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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.

DAVID DION GARCIA,

Defendant and Appellant.

E053503

(Super.Ct.No. FMB900221)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Reversed with directions.

Kevin D. Sheehy, 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, Susan Miller, and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant David Dion Garcia appeals after he was convicted of several offenses arising from a shooting incident in the home of a friend. Defendant raises a number of contentions: the court erred in failing to hold a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)), the evidence was insufficient to support certain charges or findings, one of the firearm enhancements should have been dismissed, the court incorrectly calculated defendant's presentence custody credits, and the abstract of judgment failed to correctly reflect that the sentences on certain counts should run concurrently. We agree with defendant that certain errors should be corrected (dismissal of one firearm enhancement, custody credits, correcting the abstract of judgment to reflect concurrent sentences). We also agree that the court erred in failing to hold a *Marsden* hearing. We therefore reverse the judgment, but for the limited purpose only of conducting a *Marsden* hearing and taking such further steps as that hearing may require. If, however, the *Marsden* motion is not granted, or if it is granted but newly appointed counsel does not file a new trial motion, or if a new trial motion is filed and denied, then the judgment will be reinstated, subject to the corrections indicated above.

FACTS AND PROCEDURAL HISTORY

In November of 2008, Bernardo Aguilar and Pam Perez were living in a residence in Twentynine Palms. A friend, Cindy Johnson, and her two children had been staying with Aguilar and Perez for a few weeks. On the evening of November 6, 2008, about 8:00 p.m., Aguilar and Perez were asleep in the back bedroom. Johnson and her children were asleep in the front room, occupying the couches and a mattress.

Defendant, accompanied by his girlfriend, Margaret Benavente, pounded on the front door. Johnson awoke and answered the door. Defendant wanted to talk to Bernardo Aguilar. Johnson admitted defendant and Benavente, and then went to fetch Aguilar from the back bedroom. Aguilar came out to the front room; defendant asked Aguilar to give him and Benavente a ride to a friend's house. Aguilar went back into the bedroom and asked Perez to drive defendant and Benavente where they wanted to go. Perez prepared to do so, but when she went to the front room, defendant asked her to wait a while because his friend was not yet at home.

Perez returned to the back bedroom to wait. She was accompanied by Johnson. Aguilar went out to the front room again to talk to defendant. Throughout this time, Johnson's children remained asleep in the front room.

Defendant suddenly became extremely agitated, and yelled at Aguilar, "Who are you talking to, Bernie?" Defendant pulled out a gun and fired several shots at the wall, repeatedly crying out, "Tell him to get back," or "Tell him to get away." Although Aguilar and Benavente did not see anyone, they attempted to ease defendant's agitation by going along with him; they shouted "get back" and "get away" at what was apparently a phantom intruder.

When defendant fired his pistol, both of Johnson's children awoke, startled. Johnson's son started up, but Aguilar motioned for him to lie down again. Johnson's daughter covered her head. Perez, in the back bedroom, heard the shots and called 911

on her cell phone. Perez told the operator that defendant was “flipping out,” and he had shot the wall.

Benavente grabbed defendant and tried to hide in a closet in the front room. Aguilar took that opportunity to hustle the children, Johnson, and Perez out of the house through the back door. Aguilar took the phone from Perez, and continued the conversation with the 911 operator. Aguilar said that defendant had come over to ask for a ride, but that he had then flipped out and acted like he was seeing someone who was not there. Aguilar reported that defendant was armed with a nine-millimeter handgun.

Police responded to the scene and surrounded the house. Believing that defendant might be holding Benavente, defendant’s girlfriend, hostage, the SWAT team was called into service. After a standoff lasting two or three hours, the SWAT team members decided to take action. As they stormed in, they saw defendant and Benavente lying on the floor in the closet in the front room. The handgun was also on the floor near defendant.

Defendant was arrested. A search turned up a baggie of marijuana and a baggie of methamphetamine on the floor. Benavente also had a glass pipe and another baggie of methamphetamine in her purse. Forensic testing showed that defendant had gunshot residue on his left hand. Benavente had gunshot residue on both hands.

