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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.

MICHAEL ANDRA JAMES,

Defendant and Appellant.

E057676

(Super.Ct.No. FVI1201762)

OPINION

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

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Lise Jacobson, and Vincent P. LaPietra, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendant Michael Andra James appeals from judgment entered following jury convictions for misdemeanor battery on a spouse (Pen. Code, § 243, subd. (e)(1)<sup>1</sup>), as a lesser included offense of corporal injury to a spouse (§ 273.5, subd. (a); count 1), and for preventing an executive officer from performing his official duty (§ 69; count 2). In a bifurcated trial, the court found true allegations that defendant had previously been convicted of a strike and prison prior. The trial court sentenced defendant to an aggregate prison term of five years, consisting of 365 days in jail for count 1, to run concurrent with a prison term of four years for count 2, and an additional consecutive one-year term for a prison prior.

Defendant contends the trial court erred in admitting into evidence preliminary hearing testimony of defendant's wife, Lanette James, and erred in failing to hold a *Marsden*<sup>2</sup> hearing. Defendant also argues there was insufficient evidence to support his conviction for preventing an executive officer from performing his official duty. In addition, defendant asserts the trial court erred in refusing to reduce count 2 to a misdemeanor. We reject defendant's contentions and conclude there was no prejudicial cumulative error. The judgment is therefore affirmed.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

## II

### FACTS

On February 10, 2012, defendant's daughter, Andrea James, called 911 and reported that defendant was choking her mother, Lanette James, who was pushed up against a wall outside her apartment. Andrea told 911 to come get defendant immediately because Andrea was about to stab him. Andrea said she and her mother were scared. Andrea described defendant and said he was about to drive away towards the freeway in a grey LeSabre.

As Sheriff's Deputy Antonio Acosta was driving to Lanette's apartment at around 11:00 a.m., Acosta saw defendant drive into a nearby gas station in a Silver Buick. Acosta turned on his lights and "chirped" his siren to let defendant know he was being pulled over. Defendant stopped his car at the gas station. Acosta parked behind defendant and the two got out of their cars. Acosta identified himself as a deputy sheriff and asked defendant to approach him so Acosta could talk to him. Defendant was 15 feet from Acosta. Defendant slowly walked towards Acosta, waving his arms back and forth, and shrugging his shoulders.

Acosta told defendant to turn around and put his hands behind his back. Defendant yelled, "No, I didn't do anything." Defendant took two quick steps towards Acosta and then lunged forward as if he were going to hit or tackle Acosta. Defendant moved about six to seven feet toward Acosta. Acosta moved backwards and drew his Taser, fearing defendant was going to attempt to knock Acosta down, injure him, and

grab Acosta's weapons on his belt (a Taser, baton, and gun). Acosta ordered defendant to stop and get down on the ground. Defendant was six or seven feet away. Defendant said, "Fuck you, bitch," and lunged at Acosta again. Acosta again stepped backwards and fired his Taser at defendant. Defendant fell to the ground. Acosta notified dispatch that he had Tased defendant and requested backup.

When the effects of the Taser had worn off after about five seconds, defendant started getting up. Acosta ordered defendant to stay on the ground and put his hands behind his back. Defendant continued to get up and cursed Acosta. Acosta fired the Taser again. Thereafter, defendant was compliant.

Right after the second time Acosta fired the Taser, defendant's wife, Lanette, arrived at the gas station. She ran toward Acosta, crying and sobbing uncontrollably. Her shirt was torn. Acosta ordered her to sit in her car. After backup arrived and defendant was placed in the patrol car, Acosta interviewed Lanette.

Acosta testified at trial that Lanette told him defendant and Lanette had lived together off and on during their nine years of marriage. The day of the incident, they had argued over content posted on Facebook. Their argument escalated. The couple decided defendant would leave, but as he was leaving, defendant wanted Lanette to go with him. She refused. Defendant grabbed Lanette's arm and tried to pull her out of the apartment. She fought back. Defendant became angry, wrapped his arm around Lanette's neck in a choke hold, and walked her outside. Outside, he slapped her several times and held her up against a chain-link fence. Lanette said she was scared for her life because defendant

was big and strong. She thought defendant was going to kill her. Lanette tried to break free. She clawed and scratched defendant.

