

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,		C066157
	Plaintiff and Respondent,	(Super. Ct. No. SF10123)
v.		
LOUIS RILEY JAMES,		
	Defendant and Appellant.	

Defendant Louis Riley James shot Kenneth Painter dead near a mountain road outside Nevada City in a drug deal gone wrong. A jury found defendant guilty of murdering Painter by personally discharging a firearm and of possessing marijuana for sale. The court sentenced him to 52 years to life in prison.

Defendant appeals, claiming the court improperly denied his motion to substitute appointed counsel, abused its discretion in sentencing him, and incorrectly calculated his credits. We award defendant 13 extra days of credit and affirm the judgment as modified.

FACTUAL AND PROCEDURAL HISTORY

A

The Prosecution's Case

Defendant was a drug dealer. The victim Painter was a drug supplier. Defendant was introduced to Painter by a mutual acquaintance, Gabriel Marsch.

On April 5, 2010, Painter had planned to sell 15 pounds of marijuana to defendant. In the afternoon, with the marijuana in his Jeep, Painter talked to defendant on the phone about the transaction. Later that afternoon, Painter got a text and rushed off to complete the sale. Painter drove his jeep up a mountain road outside the city limits of Nevada City with defendant following in his pickup. Defendant returned down the mountain road about 45 minutes to an hour later, but Painter did not.

In the evening, defendant called his then-girlfriend, Misty Farley, asking for a ride. He said he was on Highway 20 past Nevada City. When Farley picked him up, defendant was "dirty" and "[i]t looked like he had . . . red rusty colored dirt" on his jeans. When Farley told him he looked "real dirty," defendant said "'It's not dirt.'" Farley was under the impression it was blood, but no conclusive evidence of blood was ever found in her car.

Later that evening, defendant told Farley he had killed a man because that man had stolen some marijuana from a woman he knew. Defendant said he shot the man in the stomach, there was a struggle, and then he shot the man again in the stomach and

eventually in the head. Defendant complained of a sore back, explaining he had to carry the body on his back. He hid some of the evidence by burning his clothes and jacket.

Three days later, Painter's truck was discovered outside Nevada City. A day after that, Painter's body was discovered nearby. Painter died of a gunshot wound to the head and one to the abdomen. The gunshot to the head was inflicted from between one and 12 inches away.

The house in which defendant was staying was searched about a week after Painter was murdered. In the backyard were ashes in a wheelbarrow that were consistent with burned clothes. In defendant's storage unit was about 10 pounds of marijuana.

Defendant was arrested and while in jail, he spoke to a friend over the telephone. In the recorded conversation, defendant talked about paying Farley money for "this problem [to] go[] away."

B

The Defense

Defendant testified on his own behalf. Painter paid him \$1,000 to assist with a drug deal and picked defendant up in his Jeep on the way to the drug deal. When they reached the site where the deal was supposed to take place, defendant saw two Hispanic gentleman sitting in a truck and then saw Marsch (the one who had introduced defendant and Painter) get out of the driver's side. Painter told defendant to grab the marijuana while Painter was going to talk with one of the men. As defendant was trying to get the marijuana from the back of the

Jeep, he heard a gunshot and saw Painter and Marsch wrestling in the front seat. Defendant heard another gunshot, and Painter "cr[ie]d out." Marsch lifted up a gun and fired, and the Jeep suddenly took off. The two Hispanic men then got out the truck, with guns in hand. Defendant turned and ran into the woods.

Later that evening, defendant received a phone call from an unknown man threatening to kill him if defendant "'open[ed] [his] mouth.'" He did not call police because he was scared. He was scared of Marsch because he was "an unpredictably violent person" who had told defendant in the past "he had killed his brother and that the [drug] cartel had helped him get rid of the body."

Farley was lying when she testified defendant confessed to the murder. Defendant offered to pay Farley money not to testify because he was informed that if she were paid a certain amount of money that she would make this lie go away.

DISCUSSION

I

The Trial Court Did Not Abuse Its Discretion

In Refusing To Substitute Appointed Counsel

Defendant contends the trial court violated his federal and state right to conflict-free counsel when it "denied [his] motion for appointment of counsel to bring a new trial motion on ineffective assistance of counsel." Defendant's contention is based on six items of omitted evidence he claims were central to the case and would have "undermined" the People's theory of the

case or its critical witness Farley, or would have corroborated defendant's theory that Marsch murdered Painter.

At the hearing where defendant asked the court to replace counsel, the court listened to defendant's complaints about counsel's representation, elicited counsel's response to those complaints, and then denied the motion. The court explained that "to the extent that there are the conflicts," counsel made "tactical decisions," "properly represented [defendant] and will continue to do so." As we explain, we agree and find no abuse of discretion.

"When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel." (*People v. Webster* (1991) 54 Cal.3d 411, 435.)

A

Failure To Call Witnesses To Testify About

Defendant's Successful Marijuana Growing Operation

Defendant contends counsel was deficient for failing to call witnesses to testify he had a successful marijuana growing operation, which would have undercut the People's theory defendant had a motive to kill Painter to steal Painter's marijuana.

Counsel presented a tactical reason for not calling such witnesses. Specifically, when counsel had asked defendant if he grew marijuana, defendant did not want to admit very much about being involved in the marijuana trade, and counsel tried very hard but was never provided with any contacts who would testify defendant grew marijuana. Counsel did elicit during Farley's testimony defendant always had a wad of cash on him, but most everyone else counsel interviewed told him defendant was "penniless"

B

Failure To Call Farley's Husband To Testify

Defendant contends counsel was deficient for failing to call Farley's husband to testify she was a chronic liar. Counsel presented a tactical reason for not calling him. Counsel repeatedly tried to contact the husband but the husband refused to speak to the defense. Counsel was unwilling to put him on the stand having not spoken with him because he thought the risk was too great.