Defendant was charged with (1) grossly negligent discharge of a firearm (Pen. Code, § 246.3, subd. (a)) (count 1); (2) possession of a controlled substance (methamphetamine) while possessing a firearm (Health & Saf. Code, § 11370.1, subd.

(a)) (count 2); (3) being a felon in possession of a firearm (Pen. Code, former § 12021, subd. (a)) (count 3); (4) felony child abuse as to Johnson's children, under circumstances likely to cause great bodily injury or death (Pen. Code, § 273a, subd. (a)) (count 4); and (5) possession of a controlled substance (Health & Saf. Code, § 11377) (count 5). The information also alleged that defendant personally used a firearm in the commission of all the offenses (Pen. Code, § 12022.5, subd. (a)), that defendant had suffered one prior serious or violent felony conviction (Pen. Code, § 667, subd. (a)), and that defendant suffered one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

The jury found defendant guilty as charged on all counts, and found true the allegation that defendant had personally used a firearm in the commission of all the offenses. In a bifurcated proceeding, the jury also found true that defendant had suffered a prior serious or violent felony conviction, and a prior strike conviction.

At sentencing, the court selected count 4 (felony child abuse) as the principal term, and imposed a second-strike sentence of 12 years, plus 10 years for the firearm enhancement. The court imposed two years for count 2 (possession of a controlled substance while armed), i.e., it doubled one-third of the middle term on that count. The court also added five years for the prior serious felony conviction (Pen. Code, § 667, subd. (a)). The sentences on counts 1, 3 and 5 were stayed. Defendant's total prison commitment was thus 29 years.

Defendant appeals, raising several contentions concerning sufficiency of the evidence and other procedural matters.

ANALYSIS

I. The Evidence Was Sufficient to Sustain a True Finding That Defendant Personally Used a Firearm

Defendant contends that the evidence was insufficient to support a true finding on the gun use enhancement as to any count. Although he couches his contention in terms of a violation of his due process rights, the gravamen of defendant's argument is that the evidence was insufficient to show that he personally fired the gun. The standard of review for claims of insufficiency of the evidence is whether the entire record, considered in the light most favorable to the prosecution, discloses substantial evidence—i.e., evidence that is reasonable, credible, and of solid value—from which the trier of fact could have found the elements of the offense, beyond a reasonable doubt. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576, citing *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) The same standard applies to enhancement findings. (See, e.g., *People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 484; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.)

“But it is the *jury*, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely

because it believes that the circumstances might also support a contrary finding. [Citations.]” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) “Thus, in evaluating a claim of insufficiency of the evidence, the test is not whether we ourselves are convinced that the evidence proves the defendant guilty beyond a reasonable doubt, but whether sufficient substantial evidence supports the jury’s conclusion that it does. [Citation.] Only if it clearly appears ‘that upon no hypothesis whatever is there sufficient substantial evidence’ to support the verdict may we reverse. [Citation.]” (*People v. Poindexter* (2006) 144 Cal.App.4th 572, 577.)

Defendant urges that the prosecution failed to prove the gun use enhancement, because the evidence showed that he did not “use” the firearm “in the commission of” any of the charged crimes. The evidence indicated that defendant suddenly began “flipping out,” and appeared to see someone who was not there; he shot the gun at the phantom person, and not “in the commission of,” or in order to aid or further, any of the charged crimes, such as possession of drugs (counts 2 & 5), child abuse (count 4), felon in possession of a firearm (count 3), or grossly negligent discharge of a firearm (count 1). Defendant acknowledges that, “‘when a defendant deliberately shows a gun, . . . and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure.’” (*People v. Wilson, supra*, 44 Cal.4th 758, 806-807.) He argues, however, that any “use” of the firearm here was merely incidental to the charged crimes, because there was a purpose other than

intimidating someone to facilitate completion of the underlying crimes (in a dissociative and delusional state, shooting at a phantom). There was no evidence that defendant used the weapon to keep or facilitate possession of the drugs. There was no evidence that he knew or realized that the children were present, or that he intended to scare or otherwise harm either child. There was no evidence that defendant intended to discharge the firearm recklessly at any actual person. He did not display or shoot the gun in order to facilitate his possession of the gun. Thus, defendant argues, the enhancements cannot be sustained.

