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

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN K. RICE,

Defendant and Appellant.

F064994

(Super. Ct. No. BF140290A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Rachel Varnell, 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 Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J., and Poochigian, J.

A jury convicted appellant, Brian K. Rice, of attempted robbery (Pen. Code, §§ 664/212.5, subd. (c)).¹ In a separate proceeding, the court found true a prior serious felony enhancement (§ 667, subd. (a)), eight prior prison term enhancements (§ 667.5, subd. (b)), and allegations that Rice had a prior conviction within the meaning of the three strikes law (§ 667, subs. (b)-(i)).

On May 10, 2012, the court sentenced Rice to a 14-year term, a four-year term on his attempted robbery conviction, the middle term of two years (§ 213, subd. (b)), doubled to four years because of Rice's prior strike conviction, a five-year serious felony enhancement, and five 1-year prior prison term enhancements.²

On appeal, Rice contends the court committed *Marsden*³ error.⁴ We affirm.

FACTS

The Trial

Bakersfield Police Lieutenant Joseph Aldana testified that on January 22, 2012, at approximately 12:40 a.m., he was on patrol in an unmarked car on Martin Luther King Boulevard near Potomac. As he passed by a dirt lot, he saw Rice standing over Faruk Alam punching him four or five times as Alam lay on the ground. Lieutenant Aldana shined his light on the two men, parked his car, and walked toward them. Several onlookers were present and when one of them yelled, "Police," Rice got off of Alam and

¹ All further statutory references are to the Penal Code.

² During Rice's sentencing hearing, the probation officer informed the court that there were only five valid prison term enhancements because four of the enhancements were based on a single prison term Rice served on four prior convictions.

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

⁴ In his opening brief, Rice contends that the court erred when it used the same prior conviction to impose a serious felony enhancement and a prior prison term enhancement. In his reply brief, Rice concedes the court did not err in this respect.

walked across Martin Luther King Boulevard. Officer Dean Barthelmes arrived on the scene with other officers and detained Rice.

Lieutenant Aldana contacted Alam briefly and saw a small amount of blood on his face. He asked Alam if he needed medical attention and told him the officers who were arriving would get a statement from him. Lieutenant Aldana contacted the other officers to see who would be handling the case and told them what he observed. He also walked across the street, spoke briefly with Officer Barthelmes and left the area.

Alam testified he was walking from his apartment to buy a phone card when he was stopped by a man with a beard who asked him, "What do you have?" The man had his hands in his pockets and appeared to be pointing a weapon at Alam. Alam told the man he was going to the store. Every time Alam tried to pass, the man blocked him. Alam then turned around and crossed the street where he ran into Rice, who was missing the tips of two fingers on one hand. Rice grabbed Alam's shirt. Alam managed to get out of his grasp, but Rice got him in a headlock from behind. Alam fell and Rice got on top of him. Alam screamed for someone to call the police. Rice put his hand over Alam's mouth and repeatedly told him not to scream as he hit Alam in the face with his other hand. Rice kept telling the bearded man to check Alam's pockets. The bearded man went through Alam's pockets. He then told Rice, "He don't have anything. Let him go. Let him go. The police are going to come."

The next thing Alam remembered was that a man stopped his car, asked Alam's attackers what they were doing, and told them the police were coming. The man left, however, after Rice and the bearded man cursed at him. About two minutes later, a flashlight shone on Alam and Rice and Rice got off of him and walked away. Alam told an officer who spoke to him he did not want an ambulance and just wanted to go home.

Before the assault Alam had a \$20 bill and a cell phone in his jacket pocket. After the assault he still had the \$20 bill, but was missing the cell phone. However, he did not know whether one of the men took the phone.

During cross-examination, Alam testified he was uncertain whether he told the officer who interviewed him about the bearded man. However, he unequivocally testified that he did not tell the officer that the bearded man pointed a weapon at him or that he went through his pockets. Alam also did not tell the officer that Rice went through his jacket pockets or that Rice told the second man to go through them.

Officer Michael Malley testified that he responded to the scene and saw Alam sitting on the ground in the dirt lot breathing heavily. Officer Malley interviewed Alam with Officer Barthelmes present. Alam told Officer Malley that he was walking across Martin Luther King Boulevard and a man came up to him with his hand in his hooded sweatshirt and pointed what appeared to be a weapon at him. Alam feared for his safety because he did not know whether the man had a weapon and he begged the man not to rob him. Alam then walked back across the street and backpedaled into a dirt lot. He was trying to get away when the man punched him in the face, which caused him to fall to the ground. Once he was on the ground, the man began to repeatedly punch and kick him in the face and abdomen. The man also reached into Alam's pocket and demanded that Alam give him "all his stuff."

