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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY ACOSTA,

Defendant and Appellant.

E053382

(Super.Ct.No. FVI902489)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Michelle Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Johnny Acosta of first degree murder (count 1—Pen. Code § 187, subd. (a)).¹ The jury additionally found true allegations defendant personally used a deadly and dangerous weapon, a hammer, in committing the count 1 offense; had incurred two prior strike convictions; and two prior serious felony convictions. The court sentenced defendant to an aggregate term of incarceration of 81 years to life. On appeal, defendant contends the court erred in not instructing the jury with CALCRIM No. 627 on its own motion, and in not holding a constitutionally adequate *Marsden* hearing.² We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On November 9, 2009, defendant went to the home of his niece, Monica Steel, to visit her and her grandmother. Defendant, Steel, and Steel’s daughter then left to visit Steel’s cousin Irene³ at her new home; defendant drove. Steel testified that on the ride over, defendant “couldn’t comprehend what [she] was saying.”

When they arrived, Steel’s aunt and defendant’s sister, Debra Lucero; Irene; Irene’s three daughters; and Joy Stankewitz, a family friend, were already there. The victim, a cable installer, was in the family room installing cable.

Defendant left the room with Lucero to go to the garage in order to smoke a cigarette. Defendant was “fidgety and bouncing around.” He was skipping, jumping,

¹ All further statutory references are to the Penal Code unless indicated.

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

³ The trial transcripts do not disclose Irene’s last name.

and hitting the walls and garage door opener with his hands. Lucero asked defendant why he was behaving so strangely and whether he was on drugs. Defendant replied that he was on drugs; he said “it doesn’t stop talking to me, the voices I’m hearing.”

Stankewitz testified she followed defendant and Lucero into the garage shortly thereafter. When she arrived, Lucero told her defendant was on methamphetamine and acting agitated. She testified defendant’s eyes looked “empty.” She remembered seeing a hammer in the garage, on the ground, laid against the wall. Stankewitz went back into the house and into another room.

After approximately 10 minutes, defendant picked up something in the garage and walked back into the family room. Steel testified it looked like defendant was carrying a hammer. Defendant’s facial expression was “just blank.”

Lucero testified that while she was still in the garage, she heard kids screaming after defendant reentered the house. She ran inside. There was a commotion in the corner of the room where the TV was located; defendant was at the center of the commotion; “I felt it had to have been my brother.” Lucero saw the victim on the floor next to the television; he was not moving.

Stankewitz testified she heard glass break, went into the family room, and saw Lucero holding defendant against the window; she saw the victim’s legs. She got the kids and went outside. Steel was unable to describe what happened, saying she just went black in her head, heard screaming, and got the kids outside. She was interviewed that day by a detective whom she told she saw defendant “take the sledge hammer . . . and slam the guy several times in the head with it.”

Defendant left the house. Lucero called 911. Stankewitz also testified she called 911 and told the dispatcher they needed an ambulance because someone had been hurt.

Deputy Sheriff Brian Quintard was dispatched to the residence shortly after 4:30 p.m. As Deputy Quintard pulled up to the home, several people outside flagged him down; they asked him to go inside and check if the victim was dead. He went inside the home where he saw the victim lying on his back on the floor with “a large pool of blood around his head.” There was a ball-peen hammer lying in the blood “about a foot or two away from his body.” The victim gave out a gasp for air.

Deputy Quintard radioed for the ambulance service to hurry up. “[T]he left side of [the victim’s] head had [sustained] severe head trauma.” “It looked like there was holes in the . . . head.” When the ambulance personnel arrived, they attempted to resuscitate the victim for 10 to 15 minutes. They then transported him to the hospital.

Detective Jerry Shelton was dispatched to help locate defendant. Detective Shelton found him standing in front of a gas station mini-mart. Defendant was “[c]alm and cooperative.” Defendant was transported to the police station.

Detective Scott Cannon testified that when he interviewed Steel that day, she told him she saw defendant walk up to the victim with a hammer, begin shouting at him, called him a son of a bitch, and struck him in the head with the hammer; the victim fell to the ground and defendant struck him five to six more times; Lucero intervened and defendant left. In Detective Cannon’s interview with Lucero, she told him she saw her brother “striking the victim as he lay on the ground.” She saw a lot of blood. Stankewitz told him she saw the victim laying on the ground after the attack; there was a lot of blood.

