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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSE LEE JOHNSON, Defendant and Appellant.	F067295 (Super. Ct. No. 1449584) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Michael J. Pinkerton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, 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 Levy, Acting P.J., Kane, J. and Detjen, J.

Defendant Jesse Lee Johnson was convicted by jury of making a criminal threat (Pen. Code, § 422; count I)[1] and resisting an executive officer in performance of his duties (§ 69; count II). On appeal, he argues that (1) the court erred by failing to hold a *Marsden*[2] hearing, and (2) there was not sufficient evidence to sustain the conviction of criminal threats. We will reverse and remand with directions to hold a *Marsden* hearing.

FACTS

On September 12, 2012 at about 3:30 a.m., defendant's wife (Jane Doe) testified that she was asleep in her home in Patterson, California, when defendant called and woke her. Defendant told her that he ran out of gas and was stranded on Highway 33 near Wesley, California. He asked her to bring him some gas, and she refused. She told him that she did not have any money or gas. The road was dark and isolated, and she did not want to run out of gas while alone. She told him to wait until morning because she feared for her own safety. Initially, defendant was friendly, but then he became angry. He threatened to hit her with a machete, and she hung up. She stated that defendant called back to tell her he was going to walk back to Patterson from Wesley and would hit her with his machete when he got there. She was scared and believed defendant could follow through with the threat because two months prior, defendant showed her that he owned a machete. After the phone call, she called 911 in order to avoid a fight. She was feeling bad when defendant called her because she was tired, overwhelmed, and had been in class all day. She was also angry because she knew defendant was with his girlfriend in Stockton.

Officer Randall Watkins testified that he was dispatched to Doe's home. Doe told Watkins that defendant had threatened to chop her with a machete when he got home. He believed Doe was scared because she stuttered when she spoke, began crying, and lost

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1 Further statutory references are to the Penal Code unless otherwise indicated.

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

her composure. Watkins suggested that she leave the residence, and she went to her sister's house for that day and the following day. Watkins also left the residence to look for defendant.

Watkins found defendant on Highway 33 outside Wesley, six miles north of Patterson. He had prior contact with defendant and was able to identify him. He pulled behind defendant with spotlights as well as the red and blue lights. Watkins got out of the car and informed defendant that he was under arrest for threatening his wife. Defendant responded by yelling, "I'll end your life right now. You better shoot me right now before I do it." Watkins testified that defendant was aggressive, agitated, and confrontational. Watkins ordered defendant to put his hands in the air in order to determine whether he had any weapons. Defendant did not comply and continued yelling profanities and threats toward Watkins. When Watkins realized that defendant was unarmed, he holstered his pistol and obtained his less-lethal shotgun. He pumped the shotgun, and the sound caused defendant to place his hands on his head. However, defendant was still noncompliant and threatened to end Watkins's life.

A K-9 deputy arrived on scene, and Watkins informed defendant that the dog would be released if he did not comply. Once defendant heard the dog barking, he immediately complied and lay prone on the ground. He complied with the arrest process and was placed into the backseat of the patrol car without resistance. However, once the dog was secured in the patrol car, defendant continued yelling profanities and insults.

PROCEDURAL HISTORY

The Stanislaus County District Attorney filed a first amended information charging defendant with making a criminal threat (§ 422; count I) and resisting an executive officer in performance of his duties (§ 69; count II). The information also alleged that defendant had a prior serious felony conviction for intimidating a witness (§§ 1192.7, subd. (c), 667, subds. (a) & (d)), and had served two prior prison terms (§ 667.5, subd. (b)).

Jury trial began on February 5, 2013. Trial on the prior conviction allegations was bifurcated from the main offenses, and defendant waived the right to a jury on the priors.

The jury returned guilty verdicts on both counts on February 7, 2013. The court found the allegations of prior convictions to be true. On count I, defendant was sentenced to three years, doubled to six years for a prior serious felony conviction, plus a five-year enhancement under section 667, subdivision (a), and another one-year enhancement under section 667.5, subdivision (b), for a total term of 12 years.[3] The court imposed a four-year term for count II, to run concurrent with the term in count I.

