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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD LEE JOHNSON,

Defendant and Appellant.

F062133

(Super. Ct. No. 1254288)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Stanislaus County. Scott T. Steffen, Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J. and Franson, J.

A jury found appellant Ronald Lee Johnson guilty, as charged, of one count of intimidating a witness and/or victim (Pen. Code, § 136.1, subd. (c)(1))<sup>1</sup> and one count of battery on a spouse or cohabitant (§ 273.5, subd. (a)). !(CT 77-83, 205-207)! The trial court found true the allegations that Johnson had suffered two prior serious felony convictions (§ 667, subd. (a)), a prior strike (§ 667, subd. (d))<sup>2</sup>, and a prior prison term (§ 667.5, subd. (b)). Johnson was sentenced to 18 years in state prison.

Johnson's only contention on appeal is that the trial court erred when it denied his fourth *Marsden*<sup>3</sup> hearing. For purposes of this appeal, we assume the trial court made a procedural error by appointing conflict counsel for the limited purpose of investigating Johnson's claim that counsel was ineffective, and then reinstating prior counsel after the motion was denied. But we find no prejudice and affirm.

### **STATEMENT OF THE FACTS**

In 2008, Lani Azevedo and Johnson lived together for about nine months. On December 6, 2008, the couple argued most of the day about a telephone number Johnson found on Azevedo's cell phone, and that evening, Azevedo decided she was going to leave. Johnson told her that, if she was going to leave, she had to do it immediately and could not gather her belongings. Johnson pushed Azevedo toward the door, and she resisted. He then grabbed her by the shirt and she ended up near the couch. In the process, Azevedo fell against a laundry basket and broke it. As she tried to get to the door, Johnson picked her up and "tossed" her into the railing outside the apartment. As a result, she sustained scratches and bruises to her wrist, hands, knees, back, chest, neck

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> A second prior strike was dismissed after the court granted Johnson's *Romero* motion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).) !(CT 243)!

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

and face, and her watch was shattered and her toenail cracked. Azevedo got up and walked to a nearby store to get away from Johnson.

Once at the store, Azevedo decided against calling the police because she was afraid Johnson would get mad and she didn't want anything to happen. Johnson walked over to the store and glared at Azevedo through the window. When Azevedo went outside to speak to Johnson, he asked her if she had called the police. She said no, but Johnson threatened that, if she did, she would know what "retaliation" or "payback" was. Azevedo was intimidated by the statement, but returned with Johnson to the apartment.

As they walked back to the apartment, the two exchanged threats. Johnson threatened to tell Azevedo's employer that she was working while under the influence of methadone. Azevedo said she would call Johnson's parole officer and tell her that he had been drinking and that they had had a "scuffle." Johnson then said that, if he went back to prison, he knew "how to work the system." Johnson's threats frightened Azevedo.

Back at the apartment, Johnson threw Azevedo's belongings out of the apartment and over the railing. Azevedo walked back toward the store and encountered a law enforcement officer. Azevedo did not want to make a police report and she did not want the officers to confront Johnson because she did not want the situation "to escalate." The officer noted that Azevedo was crying and shaking, and appeared scared. Azevedo eventually told police what happened. When Johnson was subsequently arrested, he smelled of alcohol, was agitated, and had bloodshot, watery eyes.

Azevedo had taken a dose of methadone on the morning of the incident, and in the afternoon, had had some sips of Smirnoff Ice. In his defense, Johnson called a pharmacist, who had previously testified as an expert on a patient's use and response to medications, to testify that, when a person takes methadone and alcohol, the methadone prolongs the alcohol intoxication, leading to more impairment, sedation and stumbling. It might also lead to a heightened sense of feeling threatened.

## DISCUSSION

Johnson's only issue on appeal is that he contends the trial court erred when it failed to appoint new counsel after his fourth *Marsden* hearing. Specifically, Johnson argues that, once the court found a "prima facie showing" of ineffective assistance of counsel, it should have appointed new counsel for all purposes. We find no prejudicial error.

