Filed 9/6/12 P. v. Jones CA3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY JONES, Defendant and Appellant.	C065140 (Super. Ct. No. 09F01867)

We strongly discourage anyone from choosing crime as a career. Nevertheless, as with any pursuit in life, one should be prepared. For instance, if you are planning to carjack someone, you should make sure you can drive a stick-shift.

Defendant Anthony Jones and an accomplice tried to take Garrett Freitas's car at gun point. The duo were apparently unaware that starting a manual transmission vehicle requires depression of the clutch pedal. Unable to start the car, defendant turned the gun on Freitas and ordered him to drive, converting what would have been a straightforward carjacking into attempted carjacking and kidnapping for purposes of

robbery. About half a mile away, defendant told Freitas to pull over and call someone who had drugs or he "wouldn't be going home." Police arrived as Freitas scrolled through his cell phone contacts. Defendant fled on foot with the gun and was found a short distance away hiding in a backyard shed.

Defendant pled guilty to being a felon in possession of a firearm. He was then tried by jury and convicted of attempted carjacking and kidnapping for robbery. The jury also found that defendant personally used a firearm during the commission of the crimes. Following a bifurcated hearing, the trial court found that defendant had been convicted of three prior serious felony offenses (Pen. Code, § 667, subd. (a))[1], which mandated sentencing under the three strikes law (§§ 667, subd. (b)-(i), 1170.12). Defendant was sentenced to an aggregate indeterminate term of 50 years to life plus a consecutive determinate term of 25 years for the enhancements.

On appeal, defendant contends: (1) the trial court erred in imposing sentence under the three strikes law because there was insufficient evidence that defendant's prior felony offenses, which were earned in New York state, constituted serious felony offenses under California law; (2) the trial court violated defendant's constitutional right to counsel by denying five motions made under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to replace his appointed counsel; (3) the

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[1] Undesignated statutory references are to the Penal Code.

trial court also violated defendant's constitutional rights by denying his motion to dismiss the case, which was based on the assertion that his appointed counsel collaborated with the prosecution; (4) the trial court further erred by failing to suspend the proceedings after entertaining a doubt concerning defendant's competence to stand trial; and (5) the cumulative prejudice arising from the foregoing assertions of error requires reversal.

The Attorney General concedes there was insufficient evidence that defendant's New York convictions qualified as strikes within the meaning of the three strikes law. We agree and remand the matter to the trial court for the limited purpose of determining whether these prior convictions are strikes. Defendant's remaining claims lack merit. As we shall explain, the trial court made an adequate inquiry into defendant's complaints concerning his appointed counsel. Nor did the trial court abuse its discretion in determining that defendant failed to demonstrate that denial of substitution would substantially impair his constitutional right to the assistance of counsel. Defendant's claim that the trial court violated his constitutional rights by denying his motion to dismiss the case is forfeited because defendant did not adequately brief this issue on appeal. Defendant's assertion that the trial court prejudicially erred by failing to suspend the proceedings after entertaining a doubt concerning his competence to stand trial fails because the record does not disclose that the trial court

ever entertained such a doubt. Finally, having found no trial error, prejudicial or otherwise, defendant's assertion of cumulative prejudice must also fail. Accordingly, we affirm defendant's convictions, vacate the sentence, and remand to the trial court for the limited purpose of determining whether defendant's prior New York convictions are strikes under the three strikes law.

FACTS

During the early morning hours of March 9, 2009, Freitas stepped outside his apartment on Walnut Avenue in Carmichael to smoke a cigarette. As he did so, defendant and another man approached quickly from the entrance to the apartment complex. Defendant was wearing black pants, a red "puffy" jacket, and a red "beanie." The other man, Ronnie Rentie, was dressed entirely in black. Defendant pulled a semi-automatic handgun and chambered a round as they approached. Freitas was knocked to the ground by either defendant or Rentie and yelled that he did not have any money. Defendant pointed the gun at Freitas and told him to "be quiet" while Rentie went through his pockets. Rentie took his cell phone, car keys, cigarettes, and pocket change. Defendant and Rentie then walked away with their acquisitions.

About a minute later, while Freitas was still on the ground, defendant and Rentie returned and asked where his car was parked. Freitas pointed to his 1992 Toyota Tercel. Defendant grabbed Freitas, ordered him over to the car while

holding the gun to his back, and pushed him to the ground behind the car. Defendant got in the car and tried to start the vehicle. Because he did not depress the clutch pedal, the ignition made a clicking sound, but the car did not start. Defendant then got out of the car and told Freitas to “get in and drive.” Freitas complied, getting in the driver’s seat while Rentie got in the back seat and defendant got in the front passenger seat.

Freitas pulled out of the apartment complex and drove north on Walnut Avenue. With the gun pointed at Freitas, defendant told him to “look through [his] phone and find drugs for them,” threatening that if he did not find drugs, he “wouldn’t be going home.” Rentie returned the cell phone so that Freitas could comply with the demand. Freitas explained that he did not know anyone with drugs. Defendant then told Freitas to turn onto Modoc Way, turn off the headlights, and pull over. Freitas again complied. He then scrolled through his cell phone contacts in an effort to find drugs for defendant and Rentie. About 15 to 20 seconds later, a Sacramento County Sheriff’s Department patrol car pulled up behind the Tercel with the overhead lights on. Defendant warned Freitas: “Don’t say anything or I’m going to shoot you.”

The fast response of law enforcement was due to Freitas’s girlfriend, Lacey Paulson, who heard the commotion outside the apartment, saw her boyfriend being abducted from the living room window, and called 911. Sergeant Charles Turner responded to

the apartment, spoke briefly with Paulson, and then found the Tercel about half a mile from the apartment. When Turner approached the driver's side of the vehicle, he asked Freitas if "everything was okay." Freitas responded that "everything was fine," but appeared to be nervous, so Turner ordered him out of the vehicle and brought him back to the patrol car. At the patrol car, Freitas said: "God, please help me. Please help me."

As another patrol car arrived on the scene, defendant got out of the Tercel. Both Sergeant Turner and the new arrival, Deputy Darren Benato, ordered defendant to get back in the car. Defendant responded that the car was not his and started to back away from the car. Ignoring several commands to get down on the ground, defendant turned and ran away. At this point, Rentie also emerged from the car and was detained by Sergeant Turner without incident. Deputy Benato got back into his patrol car to pursue defendant, but was unable to find him.

