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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.

TOMMY MACKEY,

Defendant and Appellant.

E054342

(Super.Ct.No. FSB703219)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed with directions.

Catherine White, 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, and Sabrina Lane Erwin and Emily R. Hanks, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Based on his participation in a shoot-out with law enforcement officers in and around a Super 99 Cent Store in Highland, a jury found defendant Tommy Mackey guilty of the premeditated, attempted murders of three peace officers, Allen Girard, John Walker, and Donald Dougan, and that defendant personally and intentionally discharged a firearm in the commission of the crimes. (Pen. Code, §§ 664, 187, subd. (a), 12022.53, subds. (b), (c).) Defendant admitted one prior strike and three prison priors, and was sentenced to 69 years plus 90 years to life in prison.¹

On this appeal, defendant claims the trial court erroneously refused to instruct the jury on attempted voluntary manslaughter on an imperfect self-defense theory, based on evidence that he shot at the officers but did so believing they were gang members trying to kill him. We conclude that the attempted voluntary manslaughter instructions were properly refused because there was insufficient evidence to support them.

Defendant also claims the trial court erred in failing to conduct a *Marsden*² hearing based on his letter to the trial court, sent shortly before the sentencing hearing, seeking a continuance of the hearing based on ineffective assistance of his trial counsel. We conclude that the trial court did not have a duty to conduct a *Marsden* inquiry based

¹ Defendant was sentenced to 15 years to life for each of his three premeditated attempted murder convictions, doubled to 30 years to life based on the prior strike, for a total indeterminate term of 90 years to life. The trial court also imposed determinate terms of 20 years on each count, plus nine years based on defendant's *four* prison priors, resulting in a total determinate term of 69 years.

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

on defendant's letter, effectively a new trial motion, because defendant did not indicate he was seeking substitute counsel to assist him with the motion or in any subsequent proceedings, including sentencing.

We also reject defendant's claim that his admissions of the prior strike and prison priors are invalid because he was not fully advised of his rights to confrontation and against self-incrimination when he made the admissions. We conclude the admissions were knowing and voluntary under the totality of the circumstances.

Finally, defendant claims, and the People and we agree, that defendant was erroneously sentenced to a total of nine years on four prison priors. We remand the matter with directions to correct the sentence on the prison priors to four years, one year for each prior. In all other respects we affirm the judgment.

II. FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence*

On August 13, 2007, a specialized team of law enforcement officers was looking for defendant in order to arrest him on an outstanding felony warrant. Around 12:30 p.m., the team had defendant under surveillance from an apartment complex near the Super 99 Cent Store in Highland, and watched as he rode to the store in the backseat of a Cadillac. Defendant got out of the car and went into the store, which was part of a strip mall.

Initially, the officers were going to wait for defendant to get back into the car and apprehend him after conducting a traffic stop on the car. But the front of the store

consisted mainly of glass windows and two patrol units were visible from inside the store, so the officers decided to apprehend defendant inside the store in case he saw the patrol units and tried to flee.

At least five officers, all wearing vests identifying them as “sheriffs,” went into the store but could not find defendant. The officers were trying to be quiet and were not announcing their presence. Two clerks were inside the store. When an officer asked the clerks where defendant was, they pointed toward the back of the store.³ The store was approximately 130 feet wide and 40 feet deep, and had three separate sections of aisles with shelves. There was no back door to the store.

Sergeant John Walker and Deputy Donald Dougan walked toward the back of the store together as other officers walked down the other aisles. Sergeant Walker and Deputy Dougan saw a price tag swaying as it hung from a shopping cart, indicating someone had brushed past it. Near the back of the store, Sergeant Walker and Deputy Dougan stopped by a soda machine and waited for the other officers.

As they waited by the soda machine, Sergeant Walker and Deputy Dougan heard two gunshots fired near them, but they could not see defendant or where the shots were coming from. They retreated “back one aisle,” and Sergeant Walker knelt on one knee while Deputy Dougan stood watching in the other direction. At that point, at least one more shot was fired. The bullet struck a soup can several inches from Sergeant Walker’s head and around one foot from where Deputy Dougan was standing.

³ The store’s video surveillance system was not working.