### *Procedural Background*

The record reflects that the trial court, Judge Thomas Zeff, granted Johnson's first *Marsden* motion and appointed new counsel from Conflict I on March 6, 2009.<sup>4</sup> A month later, on April 9, 2009, the trial court, Judge Scott Steffen, denied Johnson's second *Marsden* motion.<sup>5</sup> Immediately following the denial of the second *Marsden* motion, a two-day preliminary hearing was held. Conflict I Attorney Hans Hjertonsson represented Johnson on the first day; Attorney Orenstein on the second day. The information was then filed on April 23, 2009.

On July 15, 2009, Johnson himself filed a section 995<sup>6</sup> motion to set aside the information based, in part, on a claim of ineffective assistance of counsel at the preliminary hearing. Specifically, Johnson claimed that counsel was ineffective for failing to acquire photographs of Azevedo prior to the preliminary hearing. Johnson

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<sup>4</sup> In his motion, Johnson claimed there was a breakdown in communication between himself and Public Defender Bryant. It does not appear that respondent received access to any of Johnson's *Marsden* motions other than the fourth one, which is at issue on appeal.

<sup>5</sup> Ruling on Johnson's second *Marsden* motion, Judge Steffan stated that he found Conflict I (this time Attorney Robert Orenstein) was, despite Johnson's claim to the contrary, adequately prepared for the preliminary hearing.

<sup>6</sup> Under section 995, a defendant may bring a motion to dismiss a criminal information where the defendant has been committed without reasonable or probable cause. (§ 995, subd. (a)(2)(B).)

claimed the photographs were exculpatory to his charge of battery. He also claimed counsel was ineffective for failing to adequately investigate his case, failing to elicit certain critical information from Azevedo, and that counsel spent only five minutes preparing for cross-examination of Azevedo at the preliminary hearing. At the hearing on the section 995 motion, the trial court suggested that Johnson's motion was more of a *Marsden* motion than a section 995 motion. Orenstein agreed and a *Marsden* hearing was scheduled.

At the hearing on the third *Marsden* motion before Judge Steffen, Johnson made various complaints about Conflict I counsel: that counsel failed to complete and submit a "Three Strikes letter"; that counsel failed to provide him with the transcripts from the "17(b)," the request to reduce a felony to a misdemeanor; that he and Hjertonsson argued about what Johnson thought was a possible *Brady*<sup>7</sup> violation and "some ... points" Johnson wanted argued in his section 995 motion; that both counsel have tried to dissuade Johnson from doing legal research and putting together motions; and that Orenstein failed to acquire the photographs of Azevedo.

Hjertonsson responded<sup>8</sup> that the Three Strikes letter was submitted in mid-July; that he had not promised Johnson that he would file certain motions, but that he would review everything and, if there was a basis to file a motion ("the 995, 17(b), and the *Romero* Motion") he would; and that he had contacted the prosecutor several times regarding the photographs and he had been told they would be given to him as soon as they were available. Although Hjertonsson thought there was a basis for a *Romero* motion, such a motion was untimely and only appropriate if Johnson was found guilty. As for preparation for the preliminary hearing, Hjertonsson acknowledged that he had not

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<sup>7</sup> *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

<sup>8</sup> The reporter's transcript of the *Marsden* hearing incorrectly attributes Hjertonsson's response to Mr. Baker, the prosecutor, who was not present. !(RT 39, 44)!

reviewed the case nor had any conversation with Johnson prior to the hearing, but that he did speak with Orenstein, who had spoken to Johnson at length. Orenstein provided Hjertonsson with a list of questions and a “brief explanation scenario of what happened ...” Because Johnson’s past record exposed him to a life sentence, Hjertonsson believed that it was his duty to persuade Johnson if the prosecution had a “good deal ... on the table.”

The trial court found that Johnson appeared to have a “disagreement on tactics” and some frustration in how Orenstein was handling his case, but that he had not established grounds for removal of counsel.

