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

THE PEOPLE,

Plaintiff and Respondent,

v.

DEANDRE DAVIS,

Defendant and Appellant.

C065945

(Super. Ct. No.
SF109322A)

Following a jury trial, defendant Deandre Davis was convicted of shooting at an occupied motor vehicle (Pen. Code, § 246),¹ discharging a firearm from a vehicle (§ 12034, subd. (d)), and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The jury also found true that defendant personally inflicted great bodily injury on his victim

¹ Undesignated statutory references are to the Penal Code.

(§ 12022.7) and intentionally and personally discharged a firearm (§ 12022.53, subd. (d)). Sentenced to an aggregate term of 32 years, plus eight months to life in state prison, defendant appeals his conviction.

On appeal, defendant contends he received ineffective assistance of counsel and, but for counsel's errors, he would not have been convicted of the charges against him. Defendant also contends the trial court erred in failing to hold a *Marsden*² hearing when he moved for a new trial based on counsel's ineffective assistance. Finding neither of defendant's claims to have merit, we affirm the judgment.

BACKGROUND

Around 11:20 p.m. on August 23, 2008, Pedro Munoz was driving home with his father, Joseph, and his brother, Michael. Joseph was driving Michael's gold Chevy sedan, Michael was seated in the front passenger seat, and Pedro was sitting behind Michael. The Chevy's windows were rolled down; they stopped at a red light and a green Jeep Commander stopped in the lane next to them. Pedro and Michael looked over and saw defendant seated behind the driver. The driver, Robbyn Archer, was laughing and pointing at the Chevy. Defendant's window also was rolled down; he stared at the Munozes. Pedro asked defendant, "What's up?" Before defendant could answer, the light turned green and both vehicles drove away. Archer pulled the Jeep alongside the

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

Chevy; defendant pointed a handgun at the Chevy and fired a single shot, striking Pedro on the side of his face. Archer attempted to flee but Joseph "rammed" the rear end of the Jeep in an effort to stop her. Joseph then took Pedro to the hospital, where Pedro underwent surgery for the gunshot wound to his face.

Stockton Police Sergeant Richard Ridenour was on duty driving a marked patrol vehicle when he saw the smoke created by the impact between the Jeep and the Chevy. He made a U-turn, saw the Chevy pull to the side of the road, and saw the Jeep speed away from the scene. Ridenour notified fellow officers of the chase as he pursued the Jeep. When the Jeep stopped, Ridenour saw two black men exit from the backseat. One of the men wore a white T-shirt and jeans, while the other wore a red T-shirt with a black jacket. The man in the red T-shirt, later identified as defendant, jumped a fence and ran away. Ridenour tried to follow defendant but lost sight of him.

Officer Robert Wong responded to Ridenour's call. Taking a position on the perimeter of the scene, Officer Wong saw a black man wearing a white T-shirt and jeans, who he later identified as Omarea McPherson, walking towards him. Wong took McPherson into custody and found a live round for a 12-gauge shotgun in McPherson's front pocket and a pair of rubber gloves in McPherson's rear pants pocket. As he was putting McPherson into the back of his patrol car, Wong saw defendant running at a full sprint through a field toward a shopping center; Wong notified Ridenour. Ridenour went to the shopping center parking lot,

where he found defendant. Ridenour told defendant to stop but defendant took off running between the parked cars. Defendant appeared to be getting tired, so Ridenour got out of his vehicle and drew his Taser. Ridenour ordered defendant to stop; defendant obeyed, Ridenour detained him, and patted him down. Ridenour did not find any weapons, ammunition, or gloves on defendant.

Ridenour gave defendant his *Miranda* rights, then asked defendant where he was going and what he was doing. Defendant said he was just walking home from a friend's house and did not know anything about a green Jeep. Ridenour saw that defendant was carrying a black, hooded sweatshirt that had leaves on it. Law enforcement later found a loaded handgun in a pile of bushes and leaves near the area where defendant jumped out of the Jeep.

Defendant was subsequently charged with premeditated attempted murder (§§ 664/187, subd. (a)), shooting at an occupied motor vehicle (§ 246), discharging a firearm from a vehicle (§ 12034, subd. (d)), and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). It was further alleged that defendant personally inflicted great bodily injury on his victim (§ 12022.7) and intentionally and personally discharged a firearm (§ 12022.53, subd. (d)). Defendant pleaded not guilty to the charges and denied the enhancement allegations.

The first jury trial ended in a mistrial when the jury could not reach a verdict on any count. The second jury found defendant guilty of shooting at an occupied motor vehicle, discharging a firearm from a vehicle, and being a felon in

possession of a firearm. The jury also found true the sentencing enhancement allegations. The jury could not reach a verdict on the charge of premeditated attempted murder. Accordingly, the trial court declared a mistrial on that count, then granted the prosecution's motion to dismiss the charge in the interest of justice.