Andrea came outside and threatened defendant with a knife. Defendant ignored her. Andrea slashed one of defendant's car tires. Lanette heard a pop. Defendant then released Lanette, walked to his car, and drove away. Acosta noticed small lacerations on the inside of Lanette's cheek. Lanette complained of injuries to her neck, and her cheek felt swollen.

Because Lanette was unavailable at the trial, her preliminary hearing testimony was read to the jury. During the preliminary hearing, Lanette said she had a verbal altercation with defendant over photographs she had posted on Facebook. Also, defendant wanted Lanette to return her iPad and phone he had given her but she refused and he grabbed them from her. Lanette followed defendant to the gas station because she wanted to retrieve her iPad and phone. Lanette denied that defendant had been physically violent and denied telling Acosta defendant had placed her in a choke hold, pinned her against a fence, and slapped her several times, causing her to fear for her life. Lanette said the picture taken by Acosta of a sore inside her mouth was not of a wound caused by defendant. It either was caused by Lanette biting the side of her mouth or was a cold sore.

### III

#### ADMISSIBILITY OF PRELIMINARY HEARING TESTIMONY

Defendant contends the trial court erred in admitting into evidence Lanette's

preliminary hearing testimony. Defendant argues it was inadmissible under Evidence Code section 1291 because the prosecution failed to use due diligence to secure Lanette's attendance at trial. He concludes use of Lanette's preliminary hearing testimony at trial violated his federal constitutional rights to a fair trial and confrontation.

*A. Procedural Background*

After Lanette testified at the preliminary hearing in April 2012, the trial court dismissed the case in July 2012 pursuant to the prosecution's request under section 1385, based on the "lack of necessary witness," presumably Lanette. The same day as the dismissal, the People refiled the instant case. Defendant waived his right to another preliminary hearing, and on July 27, 2012, the People filed an Information, alleging corporal injury to a spouse (§ 273.5, subd. (a); count 1), and preventing an executive officer from performing his official duty (§ 69; count 2).

In the People's trial brief filed on October 1, 2012, the prosecution requested the trial court to allow Lanette's preliminary hearing testimony in lieu of her live testimony at trial under Evidence Code section 1291. The prosecution stated that it had "made many attempts to locate and serve [Lanette], as detailed in Stephen Cunningham's affidavit, but have been unable to find her or a current address to serve her at."

During a hearing on the parties' motions in limine, the trial court heard the People's request to use Lanette's preliminary hearing testimony at trial. The prosecutor confirmed that Lanette had still not been located and submitted district attorney investigator Steve Cunningham's affidavit of due diligence. The trial court's tentative

ruling was to allow the prosecution to use Lanette's preliminary hearing testimony at trial, subject to Cunningham verifying his acts of due diligence and being subject to cross-examination.

The following day, October 2, 2012, the trial court held an Evidence Code section 402 hearing, during which Cunningham testified concerning his attempts to locate Lanette. Cunningham stated that he was a senior investigator for the district attorney's office and had been assigned to work on defendant's case. His assignment included locating Lanette and Andrea. His first attempt to locate Lanette was in August 2012. He initially attempted to contact her at the address stated on the subpoena. He went to Lanette's apartment and missed her by about an hour. Lanette's next door neighbor told him Lanette was moving and had just left with her last load about an hour before Cunningham's visit. Cunningham asked the neighbor to contact him if she saw Lanette again. The neighbor never contacted Cunningham. The neighbor said she did not get along with Lanette.

Cunningham returned to Lanette's apartment on September 28, 2012, the week before the trial, and there were new tenants. The new tenants did not know where Lanette or defendant were. One of the tenants gave Cunningham the property owner's name, Edward Lau, and his phone number. The tenant said they still received mail for Lanette and turned it over to Lau, who gave it to Lanette. Cunningham called Lau, who said he had not spoken to Lanette in a couple of weeks and did not know how to get

ahold of her. Lau said he no longer had contact with Lanette but if Lanette called him, he would let Cunningham know and would ask Lanette to call Cunningham.