None of the officers could see defendant, so they decided to retreat from the store through the front door. More shots were fired as the officers retreated, and two shots came through the front doorway. Still, none of the officers returned fire. After all the officers had retreated from the store, they set up a perimeter around the building and placed a bunker shield in the front doorway. The bunker shield was 18 to 24 inches wide and 36 inches long. From behind the shield, Detective Allen Girard looked into the store and saw defendant cross an aisle near the back of the store.

Detective Girard repeatedly yelled at defendant to come out of the store. Around 25 to 30 times, he loudly announced: “[Defendant,] this is the sheriff’s department. We have you surrounded. Drop your weapons. Come out.” Defendant then ran by the main aisle, closer to Detective Girard, and fired two more shots toward the front door. One of the bullets hit the bunker shield. Detective Girard then fired three rounds at defendant.

The officers then decided to move away from the front of the store. Minutes later, they discovered that defendant had climbed onto the roof through a patched area in the ceiling of the store. From the roof, defendant began firing at the officers in the parking lot below, and the rounds were hitting the parking lot pavement.

More officers responded to the scene, and many returned fire. Defendant jumped off the roof and threw a black revolver into a nearby bush. An officer shot him in the leg. He was also bleeding from his right shoulder area. He surrendered and was taken into custody.

A second gun, a silver revolver, was recovered from defendant's back pocket, and a bag of bullets was found in his other pocket. Defendant told the officers he had a gun in his back pocket. Markings on several bullet casings recovered from the scene indicated they had been fired from defendant's weapons.

B. Defense Evidence

The defense theory was that defendant did not act with malice because (1) he did not shoot at the officers, (2) he believed the officers were gang members who were trying to kill him, and (3) the officers planted evidence, including the black revolver which did not belong to him.

Defendant testified he went to the store to buy cigarettes and other things. When he was shopping inside the store, he did not know there was a warrant for his arrest, that several law enforcement agencies and apprehension teams were looking for him, or that any law enforcement officers were in the area. He panicked and ran when he heard at least two gunshots.

Defendant heard no one say anything before he heard the gunshots, and he did not see who was shooting. He thought members of his former gang, which was controlled by the Mexican Mafia, were shooting at him and trying to kill him. He had dropped out of the gang because the gang wanted him to kill someone and he refused, so there was a "green light" on him. He had been shot at earlier that day and the day before. He fired his gun, a silver revolver, in the shooting incident earlier that day.

After defendant heard the gunshots inside the store, he climbed to the roof through a hole in the ceiling, fearing for his life. He had his gun, a silver revolver, in his hand. As he climbed to the roof, his gun accidentally discharged once, but he did not see where the shot went. He put the gun back in his pocket as he climbed up to the roof. When he was on the roof he saw a police helicopter and thought it was shooting at him, so he got down from the roof.

After defendant climbed down from the roof, he ran into the open and lay down on the ground. When he was on the roof, he did not know that any police officers were in the parking lot, and when he was in the store he did not know that any police officers were in the store or had been in the store. When he was in the store, he denied hearing any police commands. He also denied shooting at any police officers, either from inside the store or from the roof.

As he lay on the ground after he got down from the roof, officers approached him and one of them shot him twice, once in the leg and once in the upper torso. Defendant did not recall speaking to any police detectives in the hospital when he was being treated for his gunshot wounds. His lower leg had been amputated and he was heavily medicated.

Defendant claimed that the black revolver the officers recovered from the bushes did not belong to him, and he did not handle that gun that day. He did not intentionally fire his silver revolver at any police officers. He admitted pleading guilty to burglary, grand theft, and petty theft with a prior in 1994, 1996, and 1999, respectively.

C. Prosecution Rebuttal

Detective Greg Myler interviewed defendant in the hospital four days after the shooting, after defendant waived his *Miranda*⁴ rights. Defendant told Detective Myler that he knew there was a warrant for his arrest, and that once he was inside the store “he saw people surrounding the store and heard commands which made him believe law enforcement was outside.”