Defendant has misconstrued the scope of the firearm use enhancement. Penal Code section 12022.5, subdivision (a), provides: “(a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.” The statute requires only a general intent to use the firearm. “At its core, defendant’s claim is that a gun is not used ‘in the commission of’ a crime unless the gun user *subjectively intends* to utilize the gun to accomplish the crime. We do not read the ‘in the commission of’ requirement to add a specific intent requirement to the enhancement but rather to require a particular attendant circumstance. A gun use occurs ‘in the commission of’ an offense if the gun use in fact *objectively facilitated* the commission of the offense. The issue is not one of the gun user’s *subjective* mental state but of the *objective role* that the gun use played in the commission of the crime. The ‘in the

commission of' element of a personal use enhancement does not encompass a specific intent requirement.” (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1495.)

Here, defendant unquestionably personally, and as a matter of undisputed fact, drew out his weapon, displayed it prominently, and deliberately discharged it. That discharge played a manifestly objective role in the completion of the crimes charged, such as placing Johnson’s children in danger of being struck by the flying bullets, defendant’s active possession of the firearm while legally restricted from doing so as a convicted felon, and his possession of the drugs found at the scene.

II. The Firearm Use Enhancement Should Be Stricken as to Count 1, Negligent Discharge of a Firearm, Because “Use” of a Firearm Is an Element of the Underlying Offense

However, as defendant also points out, Penal Code section 12022.5, subdivision (a), does not apply if “use of a firearm is an element of that offense.” Penal Code section 246.3 punishes “willful[] discharge[] [of] a firearm in a grossly negligent manner.” Because the actual use of a firearm (“willful[] discharge[]”) is an essential component of the legal definition of the crime, considered in the abstract, it constitutes an element of the offense. (See *People v. Hansen* (1994) 9 Cal.4th 300, 317, overruled on another point in *People v. Chun* (2009) 45 Cal.4th 1172, 1199.)

The trial court erred, therefore, in imposing and staying the enhancement as to count 1. The court should have stricken the enhancement as to that count. We order the

enhancement as to count 1 dismissed. (*People v. Allums* (1975) 47 Cal.App.3d 654, 659, disapproved on another point in *People v. Wheeler* (1978) 22 Cal.3d 258, 286, fn. 35.)

III. Substantial Evidence Supported the Verdicts as to the Drug Possession Charges

Defendant urges that the evidence was insufficient to sustain the jury's verdicts on counts 2 and 5, the drug possession counts. The evidence showed that the police found bags of methamphetamine and marijuana on the floor in the living room of the Aguilar/Perez residence, near the front door and near a closet where defendant and his girlfriend, Benavente, had occupied during the events of November 6, 2008. Perez gave evidence that there were no drugs in the house before defendant and Benavente came there. Benavente admitted using marijuana and drinking alcohol that day, and officers indicated that she appeared to be under the influence. The officers also found another small bag of methamphetamine and a glass pipe in Benavente's purse, which was seized and searched. Defendant argues that these facts, taken together, "pointed to Benavente, not [defendant], being the possessor (and the only possessor) of the controlled substances found by the front door and in Benavente's handbag." Defendant contends that there was no evidence that he had control or dominion over, or that he was even aware of the presence of the drugs, so he could not have been found guilty of possessing them.

Again, we must review the evidence contained in the entire record, we must view it in the light most favorable to the judgment, and we must draw all reasonable inferences in support of the judgment. (See *People v. Avila* (2009) 46 Cal.4th 680, 701.)