Afterwards, the man walked back across Martin Luther King Boulevard as Lieutenant Aldana arrived in his patrol car. Alam and Lieutenant Aldana each pointed out the suspect. During the interview, Alam did not mention anything about a bearded man or a calling card.

After he was interviewed by Officer Malley, Officer Barthelmes drove Alam the one-half block to his home. The officers did not find a cell phone on Rice.

The Marsden Hearing

On May 10, 2012, prior to Rice being sentenced, defense counsel advised the court that Rice believed defense counsel provided ineffective representation and that Rice was asking for a *Marsden* hearing. The court then cleared the courtroom and allowed Rice to voice his complaints. Rice, in pertinent part, complained about defense counsel's alleged failure to impeach Alam with the version of the assault he provided to the police and to the defense investigator. In doing so, Rice stated:

"I feel I was denied a fair trial by [defense counsel]. There were three different stories given by Faruk Alam. The jury only got the chance to hear just one, the one he made up on the stand when he testified. They never heard the statement he gave to police or the statement he gave to [the defense investigator].... Not once ... did the jury get to hear what was stated in the police report.

"I asked [defense counsel] to get Faruk Alam to state what he told officers in the police report in order to impeach him. He did not do it. I asked him to get Lieutenant Aldana to state what was told to him by Faruk Alam in order to impeach him. He did not do it. I asked him to get Officer Malley to state what was told to him by Faruk Alam in order to impeach him. He did not do it. I asked him to submit into evidence the police report in order to impeach him. He did not do it. I asked him to put [the defense investigator] on the stand so the jury could hear the second statement he made in order to impeach him. Again, he did not do it.

"Mr. Faruk Alam got up on the stand and lied in open court. That was all the jury got to hear because [defense counsel] did nothing in his power to impeach him nor let the jury hear the other statements he made. [Defense counsel] had five opportunities that I can count to let the jury hear the other statements in order to impeach Faruk Alam. He utilized none." (Italics added.)

In response to the above allegations, defense counsel stated,

"Okay. As to impeachment, I think your Honor will remember that was the central defense in the case. Mr. Alam told multiple stories, and I brought that out to the jury. I'll submit on the record...."

The court, however, denied Rice's *Marsden* motion without inquiring further of defense counsel why he did not call the defense investigator or any other police officers, or why he did not submit any police reports into evidence.

DISCUSSION

Rice contends he would have had a stronger case if defense counsel had impeached Alam with additional statements he made to the defense investigator and to officers other than Officer Malley. He further contends that in order for the court to determine whether defense counsel could continue to provide adequate representation, the court had to inquire further of counsel to determine whether his failure to use the police report for impeachment was a matter of discretion or neglect. Thus, according to Rice, the court abused its discretion when it denied his *Marsden* motion without making this inquiry because "the court exercised its discretion on an inadequate record." We disagree.

"When a defendant requests a substitution of appointed counsel, the trial court is required to allow the defendant an opportunity to relate specific instances of his attorney's asserted inadequacy. Depending on the nature of the grievances related by defendant, it may be necessary for the court also to question his attorney. (*People v. Hill* (1983) 148 Cal.App.3d 744, 753.) For example, in *People v. Groce* (1971) 18 Cal.App.3d 292 (*Groce*), at page 297, the court held when a defendant asserts 'specific important instances of alleged inadequacy of [counsel's] representation' such as failure to secure potentially exonerating evidence, the court cannot deny a *Marsden* motion without inquiry into counsel's reason for not introducing the evidence. But, this court held in *People v. Penrod* (1980) 112 Cal.App.3d 738, 747, inquiry into the attorney's state of mind is required only in those situations in which a satisfactory explanation for counsel's conduct toward his client is necessary to determine whether counsel can provide adequate representation. Further, that a defendant disagrees with the trial preparation and strategy

adopted by his appointed counsel does not trigger any duty of inquiry by the trial court. [Citation.]” (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1218-1219.)

“We review a trial court’s decision declining to relieve appointed counsel under the deferential abuse of discretion standard. [Citations.]” (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.)