Crime Scene Specialist Michelle Alcantara testified she found and photographed a 16-inch long hammer in a pool of blood at the scene. She took it to the medical examiner at his request. Crime Scene Specialist Kathy Schnell testified the blood spatter in the vicinity was “consistent with someone who was repeatedly hit with” the ball-peen hammer found nearby “in a very forceful and rapid fashion repeatedly.”

Dr. Steven Trenkle performed the autopsy of the victim on November 11, 2009. His first observation was “there was a lot of blood, dried blood, that was present on the face and the scalp.” “Because in this case he did have a considerable amount of dried blood on the body, we washed the body. His specific injuries are primarily about his head.” The victim had “aspirated blood, so there was bleeding in the back of the throat essentially, and he had inhaled, as he was breathing, inhaled some of that blood into the lungs.” “All of the injuries [the victim] had were blunt force injuries, and from the surface they were a combination of abrasions, lacerations, and contusions or bruises. ¶ Internally he had a lot of skull fractures and internal injury to the brain.”

“[T]he skull was massively fractured. There were multiple fractures, and the fractures went across the base of the skull. The frontal bones where the eyes are, underneath those, the bone was fractured, and across the base of the skull from the right side to the left side.” The victim’s injuries were consistent with blows received from the ball-peen hammer brought to him by Alcantara. The cause of death was the infliction of “[m]ultiple blunt head injuries.”

Detective Steven Pennington interviewed defendant that evening at about 8:00 p.m. “On [defendant’s] shirt, on the chest area was an area of . . . blood transfer, blood

smears. His lower pant legs were saturated with blood. He had blood in his shoes.”

After Detective Pennington read defendant his rights, defendant waived them and agreed to speak with Detective Pennington. Defendant stated he had smoked methamphetamine that morning and had been using daily.

Defendant reported, “I just lost my mind I guess. I mean I honestly lost my mind. I did a bunch of speed. I’ve been smoking speed for a while . . . and I just lost my mind.” “I hurt that man, I did it. [O]k I did it.” “I think he was working on the TV and I just went over there and killed him.” He obtained the hammer from the garage next to the water heater. “I think [the victim] was, he [was] kneeling down or somethin[g] probably kneeling down. And I, I came up from behind him and I killed him.” “I hit him hard.” Defendant denied hearing any voices.

Defendant stated he called 911 from the market next to a Chevron station in order to turn himself in. “[M]aybe I said to myself, maybe I’ll be better off in prison or in jail. . . . [M]aybe I would be safer in jail.” Detective Pennington observed during the interview that defendant’s behavior was not consistent with methamphetamine use: “when you first came in here . . . you were real calm and dealing with tweakers^[4] you know they’re all over the place[.]” Detective Pennington testified he did not observe any signs of methamphetamine use in defendant’s behavior during the interview. Nonetheless, a blood draw of defendant at the time reflected the presence of both methamphetamine and alcohol.

⁴ A “tweaker” is someone who regularly uses and abuses methamphetamine.

Prior to trial, defense counsel expressed a doubt regarding defendant's mental competency to stand for trial. The court stayed proceedings to permit a psychological evaluation of defendant. After evaluating defendant, Dr. Alvin Chandler compiled a report in which he noted defendant reported no prior history of psychological treatment. Nonetheless, defendant reported hearing and seeing things since 1992. He reported drinking and taking cocaine and methamphetamine since the eighth grade.

Dr. Chandler observed defendant's "affect was often not consistent with the content of the interview. This lack of consistency left a sense of possible conscious deception, on the part of the defendant. . . . His medical records did not indicate any concern over possible serious psychiatric issues by any of the medical or mental health experts, who documented their observations and opinions in his medical records. He was manipulative, demanding, intelligent and intimidating in his interactions. . . . [Defendant] frequently interrupted the conversation and directed it to the issues that he wanted to address, especially as it related to his alleged history of a psychotic disorder."

Dr. Chandler concluded there were a number of reasons why it was unlikely defendant had a psychotic disorder. "[T]est result[s] clearly indicat[e] that [defendant was] malingering, in an effort to avoid criminal prosecution." "The defendant appears to have falsely reported active symptoms of a serious mental disorder." The court found defendant competent to stand for trial.

