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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.

DANIEL HERRERA JIMENEZ,

Defendant and Appellant.

E061215

(Super.Ct.No. FSB1103014)

OPINION

APPEAL from the Superior Court of San Bernardino County. Victor R. Stull, Judge. Affirmed with directions.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, and Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant Daniel Herrera Jimenez killed one person and injured another during a failed attempt to steal a car stereo. A jury convicted defendant of murder, attempted murder, and attempted robbery, with multiple firearm enhancements. (Pen. Code, §§ 187, subd. (a); 211; 664; & 12022.53, subds. (a)-(d).)¹ The court sentenced defendant to an aggregate term of 82 years to life in prison.

On appeal defendant argues the court should have conducted a *Marsden*² hearing after he was convicted and before his sentencing. The People disagree but largely concede defendant's other arguments about the restitution order and other fees imposed by the trial court during sentencing. Subject to these modifications, we affirm the judgment.

II

FACTS

On the night of July 4, 2011, the victims, Fidel Rizo and his brother, Raul Sanchez, were drinking and shooting fireworks in their front yard. When Rizo went inside the house, Sanchez remained outside, listening to music while sitting in his SUV, which was parked in front.

¹ All statutory references are to the Penal Code unless otherwise noted.

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

Defendant and another man, Felix Garduno, approached the vehicle. Defendant knocked on the car window and asked for a beer. Sanchez invited the men inside the car to drink. Defendant sat in the front passenger seat and Garduno sat in the back, behind the driver's seat. After they began drinking, defendant and Garduno decided to steal the car stereo and attempted to remove it from the dashboard.

When Rizo heard some commotion, he looked outside and saw Sanchez being assaulted and bleeding inside the SUV, while Garduno held him in a headlock from behind. Defendant was pulling on the stereo. Rizo rushed outside to help. Defendant left the vehicle and brandished a gun. As Rizo tried to grab the gun, defendant shot him in the neck and twice in the back.

Sanchez escaped from the vehicle and yelled for Rizo to call the police. Defendant shot and killed Sanchez. The cause of death was multiple gunshot wounds to Sanchez's chin, neck, and back. Sanchez also had lacerations on his head caused by a hard object.

Garduno's fingerprints were found on the car door and the stereo was hanging by its wires from the dashboard. In the hospital, Rizo identified defendant as the shooter and Garduno as his accomplice.

At 1:00 a.m. after the shooting, defendant called his sister and asked her for a ride because he was in trouble. Two months later, border patrol agents apprehended defendant in San Diego while he was hiding in the bushes, attempting to reenter the United States illegally.

III

MARSDEN MOTION

After the jury verdict and before sentencing, defendant complained about his trial counsel's representation and asked for a continuance to prepare a new trial motion. The trial court denied the motion on the grounds there were no credible arguments to be made about ineffective assistance of counsel or sufficiency of evidence.

Defendant contends on appeal that the trial court had a duty to conduct a *Marsden* hearing. Defendant's argument assumes that his request "to waive time for sentencing and ask for transcripts to file for a motion for retrial" constituted a request for a *Marsden* hearing. We disagree because defendant did not state that he was requesting substitute counsel.

To trigger a court's duty to hold a *Marsden* hearing, there must be "at least some clear indication by defendant that he wants a substitute attorney." [Citations.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 97.) No formal motion is necessary, and a defendant need not specifically request a *Marsden* hearing by name: “[A] *Marsden* hearing is . . . an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.” [Citation.]’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803; *People v. Mendoza* (2000) 24 Cal.4th 130.)

The trial court has no duty to hold a *Marsden* hearing if neither the defendant nor defense counsel clearly indicates that the defendant wants a new attorney: “[A] trial court's duty to permit a defendant to state his reasons for dissatisfaction with his attorney

arises when the defendant in some manner moves to discharge his current counsel.”

(*People v. Lucky* (1988) 45 Cal.3d 259, 281; *People v. Sanchez* (2011) 53 Cal.4th 80, 90; *People v. Valdez, supra*, 32 Cal.4th at p. 97; *People v. Gay* (1990) 221 Cal.App.3d 1065, 1070.) A trial court should not “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*, at p. 89.)