About an hour later, Sergeant Turner was advised that a K-9 unit that was searching the surrounding neighborhood had alerted to a residence a short distance from where defendant had fled from the Tercel. Defendant was found hiding in a shed in the backyard of that residence. Surrounded by several sheriff's deputies, defendant opened the shed and ran through the backyard. One of the deputies shot defendant as he tried to jump over a retaining wall. A police dog then pulled defendant off of the wall. A loaded handgun fell from defendant's

waistband as the deputies took him into custody. Paramedics arrived a short time later, treated defendant for gunshot and dog bite wounds, and transported him to the hospital.

DISCUSSION

I

Prior Serious Felony Convictions

Defendant contends there was insufficient evidence that his three prior New York convictions (a 1989 third-degree attempted robbery, a 1991 second-degree robbery, and a 1997 third-degree attempted robbery) constituted strikes within the meaning of the three strikes law. We agree.

"To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. Avery* (2002) 27 Cal.4th 49, 53; see § 1170.12, subd. (b)(2); see also § 667.5, subd. (f).) In determining whether an out-of-state prior is a serious felony under the three strikes law, "'the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously convicted involved conduct which satisfies all the elements of the comparable California serious felony offense.' [Citation.] [¶] '"[W]hen the record does not disclose any of the facts of the offense actually committed" [citation], a presumption arises that the prior conviction was for the least offense punishable [citation]. However, the record need only contain additional

evidence from which the court can reasonably presume that an element of the crime was adjudicated in the prior conviction. [Citation.]' [Citation.]" (*People v. Zangari* (2001) 89 Cal.App.4th 1436, 1440; *People v. Myers* (1993) 5 Cal.4th 1193, 1195; *People v. Valenzuela* (2010) 191 Cal.App.4th 316, 321.)

Robbery is a strike offense. So is attempted robbery. (§§ 1170.12, subd. (b)(1), 1192.7, subd. (c)(19), (39).) However, California and New York define robbery differently. In California, "[r]obbery is the felonious taking of personal property in the possession of another, from his [or her] person or immediate presence, and against his [or her] will, accomplished by means of force or fear." (§ 211.) Thus, robbery is a form of aggravated larceny in which "the elements of larceny are intertwined with the aggravating elements to make up the more serious offense." (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) "Larceny requires the taking of another's property, with the intent to steal and carry it away. [Citation.] 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' [Citations.]" (*Id*. at pp. 254-255.) "To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his [or her] presence." (*Id*. at p. 254.)

In New York, robbery is defined as follows: "Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he

uses or threatens the immediate use of physical force upon another person for the purpose of: [¶] 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or [¶] 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." (N.Y. Pen. Law, § 160.00.) The practice commentary following this provision points out that, unlike the California robbery statute, there is "no requirement that the defendant take the property 'from the person or in the presence of another,' as was required under the former [New York] Penal Law [§ 2120]. Accordingly, a culprit who meets his [or her] victim a few blocks from the victim's store, knocks the victim unconscious, and then enters the victim's store and steals property from the store may be guilty of robbery; similarly, a culprit who forces a bank president to telephone his bank to direct an employee to take money from the safe and give it to an accomplice may be guilty of robbery." (Prac. Com. foll. N.Y. Pen. Law, § 160.00; see also *People v. Smith* (1992) 79 N.Y.2d 309, 314 ["the Commission determined that the proposed robbery statute was deficient in that it . . . contained a 'from the person or in the presence of' limitation which would exclude a variety of forcible thefts that were 'robberies in spirit'"].)

Thus, because robbery in New York can be committed without taking property from the victim or in his or her presence, the

record of defendant's 1991 robbery conviction must contain evidence from which the trial court could reasonably presume that defendant in fact took property from the victim or in his or her presence. And because "[a]n attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission" (*People v. Medina* (2007) 41 Cal.4th 685, 694-695), in order for defendant's 1989 and 1997 attempted robbery convictions to qualify as strikes, the record must contain evidence from which the trial court could reasonably presume that defendant specifically intended to take property from the victims or in their presence and took a direct but ineffectual step toward doing so. The Attorney General concedes that the record contains no such evidence. Accordingly, we must remand the matter to the trial court for a limited retrial on the prior conviction allegations. (See *Monge v. California* (1998) 524 U.S. 721, 734 (*Monge II*) [141 L.Ed.2d 615, 628]; see also *People v. Trujillo* (2006) 40 Cal.4th 165, 174.)

Defendant is also correct that New York robbery law does not always require asportation of the property forcibly taken from the victim. At first glance, California and New York laws appear to be identical with respect to asportation. (Compare *People v. Gomez*, *supra*, 43 Cal.4th at p. 255 ["the slightest movement may constitute asportation"] with *People v. Reddick* (1990) 159 A.D.2d 267, 267-268 [asportation is "an essential element of larceny" and "is proved by evidence of any

‘appreciable changing of the location of the property involved’”]; see also *People v. Woelfle* (2009) 64 A.D.3d 1166, 1167 [“‘a slight movement of the property constitutes sufficient asportation’”].) However, in New York, a defendant may be found guilty of vehicle theft without moving the vehicle at all. (See *People v. Alamo* (1974) 34 N.Y.2d 453, 457-458 [possession and control are the “paramount elements” of larceny, and the “actions needed to gain possession and control over a wallet, including movement of the wallet which, in itself, is merely an element tending to show possession and control, are not necessarily the actions needed to gain possession and control of any automobile”].) Not so in California. “California courts, following the common law, have long held that the ‘taking’ element of robbery requires that a defendant gain possession of the victim’s property *and* asport or carry it away.” (*People v. Lopez* (2003) 31 Cal.4th 1051, 1054, 1062 [applying this rule of robbery law to the carjacking statute and distinguishing California law from the New York rule announced in *People v. Alamo*, *supra*, 34 N.Y.2d 453].)

Here, the record does not disclose what property defendant forcibly took in 1991 and attempted to forcibly take in 1989 and 1997. However, his 1991 robbery conviction was in the second degree, which could have been a vehicle theft. (See N.Y. Pen. Law, § 160.10.) Thus, it is possible that this conviction did not involve the element of asportation, as that term is defined under California law. On remand, the trial court must determine

whether the record of conviction contains evidence from which it can be reasonably presumed that defendant carried away the victim's property. With respect to defendant's 1989 and 1997 attempted robbery convictions, the trial court must determine whether there is evidence from which it can be reasonably presumed that defendant specifically intended to carry away the victim's property and took a direct but ineffectual step toward doing so.