A passerby, John Bayly, testified that he stopped across the street from the store to watch what was happening after he saw a number of officers around the store. A bullet shattered a car window outside the store, and hit a building across the street next to where Bayly was standing. Bayly and other civilians were escorted into a nearby market for safety. Before the shot was fired, Bayly heard officers yelling at defendant to surrender. Later, he saw a person running along the roof firing down at the officers.

III. DISCUSSION

A. Instructions on Attempted Voluntary Manslaughter Based on Imperfect Self-defense Were Properly Refused

Following the close of the evidence, defense counsel asked the court to instruct on voluntary manslaughter based on imperfect self-defense as lesser offenses to the premeditated attempted murder charges. The trial court indicated it had considered instructing on self-defense but did not believe it applied because defendant testified he never intentionally fired his weapon during the entire incident with the officers. Defense

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436.

counsel argued the jury could reasonably conclude, based on all of the evidence, that defendant shot at the officers, but did so *not knowing* they were peace officers but believing they were gang members who had been trying to kill him. The court took the matter under submission, and later denied the request on the ground there was “a lack of substantial evidence” to support instructing the jury on attempted voluntary manslaughter based on imperfect self-defense.

On this appeal, defendant claims the trial court erroneously refused to instruct on attempted voluntary manslaughter based on imperfect self-defense. We agree with the trial court that there was insufficient evidence to support the instructions. Specifically, there was insufficient evidence that defendant could have actually believed that any of the officers were gang members who were trying to kill him.

Attempted voluntary manslaughter based on “an honest but unreasonable belief that it is necessary to act in self-defense” is considered a lesser included offense of attempted murder. (*People v. Van Ronk* (1985) 171 Cal.App.3d 818, 823-825; see *People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.) “If a person kills or attempts to kill in the unreasonable but good faith belief in having to act in self-defense, the belief negates what would otherwise be malice, and that person is guilty of voluntary manslaughter or attempted voluntary manslaughter, not murder or attempted murder.” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116.) “[T]he doctrine [of imperfect self-defense] is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense.” (*People v. Manriquez* (2005) 37 Cal.4th 547, 581.)

The trial court has a duty to instruct on lesser included offenses when substantial evidence shows the lesser offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) On appeal, we independently review the question of whether instructions on a lesser included offense were properly refused. (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

“To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.” (*People v. Blair* (2005) 36 Cal.4th 686, 745.) In other words, “[s]ubstantial evidence is evidence sufficient to “deserve consideration by the jury” that is, evidence that a reasonable jury could find persuasive.”” (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) The substantial evidence requirement is not satisfied by “any evidence . . . no matter how weak.”” (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

Here, the evidence was insufficient to warrant instructing the jury on attempted voluntary manslaughter based on imperfect self-defense. Given the context in which the shootings occurred, attempted voluntary manslaughter based on imperfect self-defense was an unreasonable theory of the case, undeserving of the jury’s consideration.

To be sure, defendant testified he believed the officers were gang members who had been trying to kill him. He claimed he panicked and ran after he heard gunshots. But defendant also testified that he did not intentionally shoot at any of the officers, either from inside the store or from the roof. And despite defendant’s testimony that he did not

intentionally shoot at any of the officers, other evidence showed he shot at officers in and around the store, including Detective Girard, Sergeant Walker, and Deputy Dougan, whom he was charged with attempting to murder. But given the overall context and setting in which the shootings occurred, attempted voluntary manslaughter based on imperfect self-defense was an incoherent and unreasonable theory of the case, unworthy of the jury's serious consideration.

To have found defendant guilty of attempted voluntary manslaughter based on imperfect self-defense, or no crime based on perfect self-defense, the jury would have had to believe defendant's testimony that he thought gang members were shooting at him, and also believe—contrary to defendant's testimony—that he shot at Detective Girard, Sergeant Walker, and Deputy Dougan, believing they were gang members trying to kill him. But given the context in which the shootings occurred, a jury composed of reasonable persons could not have concluded that defendant shot at any of the officers, actually believing they were gang members trying to kill him.

When defendant fired two shots through the front doorway, Detective Girard was crouching behind the ballistic shield in the doorway and had loudly and repeatedly been announcing the officers' presence and ordering defendant to surrender. The detective was also wearing a jacket identifying him as a member of the sheriff's department. In order to conclude that defendant shot at Detective Girard, actually believing he was a gang member trying to kill him, the jury would have had to believe that defendant did not hear any of the detective's commands, and did not see him or any other law enforcement

officers in the area before he shot at the detective. That is not a reasonable view of the evidence.