Perez's testimony gives rise to the reasonable inference that there were no drugs in the house before defendant and Benavente arrived. That Benavente had some drugs in her purse and appeared to be under the influence of illicit substances also supported the inference that it was defendant and Benavente who brought drugs into the house. After defendant had fired off his gun, Benavente grabbed him and the two fell into the closet in the front room. The remaining occupants of the house took the opportunity to flee. Defendant and Benavente were inside the house alone for a substantial period of time after that, while the house was surrounded by law enforcement officers. Defendant appeared to be holding Benavente hostage during that time. After SWAT officers stormed the house, they found items on the floor in the front room near the closet and near the front door: not only the bags of drugs, but also defendant's gun. (One officer testified that, upon recovering and inspecting the gun, it was found that the gun had jammed.) Most importantly, during the whole episode, defendant appeared to be disoriented, delusional and dissociated from reality. A rational trier of fact could readily infer that defendant, as well as Benavente, used and possessed drugs and was under the influence of the drugs. Benavente's drugs were secured in her purse; the jury could reasonably infer that defendant had carried his drugs more loosely on his person. Defendant was the one who had use and possession of the gun, which was similarly found on the floor, in close proximity to the bags of drugs found there. Defendant had a substantial period of dominion and control over the house, immediately after which the drugs were found. A logical inference was that the drugs, and the gun, found in the house

after the incident belonged to defendant. The jury was entitled to draw these reasonable inferences from the facts adduced. (See *People v. Sanchez* (2003) 113 Cal.App.4th 325, 330.)

IV. The Court's Failure to Hold a *Marsden* Hearing Requires a Limited Reversal

Defendant contends that the trial court erred at the sentencing proceedings, because it failed to conduct a *Marsden* hearing on whether to appoint new counsel to pursue a motion for new trial. After the court had explained defendant's appeal rights, defense counsel informed the court that defendant "wanted me to advise the Court, he wants a motion for a new trial. He wants to be able to get a lawyer for a motion for a new trial. I've advised him I'm not aware of grounds that would meet the standard for a new-trial motion. While there may be grounds for reversal upon appeal, I'm not aware of any fact that would give me grounds for a meritorious motion or even a tolerable motion for a new trial, so I've declined to file that." The trial court responded, "All right," but did not pursue the matter any further, and made no inquiry of defendant concerning defendant's desire to file a new trial motion, or his desire to have another attorney appointed for that purpose.

Defendant contends that defense counsel's statement to the court, particularly informing the court that defendant desired to have an attorney appointed for the purpose of filing a new trial motion, was sufficient to trigger the trial court's duty under *Marsden* to conduct a hearing about the reasons for defendant's request. Defendant urges that, "[i]mplicit in [his] request was his dissatisfaction with the performance of his appointed

counsel,” so that the court should have inquired into the reasons why defendant felt he was inadequately represented, and his basis for a new trial motion. Defendant contends that the trial court’s failure to conduct a *Marsden* hearing requires reversal of the entire judgment. Defendant urges this court to reverse, and to remand for a *Marsden* hearing; after inquiry, the trial court should either appoint new counsel to represent defendant on a motion for new trial, or reinstate the judgment.

“Although ineffective assistance of counsel is not one of the statutory grounds for granting a new trial, the issue may nonetheless be asserted as the basis for a motion for new trial. ([Pen. Code,] § 1181; *People v. Fosselman* (1983) 33 Cal.3d 572, 582-583.) In *Stewart* [*People v. Stewart* (1985) 171 Cal.App.3d 388], reversible error was demonstrated when the trial court failed to conduct further inquiry into the defendant’s allegations, made in connection with a new trial motion, that he had been inadequately represented. (*Stewart, supra*, 171 Cal.App.3d at pp. 393-394, 398.) At the hearing on the motion, the trial court asked the defendant and his counsel to divulge the basis for the claim of incompetence. (*Id.* at p. 393.) At an in camera hearing, the defendant stated that he was inadequately represented when counsel failed to call his personal doctor and “two witnesses up on the fourth floor.” (*Id.* at p. 394.) With respect to the latter two witnesses, the trial court failed to question the defendant about their expected testimony. (*Id.* at p. 398.) The reviewing court reasoned: ‘The trial court did not inquire into the substance of the witnesses’ expected testimony, but instead denied the motion without endeavoring to learn whether the testimony might have been material or even crucial and