We disagree, however, with defendant's assertion that New York law does not permit "claim of right" as a defense in a robbery prosecution. In California, "a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938.) The claim of right defense is limited "to forcible takings intended to recover specific personal property in which the defendant in good faith believes he has a bona fide claim of ownership or title," and does not extend to "robberies perpetrated to satisfy, settle or otherwise collect on a debt, liquidated or unliquidated." (*Id*. at p. 956.) New York law is in accord on this point. (See *People v. Green* (2005) 5 N.Y.3d 538, 544 [in a robbery prosecution involving a particular chattel, "a good-faith claim that the chattel belonged to the taker, would, if believed by the jury, negate the element of larcenous intent"]; see also *People v. Reid* (1987) 69 N.Y.2d 469, 475-476.) Thus, the trial court

could reasonably conclude from defendant's New York robbery and attempted robbery convictions that he did not have a bona fide claim of ownership or title to the property he took or attempted to take.

Finally, defendant argues that double jeopardy principles bar retrial on the prior conviction allegations. This argument fails because, as he acknowledges, "both the United States Supreme Court [in *Monge II*, *supra*, 524 U.S. at page 734] and the California Supreme Court [in *People v. Monge* (1997) 16 Cal.4th 826 at page 829 (*Monge I*)] have ruled that it is permissible to retry alleged prior felony convictions after reversal on appeal for insufficiency of the evidence at trial." Nevertheless, defendant asserts that "those decisions must be revisited in the wake of subsequent rulings made by the United States Supreme Court" in *United States v. Booker* (2005) 543 U.S. 220, 244 [160 L.Ed.2d 621], *Blakely v. Washington* (2004) 542 U.S. 296, 301 [159 L.Ed.2d 403], and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435]. However, as the California Supreme Court explained in *People v. Trujillo*, *supra*, 40 Cal.4th 165, a case decided after the cases relied upon by defendant: "We are not at liberty to, nor are we inclined to, disregard the holding of the United States Supreme Court in *Monge II*. Nor are we persuaded that we should reconsider *Monge I's* conclusion that the California Constitution's double jeopardy clause does not preclude retrial on a prior conviction allegation in a noncapital sentencing context." (*Id*. at p. 174.) We cannot

hold that double jeopardy principles bar retrial of the prior conviction allegations. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

We reverse the findings that defendant's prior New York convictions constituted strikes within the meaning of the three strikes law and remand the matter to the trial court for a retrial on those allegations.

II

Motions to Replace Appointed Counsel

Defendant asserts that the trial court erred and violated his constitutional right to counsel by denying five *Marsden* motions in which he sought to remove and replace his appointed counsel, Greg Foster. We disagree.

A.

Applicable Law

Our Supreme Court recently reiterated the rules governing the grant and review of a *Marsden* motion: "'In [*Marsden*, *supra*, 2 Cal.3d 118], we held that a defendant is deprived of his constitutional right to the effective assistance of counsel when a trial court denies his [or her] motion to substitute one appointed counsel for another without giving him [or her] an opportunity to state the reasons for his [or her] request. A defendant must make a sufficient showing that denial of substitution would substantially impair his [or her] constitutional right to the assistance of counsel [citation], whether because of his [or her] attorney's incompetence or lack

of diligence [citations], or because of an irreconcilable conflict [citations]. We require such proof because a defendant's right to appointed counsel does not include the right to demand appointment of more than one counsel, and because the matter is generally within the discretion of the trial court. [Citation.]' [Citation.] When reviewing whether the trial court abused its discretion in denying a *Marsden* motion, we consider whether it made an adequate inquiry into the defendant's complaints. [Citation.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1127-1128; *People v. Smith* (2003) 30 Cal.4th 581, 606.)

B.

Defendant's Marsden Motions

Defendant made a total of five *Marsden* motions to replace Foster as his appointed counsel. The relevant facts surrounding these motions are recounted below.

1. *First Marsden Motion*

On May 5, 2009, prior to the preliminary hearing, defendant moved to replace Foster as his attorney, stating: "I just feel that I cannot trust him because he is basically lying to me. If he is my lawyer, he is supposed to be my lawyer. He is supposed to have my best interest at hand. He should be able to tell me the truth about anything concerning this case, and he is not doing it. He is not telling me the truth." As an example of Foster's alleged deceit, defendant claimed that Foster told him on one occasion that he had spoken to the prosecutor and on

another occasion denied having spoken to the prosecutor. Defendant also claimed that Foster lied while advising him not to file a civil suit against the arresting officers for excessive force, explaining: "He says you might be giving them some evidence that they don't have. So, two or three times later when he comes to see me, I asked him again because I already see the contradictions. . . . He says well, the background, when they get it, they might feel you don't have a civil case. Then what is the [District Attorney] going to say? I said see, that is not what you told me the last time, you know? It is like every time he comes to see me it is a different story, you know."

In response to defendant's complaints, Foster explained that he advised defendant that he did not believe a civil suit against the officers would be successful because a jury would likely believe the officers used reasonable force to apprehend defendant in light of the fact that defendant was armed with a handgun and fleeing from the officers when he was shot. Nevertheless, Foster provided defendant with copies of relevant sections of a treatise on police misconduct. He also provided defendant with a claim form, advised defendant of the six-month filing deadline, and took independent pictures of the scene and defendant's injuries. Foster told defendant that if he chose to file a civil suit, he should wait until the last possible moment because of the prospect of civil discovery occurring during the middle of the criminal trial. Foster also suggested that such a

lawsuit might be a bargaining chip in settlement negotiations with the prosecution. Foster further stated that he had no intention of deceiving defendant.

The trial court denied the *Marsden* motion, explaining: "First of all, to the extent that there are any conflicts between [defendant] and [Foster], I find in favor of [Foster]. I have no doubt of his veracity and the recounting of facts of this case. Further, I find that [Foster] has properly represented [defendant] and will continue to do so. I further find that there has not been a breakdown in the relationship such that [Foster] cannot and would not properly continue to aggressively represent [defendant]." After denying the motion, the trial court addressed defendant: "I could ask fifty panel lawyers to come over here in an attempt to replace [Foster]. Not one of them would exceed [Foster]'s skill or competence. You have no idea how fortunate you are to have [Foster] represent you. I encourage you to ask around. He is one of the best lawyers in this county. You could not do better. I understand you are having some difficulty understanding and communicating with him, but you are extremely lucky to have him as your lawyer."

2. *Second Marsden Motion*

On September 28, 2009, defendant filed a written *Marsden* motion. Defendant complained that he and Foster would "constantly argue" about the facts of the case, the defense strategy, and whether or not defendant should file a civil suit

against the arresting officers, adding: “I have actually cursed [Foster] out on several occasions.”