Defendant testified he had ingested copious amounts of methamphetamine and had been drinking before arriving at Steel's home. He had been using methamphetamine daily for more than two years. "I started hearing things." "I've been hearing things for a

long time”; for 30 years, even before he started using methamphetamine. When he used methamphetamine, he would hear the voices more. “I get messages from the . . . police and from the radios, televisions.”

The voices told him to kill police. The voices told him “to kill or be killed.” The voices tell him “to keep the population down, to regulate the population, you have to—eventually—you’re going to be called to kill somebody or you’re going to be killed.” He thought about killing earlier in the day.

While he was in the garage smoking, he saw the police drive up the cul-de-sac and park across the street.⁵ When he saw the police car he thought that if he didn’t kill someone they were going to kill him. The voice said “go in there and kill.” The voice was controlling him. That was when he grabbed the hammer in the garage in order to kill someone. He went inside the house with the intent to kill. Defendant killed the victim by beating the victim about his head with the hammer. He did not know why he killed the victim. He believes it is wrong to kill.

Dr. Michael Kania, a clinical forensic psychologist, spoke with defendant on December 23, and 26, 2010. Defendant reported heavy use of methamphetamine and the harboring of paranoid delusional beliefs. He reported the mafia and government were sending him messages over the TV and radio to control the population by killing people. Prolonged use of methamphetamine exacerbates the symptoms of someone suffering

⁵ Lucero testified a police officer lived across the street and she would often see his police vehicle. On the day of the killing, she saw two police cars on the street outside while she was in the garage with defendant.

from paranoid delusions. Defendant's presentation was in conformity with those reports. Dr. Kania opined defendant suffered from paranoid schizophrenia for a number of years, which had been worsened by his use of methamphetamine.

Defendant had prior convictions in 1993 for voluntary manslaughter, attempted forcible rape, assault with a deadly weapon, and false imprisonment. Dr. Kania had evaluated defendant in 1993, though he did not remember having done so when he evaluated defendant and wrote the report in the current case. In subsequently looking at his previous report, he noted there was no indication of defendant's psychosis. Defendant did not report hearing voices or having any directions to kill during that previous interview. Nonetheless, during his most recent interviews with defendant, defendant reported he had heard voices when he committed the previous crimes.

Dr. Kania did not read Dr. Chandler's report dated January 12, 2010, regarding defendant's competency to stand for trial. He testified he would be interested in reading the report to the extent it reflected on defendant's propensity for malingering. Dr. Kania's own report reflected "that [defendant's] responses to the testing suggest conscious overstatement of his level of disturbance, raising the possib[ilty] of malingering." Dr. Kania did not listen to the recordings of defendant's interview with the police; if defendant had denied hearing voices at the time of the crime, that would be something he would have wished to consider in rendering a diagnosis.

DISCUSSION

A. CALCRIM NO. 627

Defendant contends the court should have instructed the jury on its own motion with CALCRIM No. 627, hallucination and its effect on the jury's determination of premeditation and deliberation. He maintains the court's failure to do so violated his constitutional right to due process by prejudicially lowering the People's burden to prove defendant's intent in committing the murder. We hold that CALCRIM No. 627 is a pinpoint instruction, which the court has no sua sponte duty to give.

“[E]vidence of a hallucination—a perception with no objective reality—is admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder.” (*People v. Padilla* (2002) 103 Cal.App.4th 675, 677.)

CALCRIM No. 627 provides: “A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening. [¶] You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder.”

The trial court has a sua sponte duty to give defense instructions supported by substantial evidence and consistent with the defendant's theory of the case. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195; *People v. Baker* (1999) 74 Cal.App.4th 243,

252.) However, instructions that relate “particular facts to the elements of the offense charged” are pinpoint instructions that a trial court has no sua sponte duty to issue to a jury. (*Barton*, at p. 197.)

