critical stage of jury selection . . . . Hence, in the ordinary sense, a criminal jury ‘trial’ has ‘commenced’ at least from the time that impaneling the jury begins, regardless of when jeopardy attaches.”

It is undisputed that defendant was present when jury selection commenced, and thereafter elected not to return to court. Under these circumstances, the trial court did not err in proceeding with trial in defendant’s absence.<sup>11</sup>

V

Substantial Evidence Supports Defendant’s Conviction  
For Possession of MDMA For Sale

Finally, defendant contends his conviction for possession of MDMA for sale is not supported by substantial evidence. We disagree.

A. Background

At trial, a criminalist and expert in the testing of MDMA testified that he received the 49 pills recovered from defendant, which were divided into two sets based on their markings. The first group consisted of 46 pills, each with a

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<sup>11</sup> Since we find no error, we need not address defendant’s cumulative error argument.

"thumbs up" imprint. The second group contained three pills, each with a "Transformer head" imprint. The expert tested one pill from each group, which is the normal procedure at a crime lab. The pill from the first group tested positive for MDMA, which the expert explained "is considered a phenethylamine, which is the amphetamine class of drugs," and has some stimulant and hallucinogenic properties. The pill he tested from the second group tested positive for MDMA and methamphetamine.

#### B. Analysis

Section 11378 prohibits the possession for sale of "any controlled substance" specified in several statutes, including sections 11054 and 11055. MDMA is not listed explicitly as a controlled substance in any of these statutes. However, section 11055, subdivision (d)(1) lists "[a]mphetamine, its salts, optical isomers, and salts of its optical isomers," and section 11055, subdivision (d)(2) lists "[m]ethamphetamine, its salts, isomers, and salts of its isomers" as controlled substances. In addition, section 11054, subdivision (d)(6) lists "3,4-methylenedioxy amphetamine" (MDA) as a controlled substance, and section 11054, subdivision (d) includes "any material, compound, mixture, or preparation" containing "any quantity" or any "salts, isomers, and slats of isomers" of any listed hallucinogenic substance, including MDA.

Plaintiff cites a case (*People v. Le* (2011) 198 Cal.App.4th 1031, review granted December 21, 2011, S197493), for the proposition that in the absence of a stipulation, to prove MDMA is a controlled substance, the prosecution must offer expert testimony that the substance qualifies chemically as a statutorily defined controlled substance or that the substance is substantially similar to a controlled substance in chemical structure or intended effect on the central nervous system. That case is inapposite because the expert in the present case testified that MDMA is a "stimulant" and "hallucinogenic" and "is considered a phenethylamine, which is the amphetamine class of drugs," and that the pills in the second group contained MDMA and methamphetamine. In any event, *Le* was depublished by the California Supreme Court's grant of review. Accordingly, defendant's claim that his conviction for possession of MDMA for sale is not supported by substantial evidence is without merit.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

BUTZ, J.