On October 14, 2009, Judge Steffen conducted a fourth *Marsden* hearing. Johnson’s motion alleged that he was denied effective assistance of counsel at the preliminary hearing because counsel had failed to obtain photographs of Azevedo until two months after the hearing, and counsel “only spent five minutes” preparing for cross-examination of the witness. At the hearing, Johnson complained about Hjertonsson’s representation during the preliminary hearing, specifically that Hjertonsson failed to present or prepare an affirmative defense, failed prepare adequately for the preliminary hearing, failed to ask Azevedo any questions about the intimidation charge, and failed to obtain and admit photographs of Azevedo. Johnson stated that he had spoken to Hjertonsson two days earlier and was shown his notes which indicated that he did not inquire about the photographs until “well after the prelim dates.” One of those photographs of Azevedo’s face, according to Johnson, showed “distress, but there is no evidence of any marks or any physical damage,” refuting her claim that her face hit the railing outside the apartment when Johnson threw her. Johnson complained of Hjertonsson’s failure to question Azevedo at the preliminary hearing about the supposed threats he made. Had he done so, according to Johnson, he could have had the section 136.1 charge dismissed. Finally, Johnson complained that, in the past month, he had sent

15 “kites” to Hjertonsson, but when he met with counsel, counsel said he did not have them and did not remember what was on them.

Hjertonsson, in response, explained that he believed he had previously addressed Johnson’s concerns about the preliminary hearing. Because he had not represented Johnson before the preliminary hearing, he could not say whether the photographs were requested or obtained prior to the hearing. Hjertonsson stated that he had received the 15 “kites” sent by Johnson and informed him that they would discuss them, but when they met, he did not have all of the “kites” with him. Nevertheless, the two went over “numerous issues” and spoke for “almost two hours.”

Johnson then reiterated his concerns and noted specifically that Hjertonsson acknowledged he had no knowledge of any of the “kites” he sent him. Johnson also stated that he had “combed” over the preliminary hearing transcript, and that Hjertonsson had not asked Azevedo “one single question” regarding the supposed threats he made toward her. Johnson’s overall concern was that Hjertonsson “refuses to help me make arrangements to have [the section 995] motion heard.”

Hjertonsson clarified that he had not said he didn’t have knowledge of any of the “kites,” only that he did not remember all of them. But he had reviewed all of them and he did what he believed “was necessary at that point in time.”

At the end of the hearing, the trial court stated that it would take Johnson’s motion under submission.

On October 19, 2009, the trial court concluded that there was “at least a prima facie showing that [Johnson] has made his case for ineffective assistance of counsel with respect to the preliminary hearing.” The court then appointed Michael Scheid from Conflicts II for the purpose of determining “whether or not there is ... sufficient grounds for a 995 motion based on ineffective assistance of counsel. If he determines that there is, he will represent you for purposes of the 995 motion, and we will see how that comes out in terms of where we go after that. ¶¶ If the 995 is granted on those grounds, then

you've made your point, and if not, it's likely that Conflicts I will continue to represent you."

The trial court directed Scheid to interview Johnson, read the preliminary hearing transcript and files, and determine whether it would be appropriate to file a section 995 motion. The court stated that it thought that "technically the [*Marsden*] hearing is still under submission ... [¶] ... [¶] ... pending further proceedings," and made it clear that Scheid would be appointed to represent Johnson "for purposes of 995 only, specially appointed." In doing so, the court did not relieve Conflicts I.

At the next hearing, on November 10, 2009, Scheid stated that he did not think there was ineffective assistance on the part of the Conflicts I law firm by failing to file a section 995 motion. In making his decision, he had reviewed the preliminary hearing transcript, reviewed correspondence from Johnson to Scheid, reviewed correspondence from Johnson to "the Conflict I law firm," and he met with Johnson once and spoke with him on the telephone twice. In speaking with Johnson, Scheid "encouraged a wide-ranging discussion in spite of the narrow focus of [his] representation." Scheid stated that he found no ineffective assistance of counsel on the part of Conflict I law firm, "not just for failing to file a 995 motion, but I did not find ineffective assistance of counsel in their representation of Mr. Johnson to date." At that point, the trial court denied the *Marsden* motion and further scheduling ensued. Jury trial began June 22, 2010.

#### *Applicable Law and Analysis*

Johnson's claim on appeal is that the trial court erred in failing to appoint a new attorney after it conducted a fourth *Marsden* hearing. Specifically, Johnson argues that, once the court found ineffective assistance of counsel, it should have appointed new counsel for all purposes. While we agree that the procedure used by the trial court was incorrect, we do not agree with Johnson's analysis of the trial court's finding and find no prejudicial error.