Cunningham also checked court records for warrants or bookings for Lanette, in the event she was in custody. He did not find anything. Cunningham checked the jail visitation log for defendant and found that Lanette had registered to visit defendant several times but had not shown up. Cunningham attempted to locate Lanette's new address by using the search engine, Accurint, and checking DMV records. He also checked with the post office the previous Friday and was told the post office had not received a change of address notice for Lanette. The postal service worker who had delivered her mail submitted a notice that Lanette had moved but there was no new address. Cunningham stated that he had exhausted his avenues for locating Lanette.

After Cunningham testified during the Evidence Code section 402 hearing, the prosecutor requested the court to find that the People had exercised due diligence in attempting to locate Lanette and that the court find she was unavailable to testify. Defense counsel responded: "I want the transcripts coming in. So I'm not going to argue against myself." The trial court found the prosecution had exercised due diligence in attempting to locate Lanette. The court reporter read to the jury Lanette's preliminary hearing testimony.

### *B. Forfeiture*

The prosecution argues that by not objecting in the trial court to use of Lanette's preliminary hearing testimony at trial, defendant forfeited his objection on appeal. We

agree. The general rule, to which we find no exception here, is “““that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.”” [Citations.]” (*People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Here, there was neither a specific nor timely objection below predicated on the Sixth Amendment’s confrontation clause or the right to a fair trial. Instead, defense counsel stated that he wanted the trial court to allow Lanette’s preliminary hearing testimony to be introduced into evidence during the trial, no doubt because, during her preliminary hearing, Lanette denied that defendant had been physically violent.

In any event, there is substantial evidence supporting the trial court’s finding that the prosecution exercised due diligence in attempting to locate Lanette.

### *C. Applicable Law*

The confrontation clauses of the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution’s witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) “““An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made ‘a good-faith effort’ to obtain the presence of the witness at trial.” [Citations.]” (*People v. Fuiava* (2012) 53 Cal.4th 622, 674-675.)

In California, “[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party

against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.” (Evid. Code, § 1291, subd. (a)(2).) A witness is unavailable if “[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court’s process.” (Evid. Code, § 240, subd. (a)(5).)

The California Supreme Court has described the efforts required by section 240 as involving “due diligence.” (See *People v. Fuiava*, *supra*, 53 Cal.4th at p. 675.) “[T]he term ‘due diligence’ is ‘incapable of a mechanical definition,’ but ‘it connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.’ [Citations.] Relevant considerations include “‘whether the search was timely begun,’” [citation], the importance of the witness’s testimony [citation], and whether leads were competently explored [citation].” (*People v. Cromer* (2001) 24 Cal.4th 889, 904; see also *People v. Fuiava*, *supra*, 53 Cal.4th at p. 675.) “‘It is enough that the People used reasonable efforts to locate the witness.’ [Citation.]” (*Fuiava*, at p. 677.) “[T]he Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.” (*Ibid.*)

When the facts are undisputed, a reviewing court decides the question of due diligence independently, not deferentially. (*People v. Fuiava*, *supra*, 53 Cal.4th at p.

675.) Under this standard of review, the trial court properly admitted Lanette’s preliminary hearing testimony.

*D. Analysis*

Defendant argues that the prosecution has not met its burden of proving (1) the prosecution acted with due diligence in attempting to make Lanette present at trial and (2) the prosecution used reasonable means to prevent Lanette from becoming absent. (*People v. Friend* (2009) 47 Cal.4th 1, 68.) We disagree. The record on appeal shows more than sufficient evidence establishing that the prosecution acted with due diligence in attempting to make Lanette available at trial. After it became apparent at about the time of the trial readiness hearing in July 2012, that Lanette would not comply with the subpoena in the first trial and she could not be located, the prosecution dismissed the case and refiled it. About a month later, Cunningham began searching for Lanette. At the Evidence Code section 402 hearing, he testified to his extensive efforts to locate Lanette, which began at least a month before the trial in October 2012, and continued up until shortly before the trial began.