In response, Foster acknowledged that he and defendant had argued, not about the facts of the case, but about the legal consequences of those facts. The largest point of contention was whether or not defendant had a viable claim against the arresting officers for excessive force. Foster explained: “And I did tell him that I didn’t believe that a jury would award him any money based on the fact that he was an armed fleeing felon who had the -- the officers had probable cause to believe had just committed an armed robbery and an armed carjacking, and had he been allowed to -- and their efforts with helicopter and dog and officers and voice commands for some period of time to ask him to come out of the shed, his refusal to do so, and when he did then bolt out of the shed and run from officers heading towards the fence, which had he been able to clear it and get out into the neighborhood would have been an armed felon loose in the neighborhood.” Nevertheless, as already mentioned, Foster provided defendant with “probably 40 pages” out of a treatise on police misconduct and told defendant that “perhaps the District Attorney’s Office would be willing to bundle his civil claim and his criminal case and resolve it in a manner that was beneficial to [defendant].” However, the District Attorney’s office “never indicated any willingness to do so,” and issued a letter to the Sheriff’s Department finding that the shooting was lawful.

Defendant also claimed that Foster "told [him] on several occasions to basically lay down and accept whatever the Prosecution is going to do in this case." Foster responded: "I think the term I used is sometimes you are caught with your hand in the cookie jar. And my advice to [defendant] was not to lay down, but there [were] some charges that we had room to argue on and there were some charges that we did not have room to argue on. [¶] And the fact that property was taken from [Freitas] by force is a pretty clear evidence of a robbery, and the fact that [Freitas] was taken about a half-mile in his vehicle by force is also pretty strong evidence of a kidnapping, and that -- but there was plenty of room to argue that this was not a kidnap for robbery, but rather a kidnap for chauffeuring . . . . [¶] . . . There is a significant difference between a simple kidnapping charge carrying a maximum of eight years versus kidnapping for robbery, which carries life. Based on the facts as I saw them, that was the best viable defense."

Defendant also asserted that Foster was "placed on the case in order to set [him] up." In connection with this assertion, defendant claimed that when Foster replaced a previous panel attorney, Renwick, who was initially assigned to his case, Foster told defendant that Renwick did not have enough experience to handle the case. Defendant did not believe this was the actual reason because Renwick told him that he had 30 years experience. In response, Foster denied that he was assigned to the case in order to "set up" defendant and stated

that he did not know the reason he was assigned to take over the case from Renwick except that there are minimum experience requirements in order to handle certain cases. The trial court found no evidence that Foster was assigned the case to set up defendant and added: "I will point out to you, I don't know what [Renwick]'s experience is, but the experience that [Foster] has of a hundred jury trials, roughly a hundred jury trials and been practicing since 1985, that is the kind of experience that most people would give their right arm to have as their defense counsel."

Defendant also claimed that Foster was "railroading" him by stating in an in limine motion that "Freitas would not be asked to attempt to identify [defendant] in court as one of the individuals of the attack," and that there would be "no mention of the lawfulness of the shooting." When the trial court asked defendant why he would want the jury to hear that the shooting was found to be lawful, defendant replied: "Why not? It's not hurting my case. What I'm saying is this, right? It's not hurting my defense. It's not hurting anything. Why would he not want this mentioned?"

With respect to the issue of identification, Foster explained that, while Freitas did not conclusively identify defendant at the preliminary hearing, he did state that defendant "fit the size and build" of one of the assailants. Foster also explained: "[W]hatever play we can get with [Freitas's] ability to identify or not identify [defendant] is -

- it would be a [Pyrrhic] victory at most. While there may be some inability, the fact of the matter is, there is an officer who saw him run from the car who identified him. He's on videotape leaving the car in clothing that is found on him a short distance away, a couple of hours away, hiding in somebody's shed." This evidence, coupled with the fact that Rentie would also testify that defendant was the one who pulled the gun on Freitas, caused Foster to believe that "the identity issue [was] very, very weak." Thus, Foster concluded that it would be better to have Freitas leave the stand without attempting to identify defendant than to add what would likely be a partial identification to the other identifications the prosecution would be able to proffer. The trial court explained to defendant that "the defense counsel is the captain of the ship, he or she is the person who has to make the tactical decisions."

Also on the identification issue, defendant complained that Foster had moved in limine to exclude the police in-car camera footage, calling that decision "mind boggling." Foster responded: "What can be seen on the in-car camera is an individual who matches [defendant's] clothing description . . . getting out of the car, walking away from the officer's commands and then running from the scene. So while the screen that I saw [was] not detailed enough to be able to see the face of the individual who got out of the car, the clothing is clearly discernible and it matches both the descriptions of clothing by

witnesses and also the clothing that [defendant] had on him when he was apprehended." The trial court commented that Foster's attempt to keep this piece of evidence away from the jury was a strategic decision and amounted to "good lawyering." Defendant responded: "To me, it's not."

Defendant also accused Foster of "feeding the Prosecution [his] defense secrets." As defendant explained this accusation: "Foster's defense was to admit to kidnapping and try to fight kidnapping for robbery. Since I refused to take that route, [Foster] alerted the Prosecution, I believe, who then gave my co-defendant a deal to testify against me a couple days before trial started." Foster responded: "I have not done that. In fact, as I searched for issues in this case, the potentially winnable issues that I see, number one, are [*sic*] that it was not kidnap for robbery as we discussed, and number two, the prior convictions out of New York do not qualify as strikes under California law. [¶] Neither of -- the first issue was discussed openly at preliminary hearing when I was asking the Court not to hold [defendant] to answer. The second has not been discussed with the Prosecution at all." Foster also explained that the reason the District Attorney decided to give Rentie a deal in exchange for his testimony against defendant was that Freitas had made some "racially derogatory remarks" on a social networking website that could damage his credibility. When asked whether he wanted to respond, defendant stated that

he could not prove Foster had divulged defense secrets without the trial court's "assistance."

Defendant also complained that Foster refused to file a *Pitchess* motion.[2] Foster responded that he did not believe the facts of defendant's case warranted the filing of such a motion. The trial court pointed out that this was a strategic decision and stated: "I don't see anything from what you've presented here that says that he has made a poor strategic decision."

Defendant further complained that Foster had not given him all of his discovery and tried to keep him "in the blind about crucial information." Foster responded that except for a recorded interview of Deputy McAtee, the officer who shot defendant, and the in-car camera footage, defendant had seen all of the discovery. With respect to the in-car camera footage, there were some technical difficulties that prevented the footage from playing on Foster's computer. Foster and the District Attorney were working on a solution to the problem. With respect to the recorded interview, the audio on the DVD was

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[2] In *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, our Supreme Court held that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219.) While this decision has been superseded by statute, motions for discovery of law enforcement officer personnel files are still referred to as *Pitchess* motions. (*Id.* at p. 1225; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81; *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 187, fn. 13.)

not clear and defendant declined Foster's offer to play for him the separate audio recording of the interview.