A short time earlier, when a bullet came within inches of striking Sergeant Walker and Deputy Dougan in an aisle near the back of the store, Sergeant Walker and Deputy Dougan were also wearing jackets identifying them as “sheriffs.” If, as defendant argues, the jury could have reasonably concluded that defendant intentionally shot at these officers, defendant must have seen they were peace officers, not gang members, when he shot at them. That the bullet came within inches of striking both officers indicates that defendant did not shoot blindly at the officers.

Finally, defendant did not testify that he intentionally shot at the officers, actually believing they were gang members trying to kill him. Instead, he claimed he did not shoot at any of the officers, and his gun accidentally discharged once as he was climbing to the roof through a hole in the ceiling. But even if the jury disregarded the accidental discharge portion of defendant’s testimony, it could not have reasonably concluded that defendant shot at any of the officers, actually believing they were gang members trying to kill him, given the overall context and setting in which the shootings occurred.

Lastly, any trial court error in failing to instruct on voluntary manslaughter based on imperfect self-defense was harmless. (*People v. Blakeley* (2000) 23 Cal.4th 82, 93 [standard of harmless error articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 applies to erroneous failure to instruct on lesser included offense].) It is not reasonably probable that the jury would have found defendant guilty of the lesser offenses, or of

committing no crimes, had it been instructed on the lesser offenses or that an actual belief in the need for self-defense negates the malice element of attempted murder. The theory that defendant fired at any of the officers, actually believing they were gang members trying to kill him, was unsupported by any reasonable construction of the evidence.

B. The Trial Court Properly Denied Defendant's Motion for a New Trial Based on Ineffective Assistance of Counsel Without Conducting a Marsden Hearing

Following the return of the verdicts and shortly before the sentencing hearing, defendant sent a letter to the trial court, stating, in part: "Your 'Honor' I want to address the court. For it can be on the record For appeal reasons. [¶] . . . My 6th Amendment was violated by forcing me into trial with my attorney that only had days to prepare, my case therefore he was ineffective toward my defense." In the same letter, defendant also claimed he was denied a fair trial, and asked the court to postpone sentencing so that transcripts could be reviewed and defendant could prepare an appeal.

At the beginning of the sentencing hearing, the court said: "I received a statement from [defendant]. I believe it's been shared with counsel . . . as I read this I take it he's asking for a delay in sentencing and asking for transcripts of the trial so he can prepare for a possible appeal. That motion is denied. As far as appellate rights are concerned, those can be handled at the conclusion of sentencing. [¶] As far as the statements of ineffective assistance of counsel . . . I'm taking that as a motion for new trial, and I'm denying that also. I found no evidence that would be supportive of it."

Defendant claims that to the extent he made or sought to make a motion for a new trial based on the ineffective assistance of his trial counsel (*People v. Fosselman* (1983) 33 Cal.3d 572, 582-583), the trial court erroneously denied the motion without conducting a “*Marsden* inquiry” concerning the factual bases of his ineffective assistance claim. The People maintain that the trial court had no duty to undertake a *Marsden* inquiry before denying the motion because defendant did not clearly indicate to the trial court that he was seeking to have the court appoint substitute counsel in place of his existing counsel. The People are correct.

An indigent criminal defendant is entitled to competent representation, and if the defendant cannot afford to hire an attorney one must be appointed for him. (*Gideon v. Wainwright* (1963) 372 U.S. 335, 343-345; *Marsden, supra*, 2 Cal.3d at p. 123; *People v. Crandell* (1988) 46 Cal.3d 833, 853.) In California, *Marsden* is ““the seminal case regarding the appointment of substitute counsel,”” and gave birth to the term ““*Marsden* motion.”” (*People v. Sanchez* (2011) 53 Cal.4th 80, 86 (*Sanchez*).)