Regardless of whether more could have been done to secure Lanette’s appearance at trial, ““[i]t is enough that the People used reasonable efforts to locate the witness.”” (*People v. Valencia* (2008) 43 Cal.4th 268, 293, quoting *People v. Cummings* (1993) 4 Cal.4th 1223, 1298.) ““That additional efforts might have been made or other lines of inquiry pursued does not affect [a] conclusion [there was due diligence] . . . . A court cannot ‘properly impose upon the People an obligation to keep “periodic tabs” on every

material witness in a criminal case, for the administrative burdens of doing so would be prohibitive. Moreover, it is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply “disappear,” long before a trial date is set.’ [Citation.]” (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

In hindsight, defendant argues the prosecution should have taken measures to prevent Lanette from disappearing but this would have placed an unreasonable burden on the prosecution. “The prosecution is not required ‘to keep “periodic tabs” on every material witness in a criminal case . . . .’ [Citation.] Also, the prosecution is not required, absent knowledge of a ‘substantial risk that this important witness would flee,’ to ‘take adequate preventative measures’ to stop the witness from disappearing. [Citations.]” (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) Although Lanette was an important witness and she indicated at the preliminary hearing that she objected to testifying, defendant does not cite any evidence that the prosecution was aware or should have been aware that Lanette posed a substantial risk of fleeing.

Furthermore, it is apparent from the record that Lanette made a calculated effort to avoid testifying by moving and not leaving any trace of her subsequent whereabouts. Under such circumstances, it is highly speculative that the prosecution could have done anything to prevent Lanette from disappearing or ensure that she testified at trial, short of placing her under 24 hour surveillance or holding her in custody. “[I]t is unclear what effective and reasonable controls the People could impose upon a witness who plans to leave the state, or simply “disappear,” long before a trial date is set.’ (*People v. Hovey*

[(1988) 44 Cal.3d 543], 564 [due diligence found where investigators began search for witness one month before trial testimony was needed].)” (*People v. Wilson, supra*, 36 Cal.4th at p. 342.) Here, the People used reasonable efforts to locate Lanette. (*Ibid.*) Thus, the trial court did not err in determining that she was unavailable as a witness and allowing the prosecution to use her preliminary hearing testimony at trial.

#### IV

#### *MARSDEN HEARING*

Defendant contends the trial court erred in failing to hold *Marsden* hearings during the jury trial and after the bifurcated court trial on his prior convictions. Defendant maintains that the court’s failure to conduct a *Marsden* hearing to fully explore the reasons for his dissatisfaction with his current appointed attorney requires reversal of the judgment or remand to the trial court to conduct a hearing on his *Marsden* motion and, if necessary, appoint new counsel to file a motion for new trial.

##### *A. Procedural Background*

During the second day of trial, on October 2, 2012, out of the presence of the jury, defendant told the court that, contrary to his attorney’s advice, he wanted to wear his orange prison clothing during the trial and “I also want new counsel because I don’t feel I’ve been represented since Day 1.” The court responded, “That’s not timely. The Court’s not going to hear this today. We’re in the middle of trial. It’s an untimely request for you to make as far as a new attorney goes.” Defendant said, “I don’t have – so in the meantime, I have to go with someone that – with my life on the line that I’m not

comfortable with?” The court told defendant, “That’s correct. It’s an untimely request, and we’re not going to hear that at this point.”

The trial proceedings continued. While discussing the possibility of placing defendant in shackles, the court asked defendant if he intended to cause a disturbance in court. Defendant said, “I just wanted to be on file that I feel . . . unfairly tried right now.” The court asked defendant if that was because the court would not “change your attorney in the middle of trial.” Defendant said that was “part of it,” and also he had a right to a speedy trial and to confront witnesses. The court ruled defendant would not be placed in shackles. Defendant interjected, “I don’t know how me and Mr. Powell [defendant’s attorney] going to stand right now.” The court told defendant that “I’m going to have Mr. Powell tell me.” The court asked defendant’s attorney, “Mr. Powell, do you have any hard feelings with respect to Mr. James?” Powell responded, “Absolutely not. I have [acceded] to his wish to move this case as speedy as possible as he has always requested.” Powell explained that defendant was troubled because he believed he had not been given the opportunity to look at four pages of discovery. But, according to Powell, defendant had a chance to look at the discovery each day of trial. Powell added that he wanted defendant to wear civilian clothing for trial, not prison clothing.