Defense counsel’s statement that defendant wanted a continuance to investigate a possible motion for a new trial based partly on counsel’s “shortcomings,” combined with defendant’s request for transcripts to pursue the motion, did not constitute a cognizable request for a *Marsden* hearing. Therefore, the trial court had no duty to conduct a *Marsden* hearing. (*People v. Sanchez, supra*, 53 Cal.4th at p. 90; *People v. Valdez, supra*, 32 Cal.4th at p. 97.)

Defendant cites *People v. Reed* (2010) 183 Cal.App.4th 1137, to argue that the trial court’s duty to hold a *Marsden* hearing was triggered after defendant expressed his wish to file a new trial motion. However, the cases cited by *Reed*—*People v. Mejia* (2008) 159 Cal.App.4th 1081, and *People v. Mendez* (2008) 161 Cal.App.4th 1362—were rejected by the California Supreme Court in *Sanchez*, which held that the Fifth District Court of Appeal in *Mejia* and *Mendez* “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.’ [Citation.]” (*People v. Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.)

In any event, *Reed* is legally and factually distinguishable. The issue in *Reed* was whether the trial court made the inquiry necessary to assess the defendant's motion for new trial based on incompetent counsel. (*People v. Reed, supra*, 183 Cal.App.4th at pp. 1143-1144.) After other unsuccessful *Marsden* motions, the *Reed* defendant asked to pursue a motion for new trial based on counsel's incompetence, and defense counsel said, "I cannot make it for him." (*Id.* at p. 1142.) *Reed* made it sufficiently clear that he was in fact requesting substitute counsel to pursue the motion for new trial. (*Id.* at pp. 1145-1146.) Therefore, the *Reed* court found that a *Marsden* hearing was required.

Here defendant had not made any other *Marsden* motions. Defense counsel did not state he was requesting substitute counsel on defendant's behalf. Defense counsel only stated that defendant wished to address the court regarding the issue of a new trial motion. Furthermore, the trial court did inquire about the basis for defendant's new trial motion. The court asked, "Do you wish to say something to me in that regard, Mr. Jimenez?" Defendant asked to waive time for sentencing and for transcripts. He did not raise the issue of incompetent counsel.

Finally, any error was harmless beyond a reasonable doubt. (*People v. Hill* (2013) 219 Cal.App.4th 646, 652-653 [Fourth Dist., Div. Two], citing *Chapman v. California* (1967) 386 U.S. 18, 24.) The only basis for the motion could be that defense counsel performed ineffectively during trial or could not adequately represent defendant at sentencing. Nothing in the record suggests that the claim of incompetence involved anything other than the trial. Because the trial judge presided over the trial, "he is then in a position to intelligently determine whether he may at that point fairly rule on the

defendant's motion for a new trial, or whether new counsel should be appointed to more fully develop the claim of inadequate representation.” (*People v. Stewart* (1985) 171 Cal.App.3d 388, 395-396; *People v. Smith* (1993) 6 Cal.4th 684, 693.) The trial court announced unequivocally that defendant had no viable basis for a new trial. Therefore, defendant cannot meet his burden to show a “*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.) Thus, any error was harmless beyond a reasonable doubt.

IV

RESTITUTION AND FEES

The parties agree that defendant’s remaining contentions have merit. The court operations assessment and the criminal conviction assessment fees should be reduced, and the errors in the abstract of judgment should be corrected to reflect the trial court’s oral pronouncements. The restitution order to the Victim Compensation Board must be reversed and the matter remanded for a new restitution hearing. The attorney’s fees must also be reversed because the trial court did not make the requisite finding of ability to pay under section 987.8, subdivision (g)(2), and the matter should be remanded for the trial court to determine whether unusual circumstances exist to rebut the presumption that defendant does not have the ability to pay.