C

*Failure To Call A Witness To Testify About
Farley's Attempt To Extort Money From Defendant*

Defendant contends counsel was deficient for not calling a witness (other than defendant) to testify about Farley's attempt to extort money from defendant in exchange for her truthful testimony defendant did not confess to her he murdered Painter. Counsel presented a tactical reason for not calling this

witness. Counsel interviewed that witness, but that witness "wouldn't confirm much of anything."

D

*Failure To Call A Witness To Testify About
Marsch's Violent Past And Reputation*

Defendant claims counsel was deficient for failing to call a witness to testify about Marsch's violent past and reputation to corroborate defendant's testimony he feared Marsch. Counsel presented a tactical reason for not calling this witness. The witness "was very uncooperative and hard to deal with." He "would not meet with [defense counsel] or [counsel's] investigator." That counsel admitted he "th[ought] perhaps [he] could have done a better job with [the witness] and questions about [Marsch]" does not show deficient strategy at the time of trial.

E

Failure To Introduce Photographs Of Defendant

Defendant contends counsel was deficient for failing to introduce photographs showing scratches to defendant's face and body to corroborate defendant's testimony he ran into the woods to escape after Marsch shot Painter. Defense counsel "agree[d]" "[i]n retrospect [he] th[ought] [he] should have introduced them" although he did not "know 100 percent what they show[ed]." (Italics added.) That counsel did not introduce them, however, does not show deficient strategy at the time of trial.

Defendant testified at trial he "got a lot of scratches on [his] face and to [his] body" as a result of running through the woods. The cause of these scratches, however, was a minor point, because defendant's admission to being in the woods was still consistent with him being the killer. Under the prosecution's version of events, defendant travelled up a mountain road with Painter, shot him three times in a struggle, and came down the road without him. This scenario leaves open the possibility defendant could have gotten those scratches while killing Painter.

F

Failure To Call A Blood Spatter Expert

Defendant contends counsel was deficient for failing to call a blood spatter expert to testify there should have been blood in Farley's car if defendant had blood on his clothes as Farley had claimed. Defense counsel agreed that "[i]n retrospect" he "th[ought] [he] should have hired a blood spatter expert" but the nontime waiver made this problematic. This did not show deficient strategy at the time of trial.

Defense counsel was able to elicit the lack of blood evidence from cross-examination and then used argument to make the point that the lack of blood meant defendant could not have been the shooter. Specifically, on cross-examination, defense counsel got the sergeant in the major crimes unit of the Nevada County Sheriff's Department to admit there was no conclusive evidence of blood in Farley's car. Based on this admission, a central theme of counsel's closing argument was, "[w]here's the

blood," emphasizing the lack of blood evidence tying defendant to the murder and noting there was no blood found in Farley's car. Given that defendant would not waive time and an expert's testimony was not necessary to make the point defendant wanted made about the lack of blood, counsel was not deficient.

G

Conclusion

As to each of defendant's six complaints raised here about his counsel's performance, counsel had a reasonable trial strategy for why he approached the case as he did. The court did not abuse its discretion in denying the motion to replace counsel.

II

*The Court Did Not Abuse Its Discretion In
Imposing A Consecutive Sentence*

Defendant contends the court abused its discretion in imposing a consecutive sentence for the marijuana charge because the court "erroneously believed it had no discretion to impose concurrent sentences." In making this argument, defendant relies on the following isolated statement made by the court: "the triad . . . is 16, two and three. And by law those are fully consecutive. So . . . we can't deviate other than to pick low or middle term."

In looking at the record as a whole, however, defendant has not affirmatively shown the court misunderstood its sentencing discretion. (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 695.) The court's statement came in response to counsel's sentencing

memo. That memo advocated for a jail term of three to six months for the marijuana conviction consecutive to the terms for murder and personal discharge of a firearm. By law, however, the determinate term attached to an indeterminate term must be the full term. (*People v. Reyes* (1989) 212 Cal.App.3d 852, 856; Pen. Code, § 1170 [court shall sentence defendant to one of three terms of imprisonment specified]; Pen. Code, § 1170.1 [subordinate term for consecutive offenses shall consist of one-third of the middle term].) Thus, when considered in the context of responding to counsel's argument, the court was telling counsel the term could not be one-third the middle term because by law those are fully consecutive. The rest of the record supports this reading of the transcript as well. At the beginning of the sentencing hearing, the court stated, "[t]he only place that really I have any sentencing discretion is on the possession of marijuana with intent to sell. On that count it's my intended decision to run that consecutive to -- select the midterm."

Based on our conclusion the record does not establish the court misunderstood its sentencing discretion, we also reject defendant's fallback argument that counsel was ineffective for not objecting.

III

Defendant Is Entitled To 13 More Days Of Presentence Credit

Defendant contends (and the People agree) the court awarded defendant 13 days too few credit. Defendant was in presentence custody from April 14, 2010 to September 17, 2010, which is 157

days and not the 144 days calculated by the probation department and awarded by the court. Defendant is entitled to these 13 days of additional credit that he earned.

DISPOSITION

The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting that defendant is entitled to 157 days of actual local time. As modified, the judgment is affirmed.

_____ ROBIE _____, J.

We concur:

_____ BLEASE _____, Acting P. J.

_____ HULL _____, J.