Defendant told the court, “[e]ven when I had Luke Byward first [defendant’s previous attorney] –” The court interrupted defendant and told him the court was not going to hear defendant’s request for a new attorney at that time because “We’re in trial.” The court added that Powell was a very experienced, excellent, highly respected lawyer,

who had tried over a hundred murder trials. The court acknowledged defendant did not want to follow Powell's advice to wear civilian clothing during the trial and said that was defendant's choice, "but it doesn't mean he can't represent you. He's indicated that he continues to be able to do so." Defendant then said it did not matter to him what he wore. The court suggested defendant follow Powell's advice and wear civilian clothing. Defendant agreed to do so and after a brief recess, the jury trial resumed, with Powell cross-examining Acosta.

At the conclusion of the trial, on October 10, 2012, after the trial court had conducted a bifurcated court trial on defendant's prior convictions, defendant informed the trial court that he wanted his attorney to file a motion for a new trial because defendant had not been properly represented during the trial and therefore he did not have a fair trial. Defendant asserted that therefore his constitutional rights were violated. The trial court noted that Powell said he was going to file motions but Powell would be the one to decide which motions to file. Defendant responded: "I've been asking him, your Honor." Powell told the court he intended to file a *Romero*<sup>3</sup> motion. The court told defendant the court was not going to do anything at that time, other than advise him of his sentencing rights. Defendant acknowledged he understood them.

The court then told defendant Powell intended to file several motions, including possibly a *Romero* motion, and Powell would decide which motions would be filed. The

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<sup>3</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

court said that it would set the matter for pronouncement of judgment on November 30, 2012, and for a hearing on the motions, if defendant waived his right to be sentenced sooner than that date. Defendant agreed to waive this right so that Powell would have additional time to prepare motions on defendant's behalf. Defendant did not request another attorney.

*B. Applicable Law*

The principles set forth in *Marsden, supra*, 2 Cal.3d 118, are well settled. “““When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.” [Citation.]” (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488; *People v. Vines* (2011) 51 Cal.4th 830, 878.) Under *Marsden*, if the ““defendant complains about the adequacy of appointed counsel,’ the trial court has the duty to ‘permit [him or her] to articulate his [or her] causes of dissatisfaction and, if any of them *suggest* ineffective assistance, to *conduct an inquiry* sufficient to ascertain whether counsel is in fact rendering effective assistance.’ [Citations.]” (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367.)

“‘[A] criminal defendant, at any stage of the trial, must be given the opportunity to state reasons for a request for new counsel.’ [Citation.]” (*People v. Lopez* (2008) 168 Cal.App.4th 801, 814.) “[I]n ruling on a postconviction *Marsden* motion, the trial court must apply the same standard it would apply in ruling on a preconviction *Marsden* motion.” (*People v. Johnson* (2009) 47 Cal.4th 668, 673, fn. 2, quoting *People v. Smith* (1993) 6 Cal.4th 684, 696.) “After hearing from the defendant, a trial court is within its discretion in denying the motion unless the defendant establishes substantial impairment of his right to counsel. [Citation.] On appeal we review the denial for an abuse of discretion.” (*People v. Vera* (2004) 122 Cal.App.4th 970, 979.)

### C. Analysis

Defendant contends that on two occasions the trial court erred in not conducting a *Marsden* hearing. The first instance was during the jury trial. The second instance was after the bifurcated court trial on defendant’s prior convictions.

We agree defendant clearly requested a new attorney during the second day of trial. Therefore, the trial court was required to conduct a *Marsden* hearing, allowing defendant to explain the basis of his request and relate specific instances of his attorney’s inadequate performance. (*People v. Vines, supra*, 51 Cal.4th at p. 878.) But the trial court’s failure to conduct a formal *Marsden* hearing does not constitute prejudicial error in the instant case because the court ultimately was informed of the basis of defendant’s request and evaluated whether the request was well-founded.