A. The Restitution Order to the Victim Compensation Board

San Bernardino Probation Officer Melinda Carpenter prepared the probation report. According to the report, a restitution specialist from the San Bernardino District

Attorney's Office stated that the Victim Compensation Board paid \$4,937.55 for Sanchez's funeral and burial expenses and \$39,547.16 for Rizo's medical expenses, totaling \$44,484.71. At sentencing, the trial court ordered defendant to reimburse the Victim Compensation Board the total amount of \$44,484.71 pursuant to section 1202.4 subsection (f).

Crime victims have the right to receive restitution for their losses. (Cal. Const., art. I, § 28, subd. (b)(13)(B); § 1202.4, subs. (a)(1) and (f).) Where state funds are used to assist a victim, as a matter of proof, the amount of assistance provided must "be established by copies of bills submitted to [the Victim Compensation Board] reflecting the amount paid by the board and whether the services for which payment was made were for medical or dental expenses, funeral or burial expenses, mental health counseling, wage or support losses, or rehabilitation. Certified copies of these bills provided by the board and redacted to protect the privacy and safety of the victim or any legal privilege, together with a statement made under penalty of perjury by the custodian of records that those bills were submitted to and were paid by the board, shall be sufficient to meet this requirement." (§ 1202.4, subd. (f)(4)(B); *People v. Lockwood* (2013) 214 Cal.App.4th 91, 96.)

The trial court's restitution order for \$44,484.17 must be reversed for lack of evidentiary support. Although the probation report indicated that the Victim Compensation Board paid \$4,937.55 for Sanchez's funeral and burial expenses and \$39,547.16 for Rizo's medical expenses, the prosecution did not provide any copies of bills or sworn statements to support the claims. (*People v. Giordano* (2007) 42 Cal.4th

644, 664.) The supporting documentation required by section 1202.4, subdivision (f)(4)(B), was not submitted to the court below. Therefore, we reverse the restitution order and remand the matter for a new restitution hearing. (§ 1260.)

B. Attorney's Fees

The trial court's order for attorney's fees in the amount of \$750 was unauthorized. The trial court failed to make a finding of "unusual circumstances" to overcome the presumption under section 987.8, subdivision (g)(2)(B), that a defendant sentenced to state prison does not have the ability to pay. We order the matter remanded for the trial court to determine whether "unusual circumstances" exist to rebut the presumption in this case, including "the defendant's reasonably discernible future financial position, limited to the next six months. [Citation.]" (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1537; *People v. Flores* (2003) 30 Cal.4th 1059, 1068.)

C. Assessments

The court operations assessment fee of \$180 (§ 1465.8) and the criminal conviction assessment fee of \$120 (Gov. Code, § 70373) were also unauthorized. The correct amounts are \$40 per count for the court operations assessment fee—a total of \$120—and \$30 per count for the criminal conviction assessment fee—a total of \$90. An unauthorized fee may be corrected at any time by the reviewing court. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) The sentencing minutes from May 9, 2014, should be corrected to reflect the reduction. (*In re Candelario* (1970) 3 Cal.3d 702, 705.)

D. The Abstract of Judgment

The appellate court has the inherent power to correct clerical errors for purposes of judicial economy. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) The abstract of judgment indicates sentences of 25 years for the section 12022.53, subdivision (d), enhancements in counts 1 and 2. This is inconsistent with the trial court's imposition of 25 years *to life* as to each firearm enhancement. The abstract should be corrected to reflect the trial court's oral pronouncement of 25 years to life for the section 12022.53, subdivision (d), enhancements.

The abstract of judgment also fails to indicate defendant's sentence in counts 2 and 3, and the fines and fees imposed by the trial court. The court imposed an indeterminate term of seven years to life in count 2, and a concurrent middle term of two years in count 3, stayed pursuant to section 654. Additionally, the abstract for the indeterminate prison commitment should be amended to reflect the trial court's award of 961 days of credit for time served, consisting of 961 actual days and zero conduct credits.

V

DISPOSITION

We remand the matter for a new restitution hearing and for further proceedings on the attorney's fees. We order the court operations assessment fee reduced to \$40 per count and the criminal conviction assessment fee reduced to \$30 per count. We also

order the clerical errors in the abstract of judgment corrected as explained above in IV-C and IV-D.

In all other respects, we affirm the judgment.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

McKINSTER
J.