““[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, quoting *People v. Alfaro* (2007) 41 Cal.4th 1277, 1320.) The decision to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the trial court’s discretion, and a defendant generally has no absolute right to more than one appointed attorney. (*Marsden, supra*, 2 Cal.3d at p. 123.) Nevertheless, ““[a] defendant is entitled to [new appointed counsel] 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 [citations].’ [Citations.]” [Citation.]” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

“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.]” (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484; see also *People v. Lucky* (1988) 45 Cal.3d 259, 281 [“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”].) If, the defendant makes a showing during a *Marsden* hearing that the right to counsel has been substantially impaired, substitute counsel must be appointed as attorney of record for all purposes. (*People v. Sanchez* (2011) 53 Cal.4th 80, 84 (*Sanchez*).) The court in *Sanchez* specifically disapproved the procedure used by the trial court here, of appointing substitute or “conflict” counsel solely to evaluate a defendant’s complaint that his

attorney acted incompetently with, in the *Sanchez* case, respect to advice regarding the entry of a guilty or no contest plea.<sup>9</sup> (*Ibid.*)

Here, the trial court gave Johnson ample opportunity to explain the basis of his contentions. In fact, he repeated many of his complaints over the course of, at least, his second, third and fourth *Marsden* hearings. The trial court adequately sought responses from counsel, and after the hearing, and intervening events, the court denied Johnson's fourth *Marsden* motion.

We disagree with Johnson's contention that the trial court's preliminary finding of "ineffective assistance of counsel with respect to the preliminary hearing," required the trial court to appoint new counsel. The definition of "prima facie" is, "[S]ufficient to establish a fact or raise a presumption unless disapproved or rebutted .... [¶] ... At first sight; on the first appearance but subject to further evidence or information ...." (Black's Law Dict. (8th ed. 2004) p. 1228, col. 1.) The finding of a "prima facie" showing is not synonymous with a finding that continued representation of Johnson by Hjertonsson would result in a substantial impairment of his right to counsel. (*Sanchez, supra*, 53 Cal.4th at p. 90.)

While we find that the trial court procedurally erred when it appointed conflict counsel for the purpose of determining if counsel was ineffective for failing to file a section 995 motion, we cannot say that Johnson was prejudiced by this action. During Johnson's fourth *Marsden* hearing, he had three main complaints regarding Hjertonsson's representation during the preliminary hearing: (1) that he failed to prepare an affirmative defense; (2) that he failed to ask Azevedo questions about the alleged intimidating threats; and (3) that he failed to obtain and admit photographs of Azevedo at the hearing.

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<sup>9</sup> The opinion in *Sanchez* was issued on December 5, 2011; Johnson's fourth *Marsden* motion was denied on November 10, 2009.

Johnson also complained that Hjertonsson had failed to address each of the concerns raised in the 15 messages he sent him between September 21, 2009 and October 7, 2009.

Johnson has failed to show that any of these complaints demonstrated that his right to effective assistance had been “““substantially impaired.””” (Sanchez, supra, 53 Cal.4th at p. 90.) The first two issues, that of failing to prepare an affirmative defense and of failing to ask Azevedo questions about the alleged intimidating threats, involve the use of trial tactics and were previously addressed in Johnson’s third *Marsden* hearing. The transcript of the preliminary hearing in the record shows that Hjertonsson did question Azevedo about a possible affirmative defense, her use of methadone and her drinking on the day in question. As for Johnson’s claim that Hjertonsson failed to obtain photographs of Azevedo prior to the preliminary hearing, Hjertonsson explained that he had not represented Johnson prior to the preliminary hearing. It would be difficult to find him ineffective before he even represented Johnson. Finally, as for the claim that Hjertonsson had failed to respond to Johnson’s “kites,” an issue that was more recent than the preliminary hearing, Hjertonsson explained that he had spoken to Johnson at length and that they had discussed numerous issues.

We find no abuse of discretion on the trial court’s part in denying Johnson’s fourth *Marsden* motion, as Johnson has failed to demonstrate that his right to effective assistance of counsel was substantially impaired. (Sanchez, supra, 53 Cal.4th at p. 90.) Any error in the procedure used by the trial court in appointing Conflict II for a limited purpose, and then relieving Conflict II when that purpose was satisfied, was harmless.

#### **DISPOSITION**

The judgment is affirmed.