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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ROBERT WILLIAMS,

Defendant and Appellant.

C066795

(Super. Ct. No.
08F00662)

Defendant James Robert Williams, having been convicted by a jury of two counts of attempted robbery and related firearm enhancements in a first trial, and of additional firearm enhancements in a second trial, moved the trial court for substitution of counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) at the conclusion of the second trial. The trial court denied the motion.

On appeal, defendant contends the trial court failed to conduct the inquiry required under *Marsden*, and erroneously denied his motion for new counsel, thus violating his right to a

fair trial and due process under the federal and state constitutions. We affirm the judgment.

FACTS AND PROCEEDINGS

Wearing a ski mask and carrying a revolver, defendant and Donald Santos attempted to rob a cigarette store while Jahmal Stanford acted as lookout. Defendant aimed his weapon at G.H., the operator of a check-cashing business located inside the cigarette store, who was squatting down under the counter attempting to hide. B.M., the owner of the cigarette store, retrieved his own gun from the back of the store and fired at Santos from behind a partition. Defendant fired a single shot, hitting G.H. in the head, and then ran away with Santos and Stanford. G.H. survived. Surgeons later recovered a .38 caliber bullet from his skull.

Defendant was charged with attempted murder (Pen. Code, §§ 664/187; undesignated statutory references that follow are to this code), and two counts of attempted robbery (§§ 664/211). The amended information alleged he was armed with a firearm (§ 12022.5, subd. (a)(1)), personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)).

A jury found defendant guilty of both counts of attempted robbery, but not guilty of attempted murder, and found true allegations that he personally used a firearm and was armed with

a firearm. The jury deadlocked on allegations that defendant personally and intentionally discharged a firearm and personally and intentionally discharged a firearm causing great bodily injury pursuant to section 12022.53, subdivisions (c) and (d), respectively, and the trial court declared a mistrial as to those allegations.

Defendant was retried on the section 12022.53, subdivisions (c) and (d) allegations, and the jury found both true.

Defendant filed a joint *Marsden* motion and motion for new trial. Following an *in camera* hearing, the trial court denied both motions, and sentenced defendant to an aggregate term of 28 years to life in state prison.

DISCUSSION

Defendant contends the trial court failed to make the necessary inquiries before ruling on his *Marsden* motion, and the court erred in denying that motion. We reject both claims.

When a defendant seeks substitution of appointed counsel on the ground of ineffective representation, the trial court must allow the defendant to explain his or her concerns in detail. "A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1244-1245 (*Jones*).) "[S]ubstitute counsel should be appointed when, and only when, necessary under

the *Marsden* standard, that is whenever, in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation]" (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

We review the trial court's decision denying defendant's motion to substitute counsel under the "deferential abuse of discretion standard." (*Jones, supra*, 29 Cal.4th at p. 1245; see also *People v. Earp* (1999) 20 Cal.4th 826, 876.)

During an *in camera* hearing after conclusion of the second trial but prior to sentencing, defendant told the court he was dissatisfied with his appointed counsel because, between the two trials, counsel met with him only two times, each for no more than 15 minutes, counsel failed to explain the pros and cons of a 23-year plea offer to him, and counsel failed to explain that he had been acquitted of attempted murder in the first trial and that he was being retried on the firearm enhancements in the second trial.

In response, defense counsel said, "Essentially, [defendant] may be somewhat correct in terms of the time that I met with him on the second trial," explaining that while he met with defendant "almost on a daily basis" during the first trial because there were "some real issues we had to struggle with on our defense," there was no need to do so during the second trial because it would, for all practical purposes, be identical to the first trial, with many of those issues having been conceded. Counsel added that he provided defendant with all of the

discovery for the first trial and copies of all relevant transcripts for the second trial.

Defense counsel acknowledged that "there was a little bit of confusion on behalf of [defendant] on what he was acquitted with and what he wasn't," but said, "In my opinion I had straightened that out." Counsel noted that, in light of defendant's admission to the attempted robberies, the defense was primarily focused in the first trial on "fighting the specific intent to kill as well as the intentional discharge," the result being a verdict of not guilty on the specific intent to kill element and a hung jury on whether defendant intentionally discharged the gun.