Defendant also complained that Foster "refused to approach the [District Attorney] about possible plea negotiations after saying that he would once [defendant's] New York priors came back to show that [defendant] suffered no strikes." Foster explained that the District Attorney was not interested in any sort of plea arrangement with defendant.

Defendant further complained that Foster advised him to waive his right to a speedy trial because of "the massive backup of cases" in the trial court. Foster responded that he had never seen a serious felony case dismissed because the trial court had a backlog of cases. The trial court agreed. Finally, defendant asserted that Foster and the prosecutor who was originally assigned to the case, Timothy Carr, had "secret dealings" when they either "met or planned to meet" outside his presence. Foster denied this allegation.

At the conclusion of the hearing, the trial court asked Foster whether his relationship with defendant had so deteriorated that he did not feel he could provide adequate representation as a criminal defense attorney. Foster responded: "No." The trial court asked whether Foster was willing to continue to represent defendant and give his best efforts in doing so. Foster responded: "Yes." The trial court then denied the *Marsden* motion.

Following denial of the *Marsden* motion, defendant moved under *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*) to represent himself. However, when the trial court questioned defendant concerning his *Faretta* motion, defendant stated: "I don't see how I can prepare for a defense." The trial court agreed and advised defendant: "I don't see how you can possibly prepare for a defense of this case. You need a lawyer, sir." Defendant responded: "You're right." Nevertheless, defendant reasserted his decision to represent himself, stating: "I would rather represent myself and get multiple life terms than have [Foster] represent me, period." Over defendant's objection, the trial court postponed the matter until the following day to give defendant an opportunity to reconsider his decision and attempt to work things out with Foster. Defendant responded: "I'm not talking to this man ever again, period."

The following day, the trial court asked defendant whether he had changed his mind about representing himself. Defendant asked to revisit the *Marsden* issue. The trial court declined the request and began to question defendant to ensure he understood the consequences of representing himself. Defendant answered that he did not care whether he understood and then refused to answer any more questions. After a short recess, the trial court reconvened the hearing on the *Marsden* motion. The trial court then asked defendant whether anything new had happened that he believed would entitle him to have Foster

replaced. Defendant refused to respond. The trial court again denied the *Marsden* motion. Returning to the *Faretta* motion, defendant still refused to answer questions, which made it impossible for the trial court to determine whether his request to represent himself was unequivocal, knowing, and intelligent. Accordingly, the *Faretta* motion was denied.

3. *Third Marsden Motion*

The following day, defendant again moved to replace Foster as his attorney, stating that certain boxes that were checked on the written *Marsden* motion were not discussed during the previous hearing. While the trial court believed that matter had been fully litigated, it nevertheless allowed defendant to address each checked box.

The first box (a) stated: "Counsel has failed and/or refused to confer with declarant concerning the preparation of declarant's defense." Addressing this contention, defendant acknowledged that Foster had conferred with him concerning the preparation of the defense by complaining that he and Foster argued over the defense strategy. And when the trial court commented that defendant was the one who was refusing to speak to Foster, defendant admitted that he had recently refused to speak to Foster. Foster added that he had conferred with defendant "12 or 13 times" concerning the preparation of the defense before defendant refused to see him. The trial court ruled: "I do not find that counsel's failed or has refused to

confer with the declarant. I think quite to the contrary. It seems to be the other way around."

The second box (b) stated: "Counsel has failed and/or refused to communicate with declarant." Addressing this contention, defendant stated: "B's answered since A is answered." The trial court agreed. Defendant then complained about the substance of the communication: "[T]he communication that we're talking about, you know, is him just telling me to lay down, just lay down; you know, I'm going to argue that it wasn't a kidnap for robbery. [¶] Other than that, lay down, that's the communication, period, and argue that you didn't suffer any prior strikes. That's it." As this argument was fully addressed in the previous hearing, the trial court moved on to the next issue.

The third box (c) stated: "Counsel has failed and/or refused to subpoena witnesses favorable to the defense and deprived declarant of the testimony critical to the defense." Addressing this contention, defendant explained that while the police were searching the neighborhood following his flight from the Tercel, a trained police dog "alerted" to a nearby residence. A background check on a vehicle parked in front of the residence came back to a man with "Antonio" as his middle name. At the time, officers believed this could be a possible match for the suspect. Defendant complained that Foster did not subpoena this individual and anyone else who lived at the residence. However, as Foster explained, this individual was

Hispanic while the victim and his girlfriend identified the assailants as African-American. Moreover, defendant was found a short time later in a shed wearing the same clothes that were seen on the person fleeing from the Tercel. And the following day, while at the hospital, defendant admitted to police that he was the one who ran from the vehicle. The trial court found that Foster made a rational decision not to subpoena this individual.

The fourth box (d) stated: "Counsel has failed and/or refused to perform and/or to have performed investigation(s) critical and necessary to the defense." The trial court asked defendant: "Other than what you have just previously stated regarding that house, is there anything else he's refused to do?" Defendant responded: "I can't even think right now, so I don't know." The trial court found no basis for concluding that Foster had failed to adequately investigate the case and moved on to the next issue.

The fifth box (g) stated: "Counsel has failed and/or refused to prepare and file motion(s) critical to the defense." Addressing this contention, defendant repeated his assertion that Foster should have filed a *Pitchess* motion, and also argued that Foster should have moved to suppress the identifications made by Rentie and Sergeant Turner. The trial court declined to readdress the *Pitchess* motion, except to say that filing such a motion would have been "inappropriate" or "extraneous." With respect to the motions to suppress, Foster stated: "I don't

know the legal basis upon which [defendant] suggests that either [Rentie's] identification of him or Sergeant Turner's identification of him could be suppressed." The trial court ruled that Foster's decision not to bring these motions was rational and pointed out that "there is no requirement of the defense counsel to bring irrational motions or motions based on irrational beliefs or unsupportable beliefs."

The sixth box (h) stated: "Counsel has failed and/or refused to impeach prosecution witness(es)." Addressing this contention, defendant complained that Foster did not impeach Freitas or Sergeant Turner at the preliminary hearing. Foster responded that he cross-examined both individuals at the preliminary hearing and explained that defendant had not mentioned anything else that he believed should have been used to impeach these witnesses. Defendant then explained that he wanted Sergeant Turner impeached because Sergeant Turner "lied on the stand" when he claimed that he did not know immediately who fired the shot after defendant ran from the shed. Foster told defendant that he wanted to save that for trial. The trial court responded: "It seems to me that if I'm convinced that the preliminary hearing is going to end up with a holding order, why would I fire all my -- my ammunition at the preliminary hearing? [¶] I'd save some for trial. [¶] Is that essentially the way this worked out . . . ." Foster answered: "Yes." The trial court found this to be a "reasonable defense strategy" and not a "refusal to impeach a prosecution witness at a preliminary

hearing." With respect to Freitas, defendant complained that Foster did not further impeach this witness after he stated at the preliminary hearing that he could not identify defendant as one of the assailants. Foster responded: "Well, if he's complaining that the witness -- the victim didn't identify him and then I left it alone, I'm not sure that's an appropriate complaint." The trial court asked whether that made sense to defendant. Defendant answered: "I mean, everything else is getting shut down. Just shut down that, too."