DISCUSSION

I. *Marsden* Hearing

A. Additional Facts

On November 6, 2012, defendant refused to attend a pretrial hearing. The following day, the court granted defense counsel's request to suspend proceedings pursuant to section 1368 because he was concerned about defendant's competency to proceed to trial. The court appointed Dr. Philip Trompetter to evaluate defendant. Defendant told Dr. Trompetter that he was trying to fire his attorney, but did not specify any reason. Dr. Trompetter concluded that defendant was irritable, hostile, and a bully, but found that he understood the role of defense counsel.

The court attempted to hold a competency hearing on December 10, 2012, but defendant refused to appear. On December 12, 2012, defendant appeared at the competency hearing. The court found defendant was competent and continued the proceedings. Then the following exchange took place:

> "THE COURT: [H]ere's the deal: Mr. Johnson, you either behave in court or lose your right to be present when your case is being called by

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[3] We have received a corrected abstract of judgment and we note that the five-year enhancement is incorrectly identified as section 667.5, subdivision (a). The correct statute is section 667, subdivision (a).

> this Court. This Court will hear everything, including a jury trial, without your presence if you continue to behave like this. What that means is—
>
> "THE DEFENDANT: I just want another lawyer.
>
> "THE COURT: —don't—you have a lawyer who's sitting right back there because of your behavior, he is kind of afraid to approach right now."

At the end of the hearing, counsel for defendant stated, "Just for the record, I think [defendant] was ready to take me." The court responded, "Well, [defendant's] behavior is quite consistent with Dr. Trompetter's report. He knows what he's doing. He is—as he indicated to Dr. Trompetter, if people mess with him, he's taking care of business."

B. Analysis

In *Marsden*, *supra*, 2 Cal.3d at page 125, the California Supreme Court held that it was error to deny a defendant that was not satisfied with appointed counsel the opportunity to explain the basis of his contention. The court reasoned that the judge is "unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request." (*Id.* at p. 123.) In accordance with the *Marsden* line of cases, the Supreme Court subsequently held:

> "at any time during criminal proceedings, if a defendant requests substitute counsel, the trial court is obligated, pursuant to our holding in *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney." (*People v. Sanchez* (2011) 53 Cal.4th 80, 90 (*Sanchez*).)

The defendant must make a clear indication that he wants a different attorney before the court is obligated to conduct a *Marsden* hearing. (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.)

The People concede that defendant's statement that he wanted a new lawyer was a "'clear indication'" of a desire for new counsel, but contend that any error is harmless. Defendant argues that the remedy for a trial court's failure to conduct a *Marsden* hearing is to remand the matter so that such a hearing can be held. We agree with defendant.

The People first assert that any error was harmless because defendant waived his request for a *Marsden* hearing. The People cite *People v. Vera* (2004) 122 Cal.App.4th 970 (*Vera*) to support this position. In *Vera*, the trial court gave the defendant an opportunity to explain his concerns with defense counsel, but was interrupted by another matter. (*Id.* at p. 976.) The trial court denied the *Marsden* motion but indicated the motion could be renewed at any time. (*Ibid.*) The defendant failed to renew his request, and the court held that there was no error because the defendant waived his request for a *Marsden* hearing. (*Id.* at pp. 981-982.) Because the court found no error, it did not determine whether the error was harmless beyond a reasonable doubt. (*Id.* at p. 982.)

The facts in the current case are distinguishable because defendant's motion was never acknowledged by the trial court. Here, the court did not give defendant an opportunity to express his grievances with defense counsel. The court also did not expressly state that defendant could renew his request at any time. Defendant did not abandon his request, as in *Vera*, because his request was never acted on by the court. Further, in the instant case the People concede that the trial court erred, whereas in *Vera*, there was no error at all.