With regard to the prosecution's offer of 23 years, defense counsel said he conveyed "all offers to [defendant]" and recommended that defendant accept the 23-year offer. He explained further, "I did say, [y]ou are essentially arguing about 36 months because the prosecution had offered 23 years. My opinion was that it gets real close to about 17 or 18. Even if we were to get acquitted on the life enhancements, and at the tender age of 20 at the time, why risk it?" The trial court interjected, "Cause you had the other gun, the 12022.53(b) that's been found true, those are ten year minimum for each--for that count." Defense counsel said, "Yes." The court added, "That could run consecutive." Counsel responded in the affirmative, explaining that it was his strategy to obtain an acquittal on the attempted murder charge and "hang on the serious charges" in order to force the prosecution to make an

offer. When he achieved that outcome, the prosecution did indeed make the offer of 23 years, which defense counsel conveyed to defendant and recommended that he accept. Counsel stated that, despite his attempts to dissuade him otherwise, defendant felt they "could do the same thing again" in the second trial. Defense counsel told defendant, "you know, the first time, they don't see us coming. The second time, they are ready for us." Counsel said he conveyed the prosecution's offer to defendant's family members and told them that they "should talk to him."

After a brief discussion regarding defendant's potential maximum sentencing exposure, defense counsel said, "Your Honor, I think I was trying to explain best case scenario. Life is gray. [Defendant] is going to get 17, and they are offering 23." The court replied, "I understand that you were thinking, the judge could go ten, and then impose the time on the attempted robberies. Got it. Okay." A discussion between defendant and the court ensued:

"[Defendant]: Your Honor, [defense counsel] told me 17 was my max. He told me 17 years was my max.

"[The Court]: And he is recommending you to take the deal for 23?

"[Defendant]: Yes.

"[The Court]: Well, how would that be?

"[Defendant]: What do you mean?

"[The Court]: Why would he tell you 17 is max. He said the D.A. is offering 23.

"[Defendant]: No. He said if I were to beat the charges, 17 years would have been my max, which I probably would have gotten--but this was before, you know, that was offered."

The trial court denied the motion. The court noted that defense counsel "got [defendant] acquitted on the attempt [sic] murder, which was quite an accomplishment," and "hung up the jury relative to this 10/20 life enhancement at the time." The court noted further that the prosecution's case was much stronger in the second trial due to the fact that the prosecution was prepared to address any and all defense tactics, having been made fully aware of those tactics in the first trial. Consequently, there was little if anything defense counsel could do that the prosecution would not be prepared for.

The trial court remarked, "I think you were certainly given a very vigorous defense throughout the course of this trial. You had a set of very inconvenient facts that there were only two guns fired, and forensic [sic] has pretty much showed that that bullet didn't come from the store owner's gun. . . . I think your testimony, you ultimately had to come in conceding that it must have been your gun, so, gee, it must have just been an accident. That's pretty tough defense to make about guns going off accidentally. I recall that your attorney cross-examined the forensic expert about accidental discharges and alike [sic]. [¶] So, to the extent that there are conflicts between yourself and [defense counsel] this morning, I certainly do give credibility to what [defense counsel] has represented."

The trial court denied defendant's *Marsden* motion, concluding defense counsel properly represented defendant and would be able to continue to do so for purposes of the motion for new trial and sentencing.

Defendant's claim that the trial court failed to make an adequate inquiry into defendant's request for substitute counsel is plainly refuted by the record. The trial court allowed defendant the opportunity to explain his complaints about counsel's performance. Defense counsel responded to each complaint. The court listened to defendant's complaints, interrupting only to make an inquiry or interject a relevant thought, and sought clarification whenever necessary. This was more than sufficient to satisfy the court's duty of inquiry. (*People v. Silva* (2001) 25 Cal.4th 345, 366-367.)