The seventh box (j) stated: "Counsel has failed and/or refused to declare prejudice and/or conflict against declarant." Foster responded: "I have no legal conflict and I have no level of prejudice against [defendant] that would make it difficult or impossible for me to perform my duties in his defense." The trial court found no evidence of prejudice or conflict sufficient to grant the motion on these grounds.

The final box (k), which was handwritten, stated: "Counsel has failed and/or refused to furnish declarant with all of the discovery needed in order to defend himself; Counsel has been giving the prosecution information about the declarant's defense on several occasions." Addressing this contention, defendant claimed to have new evidence that Foster had supplied defense secrets to the prosecution, specifically that he witnessed Foster "constantly" sending text messages to the prosecutor, Carr, but did not know what was in these text messages. Defendant asked for all e-mail and text messages exchanged

between Foster and Carr. Foster denied sharing defense secrets with the prosecution. He also denied sending any text messages to Carr, but admitted that he had sent e-mails over his cell phone, which may have looked like text messages to defendant. Foster offered to share all such e-mails with defendant. Foster also offered to share other items of discovery that he recently received, but defendant refused to meet with him at the jail. Defendant further complained that he had not received copies of the "roughly 400" crime scene photos and was missing five pages from Deputy McAtee's interview. Foster agreed to look into these missing pages for defendant. Foster also agreed to provide defendant with copies of all crime scene photos that were not duplicative.

The trial court denied the *Marsden* motion, stating: "I think we have now [discussed] everything that we can possibly discuss from the items that you've prepared and filed on September 28th. [¶] And with that, I find that there [are] no grounds for -- for the granting of a *Marsden* motion."

4. *Fourth Marsden Motion*

On November 10, 2009, defendant again moved to replace Foster as his attorney. This time, defendant complained about a particular e-mail exchange between Foster and Carr in which defendant claimed Foster violated the attorney-client privilege. The first e-mail is from Foster explaining that he was having technical problems viewing the in-car camera footage, which apparently had been sent to him as a video file. Carr responded

that he would try to get a “ready-made” copy of the footage to Foster and also offered to allow him to view the video file at the District Attorney’s office. Foster responded: “[T]hanks for the offer. [T]he one I’m primarily interested in is the camera at the scene of the initial traffic stop *where my guy flees on foot*. [H]ave you looked at that one yet?” Carr responded: “[Y]eah I watched it . . . you can see the red jacket, quality is not good enough for a definitive ID. You can see him get out, start backing away, and then take off.” (Italics added.)

Defendant complained about the italicized portion of Foster’s e-mail, explaining: “He is speaking to the Prosecution letting the Prosecution know that I did -- that I did this crime.” Defendant further argued: “After [Foster] tells him that that was me, now all of a sudden, since they see that they can’t see me on camera, now they switch their tactics. Timothy Carr gets off the case. The district attorneys switch their tactics and give my co-defendant a deal.”

In response, Foster explained that prior to the e-mail exchange, Carr told him that defendant could be seen in the video fleeing from the car, referring to defendant as “your guy.” Foster had not seen the video because of technical problems and simply stated, using the same terminology as Carr, that he was interested in seeing the video purportedly showing “my guy,” i.e., defendant, fleeing from the car. This was not meant to be taken as an admission that defendant was actually

the one depicted in the video. Foster further explained: "I did not disclose to [Carr], I did not disclose to [Liske, the prosecutor who replaced Carr on the case], I did not disclose to anybody else outside of the privileged circle of confidence that only [defendant] and I share, things that [defendant] has told me. I don't do that. I didn't do that in this case. I am not working for the [District Attorney]. I am trying to do the best I can for [defendant]." Foster also explained that Carr "was involved in another jury trial when this case was first sent out to trial, and by necessity, the District Attorney's Office had to hand this case off to another prosecutor to handle the trial. That explains [Liske]'s involvement in the case, not, as far as I know, any efforts by anybody to remove [Carr] for any sort of impropriety."

The trial court accepted Foster's explanation, found no violation of the attorney-client privilege, and denied the *Marsden* motion. Foster then stated that his relationship with defendant had not so deteriorated that he would not be able to provide an adequate defense. Defendant responded: "I'm going to file charges against [Foster]. [¶] . . . [¶] What I'm telling you is a conflict of interest, this man cannot be my attorney if I'm going to file charges against him." The trial court confirmed its ruling denying the *Marsden* motion.

Defendant then renewed his *Faretta* motion. The trial court advised defendant of the consequences and dangers of representing himself and elicited responses from defendant

indicating that he was literate, fully understood these consequences, and nevertheless wanted to represent himself. The trial court granted the motion.

On December 28, 2009, during a hearing on a motion to suppress evidence, defendant told the trial court: "Well, I'm objecting to everything that you have done ever since I have been pro per, and I'm asking right now for counsel." The trial court reappointed Foster over defendant's objection.

5. *Fifth Marsden Motion*

On February 2, 2010, defendant again moved to replace Foster as his attorney. Defendant argued that Foster had not provided him with all of the e-mails and text messages exchanged with Carr. Foster responded that he had given defendant all such e-mails and that there were no such text messages. Defendant also stated that he and Foster had "no relationship whatsoever" and argued that Foster did not "want to fight for [him]." Defendant further complained that Foster did not "fix" the *Pitchess* motion defendant filed while representing himself.

The trial court denied the *Marsden* motion, explaining that it believed Foster had provided defendant with all the e-mails exchanged with Carr. With respect to the other complaints, the trial court stated that it would not entertain "the same issues over and over again." Following denial of the *Marsden* motion, defendant again moved to represent himself. The trial court again advised defendant of the consequences and dangers of

representing himself and again granted the motion allowing him to do so.

C.

Analysis

Defendant asserts that by the time he discovered "the 'my guy' e-mail," his relationship with Foster had broken down to such an extent that the refusal to replace Foster violated his constitutional right to counsel. Specifically, defendant claims the trial court "overlooked the significant impact the e-mail had on [defendant's] evaluation of Foster," arguing: "To a layman like [defendant], discovery of the 'my guy' e-mail appeared to confirm [his] belief [that Foster was conspiring with the prosecutor to help convict him]. It reasonably seemed to [defendant] that he had caught Foster red-handed, supplying information that helped the prosecutor prove his case. As a practical matter, the attorney-client relationship between Foster and [defendant] was doomed from that point forward." We are not persuaded.