Although the trial court initially summarily denied defendant's request for a new attorney, concluding his request was untimely, shortly afterwards the court asked defendant and his attorney why defendant was dissatisfied with his attorney. When defendant complained he was not receiving a fair trial, the court asked him if he believed this because he was not permitted to change his attorney midtrial. Defendant agreed this was part of the problem and added that he was unclear as to what his situation was with his attorney. In an attempt to clarify defendant's uncertainty, the court asked defendant's attorney, Powell, if he had any "hard feelings" toward defendant. Powell said he did not. Powell added that defendant was upset because Powell had not shown defendant some discovery, but Powell had actually shown him the discovery. Powell also noted that defendant had disregarded Powell's advice to wear civilian clothes during the trial and insisted on wearing his prison clothing.

In discussing Powell's representation of defendant, the court explained to defendant that, even though defendant did not want to follow Powell's advice regarding wearing civilian clothing, that did not mean Powell could not adequately represent him, and defendant still could choose what he wore during the trial. After the court stated that Powell was an excellent attorney and suggested defendant follow Powell's advice of wearing civilian clothing, defendant indicated he was no longer dissatisfied with Powell. Defendant said he was willing to follow Powell's advice and wear civilian clothing. Defendant did not express any additional dissatisfaction with his attorney's representation or indicate he still wanted a new attorney.

Although the court did not state it was conducting a *Marsden* hearing, the court, in effect, accomplished the purpose of conducting such a hearing by allowing defendant and his attorney to explain why defendant was dissatisfied with his attorney and wanted a new attorney. Defendant was given an opportunity to relate specific instances of what he believed to be inadequate performance by his attorney. Once the court addressed those concerns, defendant's willingness to follow his attorney's advice and the absence of any other complaints demonstrated that he was satisfied with his attorney, and defendant and his attorney were not embroiled in such an irreconcilable conflict that ineffective representation was likely to result. (*People v. Vines, supra*, 51 Cal.4th at p. 878.) "The transcript clearly indicates that the trial judge made inquiry of defendant and listened to his complaints. Nothing more was required under *Marsden*." (*People v. Williamson* (1985) 172 Cal.App.3d 737, 745.) Moreover, the trial court had abundant justification for denying defendant's request for a new attorney. His request was not timely, occurring during the second day of jury trial. (*Ibid.*; *People v. Jackson* (1981) 121 Cal.App.3d 862, 872.)

Any error in not providing a proper *Marsden* hearing was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defendant is entitled to relief only if the record clearly shows that his attorney was not providing adequate representation or that defendant and his attorney had become embroiled in such an irreconcilable conflict that ineffective representation was likely to result. (*People v. Vines, supra*, 51 Cal.4th at p. 878.) It is apparent from the record that, in the instant case,

even if there had been a formal *Marsden* hearing, the outcome would have been the same. Defendant's request for new counsel would have been denied because there was no constitutional deficiency in representation or irreconcilable conflict.

Defendant's additional contention that he was entitled to a *Marsden* hearing after the bifurcated court trial on his prior convictions also lacks merit. Defendant did not make an unequivocal request for new counsel at that time. (*People v. Dickey* (2005) 35 Cal.4th 884, 920.) The basis of defendant's *Marsden* error claim is his statement: "I'd like to have my attorney file for a retrial, a new trial, because I feel that I wasn't really represented right. I didn't have a fair trial. I feel my constitutional rights was violated, my trial rights was violated."

““Although no formal motion is necessary, there must be ‘at least some clear indication by defendant that he wants a substitute attorney.’” [Citations.]” (*People v. Dickey, supra*, 35 Cal.4th at p. 920.) While defendant expressed dissatisfaction with his representation during the completed trial, defendant did not clearly indicate he wanted substitute counsel appointed. Rather, he said he wanted his current attorney, not another attorney, to file a motion for new trial. Then, after the trial court discussed the matter with defendant and his attorney, defendant agreed to a delay in sentencing so that his attorney would have additional time to file motions on defendant's behalf. Under such circumstances, the trial court was not required to conduct a *Marsden* hearing at the conclusion of the court trial on defendant's prior convictions.