The trial court's ruling was well within its discretion. While defense counsel seemed to defer to defendant's recollection of the number of times they met for the second trial, counsel explained that he met with defendant almost daily during the first trial, but that defendant's concession of various issues and the fact that there would likely be nothing new presented that had not already been raised in the first trial alleviated the need to meet with the same frequency for purposes of the second trial.

Regarding communication of the plea offer, defendant admits that he and defense counsel had a "discussion of a 23-year plea bargain" in a 15-minute meeting that took place sometime shortly after the verdict was announced in the first trial. Defendant

told the court that, "after my first trial, [defense counsel] came and . . . told me that they had offered me a 23-year deal."

Defense counsel directly addressed defendant's claims that they "never went over [the plea offer] that well," and that defense counsel never told him he should take the deal. Counsel stated that he "convey[ed] all offers" to defendant and recommended that defendant accept the 23-year deal, explaining to him, "You are essentially arguing about 36 months," and even if he were acquitted on the life enhancements, "it gets real close to about 17 or 18" years so "why risk it?" In that regard, the trial court "specifically recall[ed]" a meeting when the case was first assigned for trial wherein counsel and the court discussed that "the D.A. had made an offer" that defense counsel thought was "not an unreasonable offer all things considered," and that defense counsel conveyed the offer to defendant.

Defense counsel also explained that, despite his recommendation that defendant accept the offer, defendant insisted that, given the good result in the first trial, they could "do the same thing again." Counsel told defendant, "the first time, they don't see us coming. The second time, they are ready for us." Defense counsel also conveyed the plea offer to defendant's family members and told them they should talk to defendant about it.

As for defendant's claim of confusion over the retrial, defense counsel said he believed he "had straightened that out." Defendant confirmed that the enhancements were alleged by the

prosecution during the first trial, a fact pointed out to him by defense counsel, though defendant claimed he "[did not] remember hearing it at all." However, while he claimed he thought he "had a hung jury on the attempted murder charge," and claimed he only learned of the charged enhancements against him when he happened to "look[] over at the police's paper" during the second trial and saw that he "was acquitted on my attempted murder," he confirmed to the court that he was present during the reading of the verdict following the first trial, and heard, "[a]ttempted murder, not guilty." We also note the record is devoid of any mention of defendant complaining to defense counsel or the court after purportedly discovering the true charges for which he was being retried.

Defendant argues the plea offer of 23 years was so confusing he "cannot figure out how it was calculated" now, and therefore could not have understood it then. He then calculates a sentence of 17 years had he "received the maximum for attempted robbery and assuming consecutive sentencing," and claims he cannot understand how the prosecution arrived at an offer of 23 years.

It is not clear to us what is confusing about the fact that the prosecution offered defendant a sentence that was six years more than the maximum 17-year sentence to which he was exposed *before* the second trial on the two section 12022.53 enhancements, but was significantly less than the life sentence to which he would be exposed in the second trial.

Defendant attempts to demonstrate that the trial court was equally perplexed by the proposed 23-year deal when, in response to defendant's statement that defense counsel "told me 17 years was my max," the court asked, "Why would he tell you 17 is max. He said the D.A. is offering 23." The argument is unavailing because defendant omits the most telling portion of the exchange, in which he responded to the court, "No. [Defense counsel] said if I were to beat the charges, 17 years would have been my max, which I probably would have gotten--*but this was before, you know, that was offered.*" (Italics added.) The colloquy, read in its entirety, reflects that the court was not confused; instead, the court's question was clearly designed to clarify the point that defendant was told 17 years was his maximum potential sentence based on the convictions following the first trial, but the 23-year offer was based on defendant's exposure in the second trial.

We find no abuse of discretion in the court's denial of defendant's *Marsden* motion. Defendant's allegations that his trial attorney failed to spend sufficient time with him, to explain the 23-year plea offer, and to explain the purpose for the retrial, were adequately addressed by defense counsel's responses and by the record. Defendant has not demonstrated an irreconcilable conflict with counsel that impaired his right to assistance of counsel. (*People v. Smith, supra*, 6 Cal.4th at p. 696.)

DISPOSITION

The judgment is affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.