Thereafter, newly retained counsel appeared on behalf of defendant and moved for a new trial. Following an evidentiary hearing and argument, the trial court denied defendant's motion. The court then sentenced defendant to an aggregate term of 32 years, plus eight months to life in state prison. Defendant appeals.

DISCUSSION

I

Defendant contends he received ineffective assistance of counsel because trial counsel allowed the trial court to tell the jury that his previous felony conviction was for firearms possession. We agree trial counsel failed to effectively represent defendant, but conclude defendant suffered no prejudice as a result.

A criminal defendant has a constitutional right to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692] (*Strickland*).) "To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' [Citation.] A court

considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance.

[Citation.] The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'

[Citation.]

"With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Citation.] Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.]

"'Surmounting *Strickland's* high bar is never an easy task.' [Citation.] An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. [Citation.] Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the

client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' [Citations.] The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. [Citation.]"

(*Harrington v. Richter* (2011) ___ U.S. ___, ___ [178 L.Ed.2d 624, 642-643].)

We agree defense counsel failed to effectively represent defendant when he allowed the jury to hear defendant was previously convicted of possessing a firearm. Defendant fails, however, to prove he was prejudiced by counsel's error. Even if counsel had not allowed the jury to hear defendant was previously convicted of possessing a firearm, there was compelling evidence to convict defendant of possessing the firearm that was used in the shooting here.

Sergeant Ridenour identified defendant as one of the individuals he saw jump out of the Jeep and run away immediately after the shooting. When Ridenour saw defendant a short time later, defendant again ran away. Defendant's repeated efforts to evade law enforcement are evidence of consciousness of guilt.

In addition, immediately following the shooting, Archer told Sergeant Ridenour that defendant had just shot someone. At trial, Archer testified that she did not actually see defendant shoot the gun, but she was "pretty sure it was him"

When law enforcement found the gun, later identified as the gun used to shoot Pedro, they found it in a pile of leaves near

the spot where defendant jumped out of the Jeep. Those leaves were similar to leaves found on the sweatshirt defendant was carrying when he was taken into police custody.

Finally, at trial, defendant argued it was McPherson who shot Pedro. McPherson was in the back seat with defendant, but he was found carrying ammunition for a shotgun, not the pistol used to shoot Pedro. Accordingly, the jury had sufficient evidence to find defendant possessed the firearm used to shoot Pedro; defendant has therefore failed to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694 [80 L.Ed.2d at p. 698].)

Defendant's claim that the case was "obviously a close one" given that "the jury in the first trial hung on every count," and the eyewitness identification in the second trial "was weak," does not alter this conclusion. There were a myriad of differences between these two trials, not the least of which was a different jury. The first jury's failure to reach a verdict is not compelling evidence that counsel's error here was the reason defendant was found guilty.

II

Defendant further contends the trial court erred in failing to conduct a *Marsden* hearing when defendant moved for a new trial based on ineffective assistance of counsel. We disagree.

Under the United States and California Constitutions, a criminal defendant has the right to the effective assistance of legal counsel. (*United States v. Gonzalez-Lopez* (2006) 548 U.S.

140, 144 [165 L.Ed.2d 409, 416]; *People v. Jones* (2004) 33 Cal.4th 234, 244.) "Accordingly, a court must appoint substitute counsel if either the current appointed attorney is providing inadequate representation (*Marsden, supra*, 2 Cal.3d at p. 123) or the attorney-client relationship has become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Fierro* (1991) 1 Cal.4th 173, 204[]; see *People v. Crandell* (1988) 46 Cal.3d 833, 854[], criticized on another ground by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365[.])" (*People v. Vera* (2004) 122 Cal.App.4th 970, 978-979.)

When a defendant "in some manner" requests a substitution of appointed counsel, "the trial court must afford the defendant an opportunity to express the specific reasons why he [or she] believes he [or she] is not being adequately represented by his [or her] current counsel" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1400.) However, a trial court need not conduct a *Marsden* hearing in the absence of a request for new counsel or articulation of grounds compelling such relief from deficient representation. "Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he [or she] wants a substitute attorney.'" (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8[.])" (*People v. Mendoza* (2000) 24 Cal.4th 130, 157.)

In this case, defendant never requested substitute counsel and gave no indication that he wanted new counsel appointed to file a motion for new trial or to represent him at sentencing.

Indeed, defendant *retained* counsel to pursue the motion for a new trial based on ineffective assistance of counsel. At no time did defendant indicate he wanted new counsel *appointed* to represent him, either on the motion for new trial or at sentencing. Accordingly, there was no error.

DISPOSITION

The judgment is affirmed.

BLEASE, J.

We concur:

RAYE, P. J.

BUTZ, J.