## SUFFICIENCY OF EVIDENCE

Defendant contends there was insufficient evidence to support his conviction for attempting to prevent Acosta from performing his law enforcement duties in violation of section 69. We disagree.

*A. Standard of Review*

Upon a challenge to the sufficiency of the evidence, we examine the whole record in the light most favorable to the judgment below and determine whether or not the record discloses substantial evidence upon which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) “In making this determination, we ““must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” (*People v. Rayford* (1994) 9 Cal.4th 1, 23.)

We may not reverse defendant’s conviction simply because differing inferences and findings could have been made by the trier of fact. “[A]n 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.” (*People v. Ceja, supra*, 4 Cal.4th at p. 1139.)

## *B. Applicable Law*

Section 69 “sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 814; *People v. Bernal* (2013) 222 Cal.App.4th 512, 517.) Defendant was convicted of committing the first manner of violating section 69.

“The first way of violating section 69 ‘encompasses attempts to deter *either* an officer’s *immediate* performance of a duty imposed by law *or* the officer’s performance of such a duty at some time *in the future.*’ [Citation.] The actual use of force or violence is not required. [Citation.] Further, ‘the statutory language [of the first clause of section 69] does not require that the officer be engaged in the performance of his or her duties at the time the threat is made.’ (*People v. Smith* (2013) 57 Cal.4th 232, 240-241.)

Here, the court instructed the jury that to prove that defendant was guilty of the section 69 crime of “trying to prevent an executive officer from performing that officer’s duty,” the People were required to prove:

- “1. The defendant willfully and unlawfully used violence or a threat of violence to try to prevent an executive officer from performing the officer’s lawful duty;

“AND

“2. When the defendant acted, he intended to prevent the executive officer from performing the officer’s lawful duty.”

*C. Analysis*

In arguing there was insufficient evidence to support defendant’s conviction for violating section 69, defendant urges this court to reweigh the evidence and construe the facts in his favor, which this court cannot do. For instance, he suggests that during his encounter with Acosta, defendant was cursing Lanette, not Acosta, and defendant was not necessarily lunging at Acosta. Rather, defendant’s lunging movement was defendant’s normal gait of taking large steps. Also, defendant suggests that, when defendant attempted to get up off the ground after being Tased, he may have done this involuntarily in response to being Tased. While these may be plausible explanations for defendant’s behavior, it is not appropriate for this court to reweigh the evidence and view the evidence favorably to the defendant. Viewing the evidence favorably to the prosecution, as we must, and indulging all intendments and reasonable inferences which favor sustaining the judgment, we conclude there was substantial evidence supporting defendant’s conviction for violating section 69.

Evidence supporting defendant’s conviction for violating section 69 included Acosta’s testimony that when he stopped and attempted to question defendant concerning the reported spousal battery incident, defendant responded defiantly, refused to comply with Acosta’s instructions, and lunged at Acosta. When Acosta told defendant to turn around and put his hands behind his back, defendant yelled, “No,” and lunged toward

Acosta. Acosta feared defendant was going to knock him down and grab his weapons. Acosta testified that, when he told defendant to stop and get down on the ground, defendant said, "Fuck you, bitch," and again lunged at Acosta. Fearing defendant would injure Acosta, Acosta fired his Taser at defendant, causing defendant to fall to the ground. When defendant tried to get back up, Acosta told him to stay on the ground. Defendant ignored Acosta, cursed Acosta, and started getting up, resulting in Acosta again Tasing defendant. This evidence was more than sufficient to support defendant's conviction for attempting to prevent Acosta from performing his law enforcement duties in violation of section 69.

## VI

### REDUCING DEFENDANT'S FELONY CONVICTION TO A MISDEMEANOR

Defendant contends the trial court abused its discretion in denying his request to reduce count 2 to a misdemeanor. As a misdemeanor, defendant would not be subject to the Three Strikes law, since his other conviction in this case on count 1 was for a misdemeanor. We conclude there was no abuse of discretion in denying defendant's request.