The People then argue that failure to hold a *Marsden* hearing is not reversible per se because defendant must show that he would have received a more favorable outcome if his motion had been heard (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349 (*Chavez*); *People v. Washington* (1994) 27 Cal.App.4th 940, 944 (*Washington*)) and, since defendant failed to show that his *Marsden* motion would have been granted if it had been heard, any error is harmless. *Marsden* error is not judged by the harmless error test. Neither *Chavez* nor *Washington* state otherwise.

In *Chavez*, the court held that the trial court erred in failing to give the defendant an opportunity postconviction to explain his reasons for requesting that an attorney who had represented him at the preliminary hearing be assigned to represent him after the filing of an information. However, the error was deemed harmless because there was "no

evidence of disagreement or lack of rapport between defendant and counsel" (*Chavez*, *supra*, 26 Cal.3d at p. 349) and, therefore, there was no basis upon which to conclude that the defense had suffered. (*Id.* at pp. 347-349.) The court further noted that "*Marsden* and its progeny are in this respect clearly distinguishable from the situation before us." (*Id.* at p. 349.)

Washington is also distinguishable. In *Washington*, the defendant's *Marsden* motion was made posttrial. The motion for new trial was heard and denied, but the trial court failed to hold a *Marsden* hearing. (*Washington*, *supra*, 27 Cal.App.4th at pp. 942-943.) On appeal, the court concluded that the only basis for granting the motion would be that counsel performed ineffectively at trial or could not adequately represent the defendant at sentencing. (*Id.* at p. 944.) Since the *Washington* court was able to review the record and conclude there was no basis for concluding counsel rendered ineffective assistance, any error was harmless. (*Ibid.*)

While we agree that failure to hold a *Marsden* hearing is not reversible per se, it is "prejudicial error to deny the defendant the opportunity to explain the basis for his claim." (*Sanchez*, *supra*, 53 Cal.4th at p. 92.) In *Marsden*, the court could not "conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction" because "the defendant might have catalogued acts and events beyond the observations of the trial judge to establish the incompetence of his counsel." (*Marsden*, *supra*, 2 Cal.3d at p. 126.) Based upon this record, we cannot conclude that there is no evidence of disagreement and the defense did not suffer.

Here, defendant did not have an opportunity to articulate his reasons for requesting new counsel. Therefore, the appropriate remedy is to remand the matter with directions that the trial court conduct a posttrial *Marsden* hearing. If it is shown that good cause for appointment of new counsel has been shown, then a new trial shall be ordered. If it is found that good cause for appointment of new counsel has not been shown, then the verdict shall be reinstated. (*People v. Olivencia* (1988) 204 Cal.App.3d 1391,

1400-1401; *People v. Minor* (1980) 104 Cal.App.3d 194, 200; *People v. Maese* (1985) 168 Cal.App.3d 803, 808-810; *People v. Lopez* (2008) 168 Cal.App.4th 801, 815.)

II. Sufficient Evidence for Criminal Threat Conviction

The standard of review for sufficiency of the evidence is whether, in the light most favorable to the judgment, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1347 (*Fierro*).)

In order to prove the crime of criminal threats under section 422, the prosecution must establish the following elements: (1) the defendant willfully threatened to commit a crime that will result in death or great bodily injury; (2) the defendant made the threat with specific intent that the statement was to be taken as a threat, even if there was no intention of carrying it out; (3) the threat on its face and under the circumstances was so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat; (4) the threat actually caused the person threatened to be in sustained fear for his or her own safety or for his or her immediate family's safety; and (5) the threatened person's fear was reasonable under the circumstances. (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228; § 422.)

Defendant first contends that there is insufficient evidence to sustain a conviction of making criminal threats because there is no evidence that Doe sustained fear. Defendant's contention is without merit.