During the *Marsden* hearing, Rice claimed Alam had given three versions of the attack: one he provided to police, one he provided to the defense investigator, and one he testified to. He also asserted that defense counsel did not get Lieutenant Aldana and Officer Malley to testify to the statements Alam made to them. The evidence at trial, however, showed that Alam spoke only to Officer Malley and possibly Lieutenant Aldana about the actual assault. Further, Lieutenant Aldana testified he spoke with Alam only briefly to ask him whether he needed medical attention, that Alam made some remarks Aldana did not recall, and that Aldana did not make a police report. Officer Malley testified during direct and cross-examination regarding Alam’s statements to him, including that Alam did not mention being accosted by a bearded man. Thus, the only version of the assault the jury did not hear was the version that Alam gave to the defense investigator. Rice, however, did not identify which of Alam’s statements to the defense investigator defense counsel should have presented or how they would have further impeached Alam’s testimony.

Moreover, it is apparent from defense counsel’s statements to the court during the *Marsden* hearing that he was aware of the importance of impeaching Alam with the prior statements he made about the assault that conflicted with his trial testimony and that he followed this strategy in defending Rice. The trial court could reasonably infer from this that the disagreement between defense counsel and Rice over presenting Alam’s statements to the investigator involved trial tactics and strategy which did not trigger a duty of inquiry by the trial court. Additionally, Rice’s assertions that the jury heard only

one of Alam's three versions of the assault and that defense counsel did nothing to impeach Alam, were not true. Thus, there was no reason for the court to inquire more as to defense counsel's state of mind because it was obvious he had provided, and could continue to provide, adequate representation and that his failure to call the defense investigator was a matter of discretion, not neglect.

Rice cites *People v. Munoz* (1974) 41 Cal.App.3d 62 (*Munoz*) and *Groce, supra*, 18 Cal.App.3d 292 in support of his contention that the court had a duty to inquire further of defense counsel. These cases are inapposite.

In *Munoz*, the defendant complained to the court that his counsel did not want to defend him and he requested appointment of substitute counsel. These complaints raised the issue whether defense counsel had become so convinced of the defendant's guilt that he was unable to defend him vigorously. (*Munoz, supra*, 41 Cal.App.3d at pp. 64-65.) Despite such serious allegations, the court did not conduct a *Marsden* hearing and it made no inquiry at all of the defendant or his counsel. (*Munoz, supra*, at pp. 65-66.) In finding reversible error, the *Munoz* court held that the judge's "ruling denying appellant's request for a substitution of attorneys, without an inquiry into the state of mind of the court-appointed attorney and without attempting to ascertain in what particulars the attorney was not providing appellant with a competent defense was tantamount to a refusal on the part of the court to adjudicate a fundamental issue[.]" (*Id.* at p. 66.)

In *Groce*, the defendant was convicted of assaulting a woman with a knife. The woman testified that she was taken to a hospital after the assault and that her stab wounds were stitched. During the trial, the defendant complained to the court that the woman was not cut with a knife and that his defense counsel "did not want to bring up the doctor's report." (*Groce, supra*, 18 Cal.App.3d at p. 295.) The trial court cited its observations of defense counsel's performance during the trial and denied the defendant's

motion for substitute counsel without making any inquiry at all of defense counsel. (*Id.* at pp. 295-296.)

In finding this to be reversible error, the *Groce* court stated, “The trial judge, of course, was not required to demand the production of the records. His duty was merely to make inquiry as to whether the failure to produce those records was a matter of discretion or neglect of appellant’s counsel.” (*Groce, supra*, 18 Cal.App.3d at p. 296.)

Munoz and *Groce* are easily distinguishable because in each case, although the defendant raised a serious issue with respect to his continued representation by defense counsel, in *Munoz* the court made no inquiry at all of the defendant or defense counsel and in *Groce* the court made no inquiry at all of defense counsel. Here, the court allowed Rice ample opportunity to voice his complaints and the only real issue raised by Rice’s comments to the court was defense counsel’s failure to introduce the version of the assault Alam gave to the defense investigator. The failure to present this version, however, did not raise a serious issue regarding defense counsel’s representation of Rice because, as previously noted, Rice did not identify which statements to the investigator defense counsel should have presented or how they would have further impeached Alam. Further, the trial court inquired of defense counsel and its inquiry was sufficient for the court to determine that the failure to present any of Alam’s statements to the defense investigator resulted from trial tactics and strategy and not from neglect. Accordingly, we conclude that the court did not abuse its discretion when it denied Rice’s *Marsden* motion.

DISPOSITION

The judgment is affirmed.