By definition, a *Marsden* motion asks the trial court to appoint substitute counsel in place of the defendant’s existing counsel. (See *People v. Smith* (1993) 6 Cal.4th 684, 690 (*Smith*).) A defendant ““has no absolute right to more than one appointed attorney,”” and the trial court ““is not bound to accede to a request for substitute counsel unless the defendant makes a ““sufficient showing . . . that the right to the assistance of counsel would be substantially impaired”” if the original attorney continued to represent the defendant.”” (*Sanchez, supra*, 53 Cal.4th at p. 87; *Marsden, supra*, 2 Cal.3d at p. 123.)

When a defendant makes a *Marsden* motion, the court must allow the defendant to articulate the reasons for his dissatisfaction with his current counsel, and if any of them suggest ineffective assistance, the court must conduct an inquiry sufficient to ascertain whether counsel is in fact rendering ineffective assistance. (*Marsden, supra*, 2 Cal.3d at pp. 123-124.) More specifically, the court must allow the defendant to express any specific complaints about his current counsel; the court must question counsel, as necessary, to ascertain the veracity of the defendant’s claims, and the court must make a record sufficient to show the nature of the defendant’s grievances and the court’s and counsel’s response to them. (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367-1368; *People v. Eastman* (2007) 146 Cal.App.4th 688, 695-696.)

Although no “formal” *Marsden* motion is necessary, the court’s duty to undertake a *Marsden* inquiry does not arise—the duty is not triggered—unless the defendant gives “at least some clear indication . . . that he wants a substitute attorney.” (*People v. Dickey* (2005) 35 Cal.4th 884, 920; *People v. Lucky* (1988) 45 Cal.3d 259, 281 & fn. 8.) After the court has conducted an appropriate *Marsden* inquiry, the decision whether to grant or deny the *Marsden* motion is a matter of judicial discretion. (*People v. Clark* (2011) 52 Cal.4th 856, 912.) Denial of the motion is not an abuse of discretion unless the defendant demonstrates that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel. (*People v. Myles* (2012) 53 Cal.4th 1181, 1207.)

Defendant claims the trial court had a duty to inquire into the factual basis of his ineffective assistance claim before it denied his motion for a new trial. Relying on *People v. Stewart* (1985) 171 Cal.App.3d 388, 394-395 (*Stewart*), disapproved on other grounds in *Smith, supra*, 6 Cal.4th at pages 691 through 694 and *People v. Winbush* (1988) 205 Cal.App.3d 987, 991 and 992, defendant argues: “The law is clear that because an attorney cannot argue his or her own incompetence, when a defendant personally alleges trial counsel was ineffective, the trial court must at least inquire into the allegations.” Not so.

The defendant in *Marsden* sought substitute counsel after the prosecution had presented its case to the jury. (*Marsden, supra*, 2 Cal.3d at pp. 120-121.) *Stewart* was the first case to apply *Marsden* in the context of a postconviction motion for a new trial based on ineffective assistance. (*Smith, supra*, 6 Cal.4th at p. 691.) Following a jury trial, the defendant in *Stewart* was convicted of escaping from county jail, and instructed his trial counsel to file a motion for a new trial based on counsel’s ineffective assistance. (*Stewart, supra*, 171 Cal.App.3d at pp. 391, 393.) Counsel filed the new trial motion, but the motion did not state why trial counsel was ineffective. (*Id.* at p. 393.)

At the hearing on the new trial motion, the trial court asked the defendant and his trial counsel “if they would divulge why” the defendant thought counsel had acted incompetently, but they declined to do so, and counsel claimed he could not argue his own incompetence. (*Stewart, supra*, 171 Cal.App.3d at p. 393.) Both the defendant and counsel argued that the court should appoint a new attorney to discuss the matter with the

defendant and represent him on the motion for new trial. (*Ibid.*) The trial court made some inquiries concerning the basis of the defendant's ineffectiveness claim, but did not appoint substitute counsel for the defendant and ultimately denied the motion. (*Id.* at p. 394.)

The *Stewart* court reversed the judgment and remanded the matter to the trial court with directions "to more fully inquire into the basis for [the defendant's] motion for new trial." (*Stewart, supra*, 171 Cal.App.3d at pp. 398-399.) The court explained that: "Where a defendant requests the substitution of new counsel after trial in order to assist in the preparation of a motion for new trial based on the inadequacy of trial counsel, we believe it imperative that, as a preliminary matter, the trial judge elicit from the defendant, in open court or, when appropriate, at an *in camera* hearing, the reasons he believes he was inadequately represented at trial. . . ." (*Id.* at p. 395.)