At the sentencing hearing, defendant requested count 2 be reduced to a misdemeanor on the grounds defendant did not touch any officers when he committed the charged crime of preventing an executive officer from performing his official duty. The prosecution objected to defendant's request. The trial court concluded it was not appropriate to reduce count 2 to a misdemeanor under section 17, subdivision (b), based

on the circumstances of the crime and defendant's extensive criminal record. The court noted that defendant's count 1 conviction for the lesser offense of misdemeanor battery on a spouse (§ 243, subd. (e)(1)) was a separate crime from the count 2 offense, and a mitigated term for the count 2 crime was also inappropriate based on defendant's past history and the new conviction. The court further found there were circumstances in aggravation supporting an upper term. Nevertheless, the court sentenced defendant to the middle term, explaining that "the circumstances of this particular resisting an officer are rather minor or mitigated compared to most." The court added that the facts did not justify giving defendant only a 16-month term. The court agreed with the probation department's recommendation of sentencing defendant on count 2 to a middle term of two years, doubled under the Three Strikes law (§ 667, subd. (e)(1), § 1170.12, subd. (c)(1).)

A trial court has discretion to reduce a wobbler to a misdemeanor under the Three Strikes law. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) The discretion to reduce is subject to a broad generic standard. (*Id.* at p. 977.) "This discretion . . . is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.]' [Citation.] 'Obviously the term is a broad and elastic one [citation] which we have equated with "the sound judgment of the court, to be exercised according to the rules of law.'" [Citation.]' [Citation.]" (*Ibid.*)

In exercising this discretion, the trial court should consider the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, the defendant's character, and the general objectives of sentencing, including public safety. (*Alvarez, supra*, 14 Cal.4th at pp. 978-979.) "[T]he record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history." (*Id.* at p. 979.) The record must reflect a reasoned consideration of the defendant's background and circumstances. (*Id.* at p. 980.)

On appeal, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.]'" (*Alvarez, supra*, 14 Cal.4th at pp. 977-978.)

Here, the record reflects a reasoned consideration of defendant's background and circumstances. (*Alvarez, supra*, 14 Cal.4th at p. 980.) The trial court, as well as the probation department, reasonably concluded that reducing count 2 to a misdemeanor was not warranted because of the circumstances of the charged crimes and defendant's extensive criminal record. Defendant was 48 years old and still violating the law, with a criminal history dating back to when he was 18 years old. His past felony convictions

included grand theft person while armed in 1982 (former § 487.2, now § 487, subd. (c)); possession for sale of a controlled substance in 1993 (Health & Saf. Code, § 11351); possession for sale of cocaine base for sale in 1994 (Health & Saf. Code, § 11351.5); possession of a firearm in 1996 (§ 12021, subd. (a)(1)); possession for sale of cocaine base for sale in 1999 (Health & Saf. Code, § 11351.5); and infliction of corporal injury on spouse in 2009 (§ 273.5).

The probation department reported that defendant's prior performance on probation and parole was unsatisfactory. He had committed many of his crimes during periods of active parole. Although he was not on probation or parole at the time of the charged offenses, defendant had been released from parole on his last conviction for less than a year. Defendant had been convicted of corporal injury to a spouse in 2009 and in the instant case was convicted of battery on a spouse in 2012, along with the current offense of aggressively and defiantly resisting Acosta's efforts to investigate the battery offense. Defendant's belligerent, physically threatening conduct resulted in Acosta Tasing defendant twice, with Acosta fearing defendant would injure him. Evidence of defendant's inability to control his anger and his recent physically threatening and volatile conduct indicated that defendant posed a risk to public safety. In addition, defendant's criminal history and poor prior performance on probation and parole indicated defendant had little regard for complying with the law. The probation department also reported that defendant had not shown remorse for his crimes.

Considering the circumstances of the charged offenses, defendant's attitude toward them, and his lengthy criminal history, we conclude the trial court did not abuse its discretion in refusing to reduce count 2 to a misdemeanor.

VII  
DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.