“[E]vidence ‘proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt’ may, but only upon request, justify the giving of a pinpoint instruction that ‘does not involve a “general principle of law” as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court.’ [Citation.] ‘Such instructions relate particular facts to a legal issue in the case or “pinpoint” the crux of a defendant’s case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte.’ [Citation.]” (*People v. Jennings* (2010) 50 Cal.4th 616, 674-675 [finding trial court not required to give sua sponte instruction on “complete defense” of accident that would negate the intent element necessary for first degree murder convictions where defense hinged on facts particular to the case and the defendant failed to request the instruction]; *People v. Saille* (1991) 54 Cal.3d 1103, 1107 [trial court had no duty to instruct jury on voluntary intoxication on its own motion in order to negate intent element of premeditated murder where evidence is not a defense, but an attempt to raise a doubt]; *People v. Ervin* (2000) 22 Cal.4th 48, 91 [trial court had no duty to instruct on mental disorder on its own motion in premeditated murder case where instruction not requested].)

Here, to the extent defendant maintained his hallucinations precluded him from manifesting the requisite deliberation and premeditation to be convicted of first degree murder, he was attempting to raise a doubt regarding the intent element of the crime based on facts particular to his case, rather than raising a defense based on a general principle of law. In other words, “hallucination” is not a general defense, but rather a theory that attempts to negate the intent element of the crime depending upon the individual facts attached to a specific case. Thus, a court is not required to instruct with CALCRIM No. 627 without a specific request to do so.

Here, defendant did not request the court instruct the jury with CALCRIM No. 627, though he was given opportunity to do so. Defendant requested the court instruct the jury with CALCRIM No. 625, voluntary intoxication, which is likewise a pinpoint instruction the court is not required to give without a request. (*People v. Saille, supra*, 54 Cal.3d at pp. 1119-1120.) The court instructed the jury with CALCRIM No. 625. Thus, even though evidence was adduced at trial that would have supported giving CALCRIM No. 627, the court was not required to do so without a request from defendant.⁶

B. MARSDEN HEARING

Defendant contends the court committed prejudicial error by failing to provide him with an adequate hearing to permit elucidation of his concerns with defense

⁶ In defendant’s reply brief he raises, for the first time, a contention that defense counsel was constitutionally ineffective for failing to request the court instruct the jury with CALCRIM No. 627. “It is axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party.” (*People v. Tully* (2012) 54 Cal.4th 952, 1075.) Thus, we deem defendant’s claim of ineffective assistance of counsel forfeited for failure to raise it in the opening brief.

counsel's performance; thus, effectively barring him from establishing whether defense counsel was failing to provide constitutionally adequate representation. We disagree.

Prior to trial on February 25, 2011, the court heard defendant's *Marsden* motion to relieve his appointed counsel and appoint him new counsel. Defendant contended defense counsel had a bad attitude toward him, had not seen him in 16 months, and that defendant was not receiving treatment for his diagnosed mental health condition of paranoid schizophrenia. The court denied the motion.

On March 11, 2011, likewise prior to trial, defendant again moved to dismiss his appointed counsel. The court ordered the courtroom cleared and heard defendant's *Marsden* motion. Defendant maintained defense counsel told him he had no chance of winning, and he was still not receiving psychological help. The court denied the motion.

On March 17, 2011, in the middle of the People's case-in-chief, as the People questioned one of its witnesses on direct, defendant stated, "He's trying to railroad me, this guy here. He calls me a killer." The court told the witness to cease her testimony as defendant declared, "Railroading me." The court excluded the jury and witness from the court room and informed defendant it was not in his interest to say anything in front of the jury unless he was on the witness stand.

Defendant informed the court, "I just feel my lawyer is railroading me. He doesn't want to communicate with me. Yesterday I had an argument with him. He didn't want to talk to me. He said, I don't want to talk to you. How do you think I feel? This man representing me has an attitude with me in this situation in a murder trial. I don't feel comfortable. I don't like my representation at all. This is not fair to me." The court

informed defendant it would do everything it could to preserve the trial and ensure its fairness, including excluding defendant from trial if necessary. The court observed, “I don’t know what it is that is in your mind, but this is not the time for a *Marsden* hearing. That’s already happened. In fact, you had two and both of them were denied.” The court declared that defense counsel “is a very skilled attorney. He can represent you. He says he can represent you. There’s already been a determination made.”