In summarizing its decision, however, *Stewart* drew no distinction between a defendant who "in some manner moves to discharge his current counsel" or "at least [makes] some clear indication . . . that he wants a substitute attorney" (*People v. Lucky, supra*, 45 Cal.3d at p. 281 & fn. 8) to prepare a new trial motion based on ineffective assistance, and a defendant who moves or seeks to move for a new trial based on ineffective assistance *without indicating* he wants substitute counsel to assist him in making the motion (*Stewart, supra*, 171 Cal.App.3d at pp. 395-397).

The *Stewart* court wrote: "To summarize, we conclude that in hearing a motion for new trial based on incompetence of trial counsel, the trial court must initially elicit

and fully consider the defendant's reasons for believing he was ineffectively assisted at trial. In so doing, the court must make such inquiries of the defendant and the trial counsel as in the circumstances appear pertinent. If the claim is based upon acts or omissions that occurred at trial or the effect of which may be evaluated by what occurred at trial the court may rule on the motion for new trial without substituting new counsel. If, on the other hand, the claim of incompetence relates to acts or omissions that did not occur at trial and cannot fairly be evaluated by what occurred at trial, then, unless for other good and sufficient reason the court thereupon grants a new trial, the court must determine whether to substitute new counsel to develop the claim of incompetence. New counsel must be appointed when the defendant presents a colorable claim that he was ineffectively represented at trial; that is, if he credibly establishes to the satisfaction of the court the possibility that trial counsel failed to perform with reasonable diligence and that, as a result, a determination more favorable to the defendant might have resulted in the absence of counsel's failings." (*Stewart, supra*, 171 Cal.App.3d at pp. 396-397.)

Like the defendant in *Stewart*, the defendant in *Winbush* asked the court to appoint requested substitute counsel to pursue a new trial motion based on the ineffective assistance of the defendant's trial counsel. (*People v. Winbush, supra*, 205 Cal.App.3d at p. 989.) The *Winbush* court broadly remarked that *Stewart* outlined "[t]he appropriate procedure for the trial court to follow when [a] defendant seeks to file [a] new trial motion based on ineffective representation of counsel," without distinguishing the case

before it from ones in which the defendant does not indicate he wants the court to appoint substitute counsel to pursue the new trial motion. (*People v. Winbush, supra*, at p. 989.)

In its 1993 decision in *Smith*, the California Supreme Court clarified that the scope of a trial court's duty of inquiry under *Marsden* and *Stewart* are one and the same:

“[*Stewart*] merely applied the *Marsden* rule to a particular factual situation, and employed somewhat different language. . . . [T]he standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction. Any suggestion that the use of different language in *Stewart* . . . implies a different rule than that of *Marsden* is disapproved. A defendant has no greater right to substitute counsel at the later stage than the earlier.” (*Smith, supra*, 6 Cal.4th at pp. 693-694.)

More recently, in its 2011 decision in *Sanchez*, the state Supreme Court admonished defense counsel and trial courts to abandon the practice of requesting and appointing “conflict” or “substitute” counsel to investigate or evaluate a defendant's proposed new trial motion or a plea withdrawal motion based on ineffective assistance as a substitute for conducting a *Marsden* inquiry. (*Sanchez, supra*, 53 Cal.4th at p. 89; *People v. Eastman, supra*, 146 Cal.App.4th at pp. 696-697.) A court cannot discharge its *Marsden* obligation by appointing another attorney to independently determine whether the defendant has made a sufficient showing to discharge his current counsel and appoint substitute counsel under *Marsden*. (*Sanchez, supra*, at p. 89.) The *Sanchez* court also pointed out that, though it acknowledged in *Smith* that “it is difficult for counsel to argue

his or her own incompetence,” it did not suggest it is impossible for counsel to do so. (*Sanchez, supra*, at p. 89, quoting *Smith, supra*, 6 Cal.4th at p. 694.)