"The court does not abuse its discretion in denying a *Marsden* motion '"unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel."' [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when 'the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is

likely to result [citation].' [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 912.) However, "'[a] trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel . . . .' [Citation.]" (*Id*. at p. 913; *People v. Crandell* (1988) 46 Cal.3d 833, 860, overruled on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

Here, defendant initially claimed not to trust Foster because of purported lies Foster told him concerning the civil suit defendant wanted to file against the arresting officers. The trial court appropriately denied defendant's *Marsden* motion on this ground, accepting Foster's assurance that he never lied to defendant. During the second *Marsden* hearing, defendant claimed not to trust Foster because Foster advised him to "lay down and accept whatever the Prosecution is going to do in this case." Foster denied telling defendant to "lay down," but admitted that there were disagreements over the legal advice he provided, i.e., because there was "pretty clear evidence" of robbery and kidnapping, the "best viable defense" was to try to convince the jury that he did not kidnap Freitas for purposes of robbery. However, such disagreements over trial strategy do not "'constitute an "irreconcilable conflict"'" unless they portend a complete breakdown in the attorney-client relationship. (*People v. Clark*, *supra*, 52 Cal.4th at p. 912; see *People v. Freeman* (1994) 8 Cal.4th 450, 481 [defendant's distrust of

counsel who suggested he plead guilty did not state an adequate basis for substitution of counsel].) The trial court did not abuse its discretion in accepting Foster's assurance that such a complete breakdown had not occurred. Nor did the trial court abuse its discretion in rejecting defendant's claims that Foster was assigned to the case in order to "set [him] up" and was "feeding" the prosecution "defense secrets." Defendant presented no evidence to support these allegations.

Following the denial of defendant's second *Marsden* motion, defendant refused to speak to Foster. During the third *Marsden* hearing, the trial court again accepted Foster's assurance that he had "no legal conflict" and "no level of prejudice against [defendant] that would make it difficult or impossible for [Foster] to perform [his] duties in [defendant's] defense." This too was an appropriate exercise of the trial court's discretion. While it is clear that defendant did not trust Foster, the trial court reasonably could have concluded that defendant's refusal to speak to Foster prevented Foster from "demonstrat[ing] he was worthy of defendant's trust." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1086; *People v. Crandell*, *supra*, 46 Cal.3d at p. 860.)

Nor was the trial court required to find that defendant's discovery of the "my guy" e-mail created an irreconcilable conflict between defendant and Foster. Foster explained that the phrase "my guy" was not intended to be taken as an admission that defendant was actually the one depicted in the in-car

camera footage. The trial court explained to defendant that the statement was not an admission. Indeed, in response to Foster's question concerning the portion of the video "where my guy flees on foot," i.e., where defendant was alleged to have fled on foot, the prosecutor admitted that the video quality was "not good enough for a definitive ID." Thus, the prosecutor did not take Foster's statement to be an admission concerning defendant's identity as the man depicted in the video. Defendant's refusal to accept Foster's reasonable explanation for the use of the phrase "my guy" cannot serve as the basis for requiring substitution. (See *People v. Smith* (1993) 6 Cal.4th 684, 696 [a defendant cannot compel a substitution of counsel by his or her own conduct that manufactures a conflict].) This is especially true in this case, where defendant steadfastly refused to cooperate with Foster, "cursed [him] out on several occasions," attempted to remove him five separate times, and ultimately refused to even speak to Foster. (See *People v. Clark*, *supra*, 52 Cal.4th at p. 913 ["defendant's proclamation during an angry tirade that he did not want 'these bitches' for his attorneys strongly suggests that any breakdown in his relationship with counsel was attributable to his own attitude and refusal to cooperate"].)

We also reject defendant's contention that the trial court improperly relied on Foster's reputation in the legal community and its own confidence in Foster's professional skill. The denial of a *Marsden* motion cannot be based solely on the court's

“confidence in the current attorney and observations of that attorney’s previous demonstrations of courtroom skill. [Citations.] Instead, the court must inquire on the record into the bases of defendant’s complaints and afford him [or her] an opportunity to relate specific instances of his [or her] attorney’s asserted inadequacy.” (*People v. Hill* (1983) 148 Cal.App.3d 744, 753; *Marsden*, *supra*, 2 Cal.3d at p. 124 [“a judge who denies a motion for substitution of attorneys solely on the basis of his [or her] courtroom observations, despite a defendant’s offer to relate specific instances of misconduct, abuses the exercise of his [or her] discretion to determine the competency of the attorney”].)

Here, the trial court fully inquired into defendant’s complaints regarding Foster. While the trial court advised defendant that he was “extremely lucky” to have Foster as his attorney, pointed out Foster’s “extensive experience” as a criminal defense attorney, and commented that Foster was “doing a very good job” and had represented defendant “strenuously,” these statements do not establish that the trial court relied solely on its confidence in Foster and on observations of Foster’s courtroom skill in denying defendant’s *Marsden* motions. We find no abuse of discretion.

In sum, the trial court made an adequate inquiry into defendant’s complaints concerning Foster and did not abuse its discretion in concluding defendant did not demonstrate that a

failure to replace Foster would substantially impair his right to assistance of counsel.

III

Foster's Purported Collaboration with the Prosecutor

After defendant's fifth *Marsden* motion was denied and he was again allowed to represent himself under *Faretta*, defendant moved to dismiss the case, arguing that his Fifth Amendment right against self-incrimination, his Sixth Amendment right to counsel, and his Fourteenth Amendment right to due process were violated by the "my guy" e-mail. The trial court denied the motion.

Defendant claims this ruling was error, but offers absolutely no argument to support this contention. Besides referencing the Fifth, Sixth, and Fourteenth Amendments he cited to the trial court, defendant cites no legal authority. "'[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as [forfeited], and pass it without consideration. [Citations.]' [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Hovarter* (2008) 44 Cal.4th 983, 1029; Cal. Rules of Court, rule 8.204(a)(1)(B).) Thus, defendant has forfeited this contention by failing to adequately brief the issue on appeal.

IV

Competence to Stand Trial

Defendant further asserts that the trial court erred by failing to suspend the proceedings after entertaining a doubt concerning his competence to stand trial. We disagree.