without appointing new counsel to assist the court in this regard. We believe this constituted error. “A trial judge is unable to intelligently deal with a defendant’s request for [*a new trial on the basis of trial counsel’s incompetence* or for] substitution of attorneys unless he is cognizant of the grounds which prompted the request.” [Citation.] A denial of appellant’s motion for new trial based on ineffective representation without careful inquiry into the defendant’s reasons for claiming incompetence “‘is lacking in all the attributes of a judicial determination.’ [Citations.]” [Citation.]’ (*Ibid.*, italics added.)” (*People v. Reed* (2010) 183 Cal.App.4th 1137, 1143-1144.) Defendant here argues that the trial court’s failure to conduct an inquiry, upon learning from defense counsel of defendant’s desire to file a motion for a new trial and to appoint a new attorney to file that motion similarly was lacking in the attributes of a judicial determination. We are compelled to agree.

“[A] trial court is obligated to conduct a *Marsden* hearing on whether to discharge counsel for all purposes and appoint new counsel when a criminal defendant indicates after conviction a desire to withdraw his plea [or move for a new trial] on the ground that his current counsel provided ineffective assistance,” but “only when there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ [Citation.]” (*People v. Sanchez* (2011) 53 Cal.4th 80, 89-90.) Here, defense counsel did inform the trial court that defendant wanted another attorney to pursue a motion for new trial, but there was no express indication that the ground for seeking a new trial had anything to do with trial counsel’s

alleged provision of ineffective assistance. Defendant urges that the mere request to file a motion for a new trial implied that defendant's motion would be based on trial counsel's deficient representation.

The People respond that there was no such implication: Defendant "never proffered any basis for the new trial motion to the trial court, let alone dissatisfaction with trial counsel's representation." The most readily discernible claim of dissatisfaction with counsel's representation was, of course, trial counsel's decision not to pursue a motion for a new trial. Counsel did not refuse out of hand to consider filing such a motion; rather, he had investigated the possible grounds, and found none that was tenable.

If counsel's failure to accede to defendant's wish to file a motion for a new trial was the sole ground for defendant's dissatisfaction with counsel's performance, that would be insufficient to support the appointment of substitute counsel under *Marsden*. Disputes over trial tactics do not constitute an irreconcilable conflict with counsel which requires a substitution of appointed attorneys. (*People v. Cole* (2004) 33 Cal.4th 1158, 1190; *People v. Valdez* (2004) 32 Cal.4th 73, 95; *People v. Welch* (1999) 20 Cal.4th 701, 728.) Trial counsel is not required to undertake futile actions, just because the defendant demands them, at the risk of discharge under *Marsden*. (See *People v. Panah* (2005) 35 Cal.4th 395, 431-432.)

The problem here is that the trial court's failure to conduct an initial inquiry, as required by *Marsden*, has resulted in a record devoid of evidence one way or the other whether defendant may have had additional concerns. Defense counsel's statement,

expressly indicating that defendant did, in fact, desire the appointment of a new attorney (see *People v. Sanchez, supra*, 53 Cal.4th 80, 89-90), was sufficient to apprise the trial court of a potential *Marsden* issue. The court should then have “give[n] the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney.” (*Id.* at p. 90, citing *Marsden, supra*, 2 Cal.3d 118, 126.) If, upon such inquiry, the defendant “makes a showing . . . that his right to counsel has been ““substantially impaired”” (*Marsden, supra*, 2 Cal.3d at p. 123), substitute counsel must be appointed as attorney of record for all purposes [citation].” (*People v. Sanchez, supra*, at p. 90.) Similarly, the court in *People v. Dickey* (2005) 35 Cal.4th 884, held that, ““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.]’ [Citation.]” (*Id.* at p. 917.)

The trial court’s failure here to conduct a further inquiry has resulted in a record which does not explain whether defendant actually had any complaint against his appointed attorney below, or any embroiled disagreement. As noted, the most obvious point of disagreement indicated by the circumstances was whether or not counsel should file a motion for a new trial, but there may have been other, less obvious, concerns.