Moreover, the California Supreme Court has never suggested that a court should “presume a defendant is requesting substitute counsel *without at least some indication that he or she wants to be represented by counsel other than the current appointed attorney.*” (*Sanchez, supra*, 53 Cal.4th at p. 89, italics added.) To the contrary, it has consistently held that a trial court has no duty to conduct a *Marsden* inquiry absent “‘at least some clear indication by defendant’ . . . that [he] ‘wants a substitute attorney.’” (*Id.* at pp. 89-90; *People v. Martinez* (2009) 47 Cal.4th 399, 421; *People v. Dickey, supra*, 35 Cal.4th at pp. 917-922; *People v. Lucky, supra*, 45 Cal.3d at p. 281 & fn. 8; see also *People v. Crandell, supra*, 46 Cal.3d at pp. 854-855 [defendant’s motion to represent himself based on inadequate assistance does not trigger the trial court’s duty to conduct a *Marsden* inquiry, or to suggest substituted counsel as an alternative to self-representation].)

In *Sanchez*, the defendant pled guilty to cultivating marijuana. On the date set for sentencing, his appointed counsel told the court that he wished to explore the possibility of withdrawing his plea, ostensibly on ineffective assistance grounds. (*Sanchez, supra*, 53 Cal.4th at pp. 84-85.) The *Sanchez* court concluded that “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 on the ground that his current counsel provided ineffective assistance *only when*

there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’” (*Id.* at pp. 89-90, italics added.)

As the People point out, the state appellate courts are divided on the question of whether a defendant’s request to file a new trial motion based on ineffective assistance triggers the trial court’s duty to conduct a *Marsden* inquiry. The Fifth District Court of Appeal and the First District Court of Appeal, Division Five, have concluded that the duty to conduct the *Marsden* inquiry is triggered when the defendant simply files or seeks to file a motion for a new trial based on ineffective assistance—even if the defendant does not expressly seek the appointment of substitute counsel to pursue the motion. (*People v. Reed* (2010) 183 Cal.App.4th 1137, 1140-1148 [First Dist., Div. Five]; see also *People v. Mendez, supra*, 161 Cal.App.4th at p. 1367 [Fifth Dist.]; *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1086 [Fifth Dist.]; see also *People v. Eastman, supra*, 146 Cal.App.4th at p. 696 [Fifth Dist.].)

By contrast, the Third District Court of Appeal and the First District Court of Appeal, Division Two, have concluded that the duty to conduct a *Marsden* inquiry is not triggered unless the defendant seeks substitute appointed counsel to assist him in preparing or presenting the new trial motion based on ineffective assistance. (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485 [Third Dist.]; *People v. Gay* (1990) 221 Cal.App.3d 1065, 1069-1071 [First Dist., Div. Two].) The People urge us to follow *Richardson*. We agree that *Richardson* and *Gay* are correct.

Richardson and *Gay* are in keeping with the California Supreme Court's recent decision in *Sanchez*. Indeed, *Sanchez* expressly disapproved of the Fifth District Court of Appeal's decisions in *Mendez*, *Mejia*, and *Eastman* to the extent they "incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant, either personally or through current counsel, that the defendant 'wants a substitute attorney.'" (*Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.) Though *Sanchez* did not mention *Stewart*, *Winbush*, or *Reed* by name, these cases are in the same line of authority as *Mendez*, *Mejia*, and *Eastman*, and were disapproved sub silentio in *Sanchez*.

Thus here, the trial court did not have a duty conduct a *Marsden* inquiry or hearing concerning the basis of a defendant's ineffective assistance claim in connection with defendant's letter in which he effectively moved for a new trial on ineffective assistance grounds. There was no clear indication on the part of defendant or his appointed counsel that defendant wanted the court to appoint substitute counsel in order to assist him with any new trial motion. (*People v. Richardson, supra*, 171 Cal.App.4th at p. 485, discussing *People v. Dickey, supra*, 35 Cal.4th at pp. 920-921; *People v. Gay, supra*, 221 Cal.App.3d at pp. 1069-1071, discussing *People v. Crandell, supra*, 46 Cal.3d at pp. 854-856.)⁵

⁵ Defendant does not claim that the new trial motion was erroneously denied on its face, or based on the contents of defendant's letter to the court.