In order to establish that the victim sustained fear, the fear must be more than "momentary, fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156 (*Allen*).) In *Fierro*, the defendant and the victim engaged in a verbal altercation. (*Fierro*, *supra*, 180 Cal.App.4th at p. 1345.) The defendant was armed with a gun, and threatened to kill the victim and his son "'right now.'" (*Id.* at p. 1346.) The victim called the police about 15 minutes later and told the operator he was scared. (*Ibid.*) The victim later testified that he was "'scared to death during the whole ordeal.'" (*Ibid.*) The court found

that the jury could have reasonably found that the victim sustained fear even though the threat only lasted about 40 seconds and he waited about 15 minutes to call the police. (*Id.* at p. 1349.) The court reasoned that when one believes he is about to die, one minute is longer than "'momentary, fleeting, or transitory'" and, therefore, concluded that there was substantial evidence that the victim sustained fear. (*Ibid.*)

In the current case, defendant maintains that Doe's fear was alleviated by calling 911 and later going to her sister's house and, therefore, the fear was "momentary, fleeting, or transitory." (*Allen*, *supra*, 33 Cal.App.4th at p. 1156.) Contrary to defendant's argument, the fact that Doe immediately called 911 and later left her home substantiates rather than disproves the jury's finding that she sustained fear. She testified that she felt scared because she believed defendant was capable of following through with his threat of chopping her up with a machete. Defendant had shown her the machete about two months prior. She also testified that she was aware of his behavioral problems. Watkins also observed that Doe was still fearful. The evidence suggests that the jury reasonably concluded that Doe sustained fear that was more than "momentary, fleeting, or transitory." (*Ibid*.)

Defendant asserts the facts of this case are similar to the facts of *In re Ricky T.* (2001) 87 Cal.App.4th 1132 (*Ricky T.*). In *Ricky T.*, a student defendant threatened his teacher by saying, "'I'm going to get you,'" and the teacher sent the defendant to the dean's office. (*Id.* at p. 1135.) The teacher felt physically threatened, although the defendant did not make a specific threat or further action. (*Ibid.*) The court found insufficient evidence that the teacher sustained fear beyond the time of the incident. (*Id.* at p. 1140.) The evidence did not suggest that the fear was more than "fleeting or transitory." (*Ibid.*)

The facts of this case are significantly different than *Ricky T.* Doe immediately called the police after defendant's threats. Her fear was not momentary, given that Watkins arrived at her home and observed that she was still in fear. She testified she was

scared, and she did not stay in her own home that night. There is sufficient evidence to support the jury finding that Doe sustained fear.

Next, defendant asserts that there was not sufficient evidence to show that the fear was reasonable under the circumstances because her state of mind was distorted due to a stressful day. Defendant cites *Ricky T.*, where the court found the defendant's threat to be no more than "intemperate, disrespectful remarks" and merely an emotional response to an incident. (*Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1140-1141.) The remarks caused the victim to react by sending the defendant to the dean's office. (*Id.* at p. 1140.) The court found that the victim's fear was not reasonable because this was the appropriate response to a classroom disturbance, and not a reaction to a death threat. (*Id.* at p. 1141.)

Under the circumstances of the current case, a reasonable person would sustain fear if his or her spouse, who has a history of behavioral problems, called multiple times during the night, and threatened to chop the person with a machete. The fact that Doe "had a bad day" does not render her fear unreasonable. Doe's awareness that defendant had a machete also supports the reasonableness of her fear. Additionally, when Watkins found defendant, he was aggressive and confrontational. There is no evidence that defendant's threats were only emotional outbursts like those in *Ricky T.* given defendant's history and the specificity of the threat. Doe's reaction was to call the police and spend a few days away from home, clearly more reactive than sending a student to the office. There is sufficient evidence for a reasonable jury to conclude that Doe's fear was reasonable under these circumstances.

DISPOSITION

The judgment is reversed with directions to conduct a *Marsden* hearing, at which time defendant shall have a full opportunity to state the reasons he previously requested the appointment of new counsel. If the court determines that good cause for appointment of new counsel has been shown, the court shall appoint new counsel and set the case for retrial. If the court determines that good cause has not been shown, it shall reinstate the

verdict and judgment appealed from. If the verdict is reinstated, the abstract of judgment should be corrected as noted in footnote 3, *ante*.