"It is well established that the criminal trial of an incompetent defendant violates the due process clause of the state and federal Constitutions." (*In re Ricky S.* (2008) 166 Cal.App.4th 232, 234; *Medina v. California* (1992) 505 U.S. 437, 453 [120 L.Ed.2d 353, 368]; *Pate v. Robinson* (1966) 383 U.S. 375, 377-378 [15 L.Ed.2d 815, 817-818]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1002.) The standard for determining whether a defendant is competent to stand trial was set forth in *Dusky v. United States* (1960) 362 U.S. 402 [4 L.Ed.2d 824]. "Under that standard, the inquiry is whether the defendant '"has sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding -- and whether he [or she] has a rational as well as factual understanding of the proceedings against him [or her]."'" (*Timothy J. v. Superior Court* (2007) 150 Cal.App.4th 847, 857, quoting *Dusky v. United States*, *supra*, 362 U.S. at p. 402 [4 L.Ed.2d at p. 824].)

These constitutional protections are also implemented by statute. (§ 1367 et seq.) Section 1367, subdivision (a), provides that "[a] criminal defendant is incompetent and may not be 'tried or adjudged to punishment' if 'as a result of mental disorder or developmental disability, the defendant is unable to

understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.'" (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1273; § 1367, subd. (a).)

Section 1368 provides in pertinent part that if, "during the pendency of an action and prior to judgment, a doubt arises in the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent" (§ 1368, subd. (a)), and if defense counsel indicates a belief that the defendant "is or may be mentally incompetent," the court must order a competency hearing (§ 1368, subd. (b)), and "all proceedings in the criminal prosecution shall be suspended until the question of the present mental competence of the defendant has been determined" (§ 1368, subd. (c)). Section 1369 sets forth the procedure for conducting the competency hearing in an adult criminal proceeding, including the appropriate standard to be employed in reaching the ultimate decision as to competence: "It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent." (§ 1369, subds. (b)-(f).)

Here, contrary to defendant's argument on appeal, the trial court neither expressed nor entertained a doubt regarding his competence to stand trial. Indeed, after denying defendant's

third *Marsden* motion, the trial court addressed a handwritten motion made by defendant in which he moved the court to allow him "to argue that he cannot in any way conform his conduct to the requirements of law" and to "look into [defendant's] mental capacity . . . based on the fact that he does suffer from mental illness and possibly did not have the capacity to commit or even appreciate the criminality of his conduct." The trial court asked defendant if he was arguing that he was incompetent to stand trial and commented: "You have made a number of arguments to the Court over the last three days, and the -- the farthest thing from my mind at this point is that you're incompetent to stand trial, that you have been arguing vociferously and quite competently a number of motions." The trial court then asked Foster whether he believed defendant was incompetent to stand trial. Foster responded: "I am not raising a competency issue as to this client in this case." Far from entertaining a doubt as to defendant's competence to stand trial, the trial court specifically stated: "I've seen absolutely no indication whatsoever to show that you are -- to show that you are incompetent to stand trial."

Thereafter, on October 7, 2009, defendant entered a plea of not guilty by reason of insanity (NGI). On November 3, 2009, defendant indicated to the trial court "that he did not wish to go forward with the NGI plea." On November 10, 2009, as already mentioned, defendant's fourth *Marsden* motion was denied and his *Faretta* motion was granted. That day, defendant also withdrew

his NGI plea and stated that he was not claiming to be incompetent to stand trial. As also previously mentioned, Foster was reappointed on December 28, 2009. On February 4, 2010, the trial court again allowed defendant to represent himself without raising any concern regarding defendant's competence to stand trial.

Nevertheless, defendant contends the following events reveal that the trial court entertained a doubt as to his competence to stand trial. The day after the prosecution began its case, a staff psychologist at the county jail examined defendant pursuant to section 4011.6. This section provides in pertinent part: "In any case in which it appears to the person in charge of a county jail, city jail, or juvenile detention facility, or to any judge of a court in the county in which the jail or juvenile detention facility is located, that a person in custody in that jail or juvenile detention facility may be mentally disordered, he or she may cause the prisoner to be taken to a facility for 72-hour treatment and evaluation pursuant to Section 5150 of the Welfare and Institutions Code[3]

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[3] Welfare and Institutions Code section 5150 provides: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility

and he or she shall inform the facility in writing, which shall be confidential, of the reasons that the person is being taken to the facility." (§ 4011.6.) The staff psychologist who examined defendant determined that defendant "[d]id not meet [Welfare and Institutions Code section] 5150 criteria at this time." When the trial court was informed of this evaluation, the court stated: "Let me put on the record very quickly that I have received clearance from medical personnel at the jail that we are ready to proceed, that there is no reason not to proceed."

Defendant argues that the trial court's "choice of words indicates that, prior to receiving the report, it had entertained a doubt about whether [defendant] had the mental capacity to proceed." And because section 1367.1 provides that a misdemeanor defendant may be referred for evaluation and treatment under section 4011.6 if the court concludes there is reason to believe the defendant is mentally disordered and may be incompetent to stand trial, defendant argues that it "seems

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for 72-hour treatment and evaluation. [¶] Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false."

evident the trial court used section 1367.1 to determine whether [defendant] was able to proceed with trial and self-represent." From this, defendant concludes that the trial court erred in employing section 1367.1, pointing out that this provision applies only in misdemeanor cases.

Defendant's premise is flawed. There is nothing in the record to suggest that the trial court ordered the section 4011.6 evaluation to alleviate a doubt as to defendant's competence to stand trial. Indeed, there is nothing in the record indicating that the trial court ordered the evaluation. It is entirely possible that the "person in charge of [the] county jail" (§ 4011.6) ordered the evaluation because he or she had probable cause to believe that defendant was, "as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled." (Welf. & Inst. Code, § 5150.) "[A] conclusion that a defendant is dangerous or gravely disabled does not necessarily mean the defendant is incompetent to stand trial." (*People v. Ford* (1997) 59 Cal.App.4th Supp. 1, 5.) Nor does the trial court's statement that it received clearance from the jail to proceed indicate that it ever doubted defendant's competence to stand trial.

Because there is no evidence in the record that the trial court entertained any concern as to defendant's competence to stand trial, we conclude the trial court was not required to suspend the criminal proceedings pursuant to section 1368.

V

Cumulative Prejudice

Aside from the trial court's findings that defendant's prior New York convictions constitute strikes, which requires reversal of those findings and remand for a retrial on those strike allegations, we have found no error, prejudicial or otherwise. Thus, defendant's assertion of cumulative prejudice must also fail.

DISPOSITION

The findings that defendant's prior New York convictions constituted strikes within the meaning of the three strikes law are reversed and the matter is remanded to the trial court for a retrial on those allegations. In all other respects, the judgment is affirmed.

HOCH, J.

We concur:

BLEASE, Acting P. J.

HULL, J.