C. Defendant's Admission of the Prior Strike and Four Prison Priors Was Knowing and Voluntary Under the Totality of the Circumstances

Defendant claims his admissions of the prior strike and prison priors are invalid and must be reversed because the trial court did not advise him of his federal constitutional rights against self-incrimination and to confrontation before he admitted the allegations. We conclude the admissions were knowing and voluntary under the totality of the circumstances, and are therefore valid.

During jury deliberations on the attempted murder charges and enhancements, the trial court addressed the matter of prior strike and prison prior allegations. The court said: "Okay. [Defendant], you have a right to have a jury determination as to whether or not . . . you actually suffered those priors. Do you want to waive the jury view on that or your right to a jury trial on that and admit those at this time?" Defendant said "yes," and admitted the truth of the prior strike and prison priors. The court did not tell defendant that he had a right not to testify or to confront witnesses during any trial on the prior strike and prison prior allegations.

Before a court may accept a criminal defendant's admission of a prior conviction allegation, it must advise the defendant and obtain his or her waivers of (1) the right to have a jury determine the fact of the prior conviction, (2) the right to remain silent, and (3) the right to confront witnesses. (*In re Yurko* (1974) 10 Cal.3d 857, 863.) An

incomplete advisement of these *Boykin-Tahl*⁶ rights does not render the admission invalid “if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

People v. Mosby (2004) 33 Cal.4th 353 is directly on point. There, the defendant admitted having a prior conviction for possessing a controlled substance after the jury found him guilty of selling cocaine. (*Id.* at pp. 357-358.) Before the court accepted the admission, it advised the defendant that he had a right to a jury trial on the prior conviction allegation, but did not tell him he had a right not to testify and to confront witnesses in any trial on the allegation. (*Ibid.*) Still, when the defendant admitted the allegation, he had just undergone a jury trial in which he was represented by counsel. (*Id.* at p. 364.) He also had prior experience with the criminal justice system; he suffered the prior conviction of possessing a controlled substance upon pleading guilty to the charge, and would have received *Boykin-Tahl* advisements when he entered the guilty plea. (*People v. Mosby, supra*, at pp. 364-365.) The *Mosby* court concluded that the defendant’s admission was valid because it was knowingly and voluntarily made under the totality of the circumstances. (*Ibid.*)

The same circumstances are present here. When defendant admitted the prior strike and prison prior allegations, he had just undergone a jury trial in which he was represented by counsel. During trial, he admitted pleading guilty to burglary, grand theft,

⁶ *Boykin v. Alabama* (1969) 395 U.S. 238, 243; *In re Tahl* (1969) 1 Cal.3d 122, 132.

and petty theft with a prior in 1993, 1996, and 1999, respectively, and he was presumably given complete *Boykin-Tahl* advisements when he entered those guilty pleas. Thus here, as in *Mosby*, defendant's admission of the prior strike and prison priors was knowingly and voluntarily made under the totality of the circumstances.

D. Defendant's Sentence on the Four Prison Priors Must Be Reduced to Four Years

Defendant, the People, and we agree that defendant was erroneously sentenced to nine years on his four prison priors. (Pen. Code, § 667.5, subd. (b).) The trial court imposed one year on each of the *three* prison priors and attached the three-year terms to each of the three attempted murder convictions in counts 1, 2, and 3, resulting in a nine-year term on *four* prison priors. Prison prior enhancements do not attach to particular counts, and may be imposed only once. (*People v. Tassell* (1984) 36 Cal.3d 77, 90; *People v. Smith* (1992) 10 Cal.App.4th 178, 181-183 [Fourth Dist., Div. Two].) We therefore remand the matter with directions to reduce defendant's sentence on the prison priors from nine years to four years.

IV. DISPOSITION

The matter is remanded to the trial court with directions to reduce defendant's sentence on the four prison priors to one year each, or a total of four years, rather than nine years, resulting in a determinate term of 64 years rather than 69 years. The court is further directed to prepare an amended abstract of judgment reflecting this reduction in defendant's sentence, and to forward a copy of the abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.