Defendant retorted, “I’m trying to communicate with him. We have a communication problem. I don’t think that’s a very good choice to have this man represent me when we have a communication problem. We can’t talk to each other. We’re not on the same page.” The court noted defense counsel could not talk to defendant while witnesses were being examined because he had to pay attention to the testimony. Defendant responded: “Even when we’re not in trial. We have a communication problem. We have no communication at all. I’m totally in left field with this man, and yet you apply him to me. I don’t feel that’s right. I don’t feel you’re making a right decision, Judge—your Honor.” The court reprimanded defendant to either behave himself or be excluded from the proceedings. The court had the jurors brought back into the courtroom and directed them to disregard anything they heard regarding the incident.

The People continued their examination of the preceding witness, and called three additional witnesses. The court then engaged in the following colloquy with defendant and defense counsel outside the jury’s presence, but within the presence of the People:

“The Court: . . . I’ve noticed since the time of this morning’s unsolicited comments from you, [defendant], that you have spent quite a bit of time with head huddled with [defense counsel] and you speaking to him, him speaking back to you. [¶] What is it now? Are you saying that he’s not talking to you still?

“[D]efendant: I was asking him about certain things like my paperwork.

“The Court: I really don’t want you to tell me what the nature of the conversation was. I’m saying, are you still saying that you’re not able to communicate with [defense counsel]?

“[D]efendant: We have a communication problem.

“The Court: And the communication problem is?

“[D]efendant: It seems like it’s personal. I don’t know what his problem is. It seems like he has a personal thing. Maybe it’s—it’s the whole case itself, the nature of it. Maybe it’s really distasteful to him or something, but I had a—interview with him back at the jail—

“[Defense Counsel]: We’re not going to talk about what we discussed.

“The Court: I think it’s time you listen very, very carefully. All I asked you is if it is still your opinion that you’re not—that there’s no communication between you and [defense counsel]?

“[D]efendant: Only barely now that you’ve mentioned it, you know, just a little while ago that you are—now I’m starting to see some slight changes in his demeanor with me, his communication is starting to change at this point right now at this stage, and

I think that we're far into the stage. It should have been like this a long time ago, and it barely started a couple minutes ago.

“The Court: That would be inconsistent with my observations of what's happened throughout the course of this trial. I was watching during jury selection. [Defense counsel] would talk to you before exercising peremptory challenges, and you were talking back and forth about the make up of the panel that was selected. There was clearly communication in my opinion. [¶] I've heard him over the—seen him consulting you over the course of this trial so far, not just today, about what questions you think there might be that should be asked of any particular witness. He's consulting you on that subject or talking to you about that. It seems that there isn't a sudden communication between you and your attorney, but at least you're indicating to me that you're communicating at this time; is that right?

“[D]efendant: He may be a very skilled lawyer, but he's very unprofessional, and he's throwing paperwork at me like this here (indicating). You think that's professional at this point in time?

“The Court: I've seen nothing of that sort. The record should reflect that you seem to have just picked up a piece of paper and sort of—

“[D]efendant: I was just displaying what you're asking me about all this. I'm telling you that that is his demeanor, this was his action to me. I didn't like that, you know. So I threw paperwork back at him, you know. I don't think that was professional for him to—my lawyer.

“The Court: Okay. [Defense counsel], did you throw papers at your client?

“[Defense Counsel]: No.

“The Court: [Defense counsel], are you refusing to talk to your client?

“[Defense Counsel]: No.

“[D]efendant: Yesterday he refused to talk to me.

“[Defense Counsel]: Don’t talk about what we talk about. Just answer the questions.

“[D]efendant: No, I’ve—

“The Court: [Defense counsel], how many murder trials have you handled?

“[Defense Counsel]: I think we’re in the mid-80 cases now.

“The Court: So in all those cases, was your client—in all of the murder trials, was your client accused of murder?

“[Defense Counsel]: Yes.

“The Court: Is this case one that is so disgusting or appalling to you that it leaves you angry at [defendant] in such a way that you feel that that interferes with you ability to represent him?

“[Defense Counsel]: No, your Honor. After doing this this long, the nature of the case is not something that I consider. I just do my job.

“The Court: All right. I think this record is sufficient. I’m not going to go further. I’m not going to do any further hearing on it at this point. I just wanted to put my observations on the record and give everybody a chance to make their comments.”