In a case of *Marsden* error, “Reversal is required unless the record shows beyond a reasonable doubt that [the defendant] was not prejudiced. [Citations.]” (*People v. Reed, supra*, 183 Cal.App.4th 1137, 1148.) The same court went on to state that, “a trial court’s

failure to conduct a postconviction *Marsden* hearing is harmless where the defendant ‘has made no showing . . . either that his *Marsden* motion would have been granted had it been heard, or that a more favorable result would have been achieved had the motion in fact been granted.’ (*People v. Washington* (1994) 27 Cal.App.4th 940, 944 (*Washington*)). In *Washington*, the defendant made a *Marsden* motion in conjunction with a motion for new trial. The trial court heard and denied the motion for new trial, but failed to hold a *Marsden* hearing. [Citation.] In concluding that the *Marsden* error was harmless, the court observed that, because of the timing of the motion, the only basis for the motion could be that counsel performed ineffectively during trial or could not adequately represent the defendant at sentencing. [Citation.] The court concluded, after its own review of counsel’s actions, that no grounds for claiming ineffective assistance of counsel existed. The court observed: ‘We cannot see how the appointment of a different attorney would have gained [the defendant] a new trial, or could have had any effect on the sentence imposed’ (*Ibid.*) Because the failure to hold a *Marsden* hearing did not deprive the defendant of any arguments on appeal or otherwise affect the verdict or sentence, the reviewing court concluded that the defendant would not have obtained a more favorable result had the motion been entertained. (*Ibid.*)” (*People v. Reed, supra*, 183 Cal.App.4th 1137, 1148.)

The difficulty in *People v. Reed*, however, as in this case, is that the record is devoid of any evidence at all concerning what the defendant’s concerns may have been. The *Reed* court found that *Washington, supra*, 27 Cal.App.4th 940, was “distinguishable

because, in that case, the trial court denied the motion for new trial and the defendant did not raise any argument with respect to such motion on appeal. (*Washington, supra*, 27 Cal.App.4th at pp. 942-943.)” (*People v. Reed, supra*, 183 Cal.App.4th 1137, 1148.) That is, the defendant in *Washington* was able to obtain his motion for a new trial, and to explain there any reasons he may have had to criticize his trial counsel’s performance during that trial. In this case, no motion for a new trial was filed, so the court had nothing to evaluate in terms of counsel’s performance during the trial. The *Reed* court again explains: “Here, we simply cannot determine from the silent record before us whether further inquiry would have led to a different result. [Fn. omitted.] The People point out that ‘[a]ppellant has not attempted to argue or cite any support in the appellate record that he would have, or should have, prevailed on the ineffective assistance ground in a motion for new trial.’ But, because it remains impossible on this record to determine whether further inquiry would have led the court to grant a new trial motion, we cannot conclude that the trial court’s error was harmless beyond a reasonable doubt. [Fn. omitted.] (See *Marsden, supra*, 2 Cal.3d at p. 126; [*People v.*] *Mejia* [2008] 159 Cal.App.4th [1081,] 1087 [reversing and remanding when it was unknown what defendant might have shown after inquiry]; [*People v.*] *Winbush* [1988] 205 Cal.App.3d [987,] 991 [‘[a]n appellate court cannot speculate upon the basis of a silent record that the trial court, after listening to defendant’s reasons, would decide the appointment of new counsel was unnecessary’].)” (*People v. Reed, supra*, 183 Cal.App.4th 1137, 1148-1149.)