““When a defendant seeks substitution of appointed counsel pursuant to *Marsden*[,] “the trial court must permit the defendant to explain the basis of his

contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” [Citation.] ‘A trial court should grant a defendant’s *Marsden* motion only when the defendant has made “a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.” [Citation.]’ (*People v. Streeter* (2012) 54 Cal.4th 205, 230.) “‘We review the denial of a *Marsden* motion for abuse of discretion.’ [Citation.] ‘Denial is not an abuse of discretion “unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.” [Citation.]’ (*Ibid.*)

Defendant maintains the court’s failure to conduct a *Marsden* hearing outside the presence of the People immediately following his outburst during trial resulted in prejudicial error because defendant could have disclosed information that his counsel was providing ineffective assistance such that the court would have been required to remove defense counsel and appoint new counsel. Although we agree that the better practice would have been to immediately hold an *in camera* hearing outside the presence of the People, in which the court could have examined defendant and defense counsel regarding the precise areas of defendant’s discontent, we find no prejudice. (*People v. Madrid* (1985) 168 Cal.App.3d 14, 19 (*Madrid*) [“We believe the better practice is to exclude the district attorney when a timely request is made to do so by the defendant or his counsel. In the absence of a request, the trial court should exclude the district attorney whenever

information would be presented during the hearing to which the district attorney is not entitled, or which could conceivably lighten the prosecution's burden of proving its case. [Citation.]”.)

Here, as the court observed, defense counsel did not have the opportunity to communicate at length with defendant while the trial was ongoing. Defense counsel was required to pay attention to the witnesses' testimony so he could effectively prepare defendant's defense. Moreover, the court noted that it had seen defense counsel interact with defendant during the trial. Although the court's observations cannot be the sole basis upon which to deny a *Marsden* motion, here, the court also examined defense counsel regarding the complaints made by defendant; defense counsel stated he had not refused to communicate with defendant.

On this cold record, we can neither contradict the court's observations that defense counsel was communicating with defendant both before and after defendant's outburst, nor can we override the court's obvious factual determination that it believed defense counsel's assertion that there was no communication problem, over defendant's claim to the contrary. Indeed, even defendant acknowledged that his communication with defense counsel had improved since his initial outburst. Furthermore, it is unlikely defense counsel would have had much additional opportunity to communicate with his client at length during the subsequent examination of four witnesses by the People for the very reasons stated by the court; thus, defendant was not prejudiced by the delay between his initial outburst and the court's hearing on the matter. Likewise, defendant's two pretrial *Marsden* hearings were based, at least in part, on claims of inadequate communication.

The courts' denial of those motions support this court's ultimate conclusion there was no failure to communicate, because defense counsel had much more opportunity to communicate with his client prior to trial.

Finally, defendant's claim that he was prejudiced by the People's presence at the subsequent hearing on his complaints because he was effectively chilled from expressing all his bases of disgruntlement with defense counsel for fear of disclosing confidential information, is simply not borne by the record. Neither defendant nor defense counsel made any request that the trial court exclude the People from the hearing. (*Madrid, supra*, 168 Cal.App.3d at p. 19.) As that court noted, "no single, inflexible procedure exists for conducting a *Marsden* inquiry. Indeed, several of the reported decisions reveal the presence of the district attorney during the *Marsden* hearing. [Citations.]" (*Id.* at p. 18.)

Here, the trial court conducted the hearing in a manner in which it thought best, considering the particular circumstances of the procedural posture of the case. "The procedural parameters of the *Marsden* inquiry should be shaped by the particular facts and interests involved. The trial court is in the best position to assess whether the defendant's motion, as here, is frivolous or for purposes of delay and can be most expeditiously handled in open court so the court can efficiently manage its calendar." (*Madrid, supra*, 168 Cal.App.3d at p. 19.) "The trial court did not abuse its discretion by failing to exclude the district attorney from the *Marsden* hearing when [the defendant] did not object to the district attorney's presence until after a full *Marsden* inquiry had been conducted and his stated basis for the motion did not indicate he would disclose any

inappropriate information to the prosecution.” (*Id.* at pp. 19-20.) Here, defendant did not object to the People’s presence at the hearing either before or after the hearing, and defendant never indicated any confidential basis for seeking to have defense counsel relieved. Thus, the court acted within its discretion in both the manner in which it held the hearing and in implicitly denying defendant’s request.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.