We likewise have an utterly silent record, upon which defendant was not enabled to state his reasons or concerns. And, unlike *Washington*, no new trial motion was filed. Under analogous circumstances, where the failure to hold a *Marsden* hearing has resulted in a silent record (see *People v. Reed, supra*, 183 Cal.App.4th 1137, 1148-1149; *People v. Mendez* (2008) 161 Cal.App.4th 1362 [the defendant’s trial attorney informed the trial court that the defendant wished to make a new trial motion based on competency of counsel, which was held adequate to put the trial court on notice of his request for a *Marsden* hearing]; *Mejia, supra*, 159 Cal.App.4th 1081 [defense counsel announced that the defendant wanted to make a motion for a new trial, expressly based in part on counsel’s alleged conduct at trial, triggering an “imperative” duty to elicit the defendant’s reasons on the record]), the courts have permitted a limited reversal and remand. Following the lead of the California Supreme Court in *People v. Sanchez, supra*, 53 Cal.4th 80, at pages 92-93, we “reverse[] the judgment of the trial court and remanded the matter to that court with the following directions: ‘(1) the court shall hold a hearing on [defendant]’s *Marsden* motion concerning his representation by [appointed counsel]; (2) if the court finds that [defendant] has shown that a failure to replace his appointed attorney would substantially impair his right to assistance of counsel, the court shall appoint new counsel to represent him and shall entertain such applications as newly appointed counsel may make; and (3) if newly appointed counsel makes no motions, any motions made are denied, or [defendant]’s *Marsden* motion is denied, the court shall reinstate the judgment.’”

In view of this disposition of the *Marsden* issue, we do not address defendant's further claim that, if his trial counsel's conduct was deemed in some manner to waive or otherwise preclude his right to move for a new trial, then that conduct would constitute ineffective assistance of counsel.

V. Defendant's Presentence Custody Credits Must Be Corrected

Defendant asserts that the trial court miscalculated his pretrial custody credits. The People concede the error. The court awarded defendant 656 days of actual custody credit, plus 97 days of conduct credits. Between the date of arrest on June 3, 2009, and sentencing on March 23, 2011, however, defendant was actually in custody for 659 days.

Under Penal Code section 2933.1, defendant earned conduct credits at a capped rate of 15 percent. He was therefore entitled to 98 days of additional (conduct) credits. His total amount of credits should have been 757 days, rather than 753 days.

We modify the judgment to reflect these corrected days of credit and order the abstract of judgment amended accordingly. (See, e.g., *People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12.)

VI. The Stayed Sentences on Counts 1, 3 and 5 Should Be Run Concurrently

Finally, defendant contends, again correctly, that the abstract of judgment erroneously reflects that the sentences stayed on counts 1, 3 and 5 are consecutive terms. The court did not specify on the record at the time of sentencing, however, whether the sentences imposed were to be run consecutively or concurrently to the principal term. *People v. Black* (2007) 41 Cal.4th 799, holds that the court must deliver orally, on the

record, any reasons for imposing a consecutive sentencing choice. (See also Cal. Rules of Court, rules 4.406(a), (b)(5), 4.433(c)(3), (c)(5).) Penal Code section 669 requires that “concurrent sentences be imposed if the court does not specify how the terms must run,” and thus constitutes a kind of “default in the event the court fails to exercise its discretion.” (*People v. Black, supra*, 41 Cal.4th 799, 822.)

The abstract of judgment should be corrected to state that the stayed terms for counts 1, 3 and 5 are concurrent with count 4.

DISPOSITION

The judgment is reversed, with these directions: (1) the court shall hold a hearing on defendant’s *Marsden* motion concerning his representation by appointed counsel, with respect to defendant’s desire to file a motion for a new trial; (2) if the court finds that defendant has shown that a failure to replace his appointed attorney would substantially impair his right to effective assistance of counsel, the court shall appoint new counsel to represent him and shall entertain a motion for a new trial if newly appointed counsel files one; and (3) if newly appointed counsel makes no new trial motion, if any such motion made is denied, or if defendant’s *Marsden* motion is denied, the court shall reinstate the judgment.

In the event of reinstatement of the judgment, we direct that the abstract of judgment be corrected in the following particulars: (1) reflecting 659 days of actual presentence custody credit, plus 98 days of presentence conduct credits, for a total of 757 days of presentence credits; and (2) the sentences on counts 1, 3 and 5 are to run

concurrently to the sentence on count 4. A copy of the corrected abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

In addition, if the judgment is reinstated, the firearm use enhancement as to count 1 (negligent discharge of a firearm) must be dismissed. In all other respects, the judgment, if reinstated, is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.
KING
J.