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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALONSO JOSE LOPEZ,

Defendant and Appellant.

G043976

(Super. Ct. No. 09ZF0073)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alonso Jose Lopez challenges his conviction for robbery, burglary, and street terrorism. He contends the court wrongly failed to instruct the jury on the affirmative defense of withdrawal from conspiracy. He further contends the court wrongly failed to consider his *Marsden* request to replace his appointed trial counsel.¹ But no substantial evidence supported a withdrawal instruction. And the court adequately heard his *Marsden* request, before permissibly denying it. We affirm.

FACTS

Three men entered a Laguna Beach jewelry store on August 25, 2009, at around 7:00 p.m. One pointed a gun at an employee and demanded the key to the display cases. The employee unlocked the cases. Two men loaded a backpack with jewelry. One of them told the employee they were going to tie her up. The third man stood by the doors, telling the other two to hurry.

The three men left. A bystander who saw two of them robbing the store followed them to their car. He saw a third man get into the car before they drove away.

The police found and followed the car. It eventually stopped, and someone ran away from it. Stolen jewelry was still in it. The car and its contents also contained fingerprints belonging to Pedro Hernandez and Michael Burgin. Hernandez belonged to the Vista Homeboys (“VHB”) criminal street gang. Burgin was loosely associated with VHB.

The police also found fingerprints on the car belonging to defendant, a VHB gang member whose moniker was “Risky.” Defendant’s identification card and cell phone were in the car. And his fingerprints were on things inside of it — including a bag of zip ties.

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

The car was registered to defendant's girlfriend, Sylvia Casteneda. She reported the car stolen. Officers responding to her house noticed a hotel receipt with Burgin's name on it. Security video at that hotel showed Casteneda and Burgin checking in together at 2:00 a.m. on the morning after the robbery.

The police obtained a search warrant for text messages sent from Casteneda's cell phone. On the day of the robbery at 2:15 p.m., she texted Hernandez: *"Hey what happen I thought u GUYS were taking the car."* He responded: *"That's what I thought risky said we cant take it whats going on doesn't he want to come up that's whats holding us up."* She texted back: *"FUCK Man what an idiot. Idk^[2] what his deal is. I told yes since yesterday so that's what we left off Wen u GUYS took off. So Wen he came back it was a [¶] . . . different story. I'm making him doing it in my car . . . So hold on let me get at him ok."* She quickly added: *"Just don't let him I'm knw I'm texting u."* At 2:44 p.m., Casteneda texted Hernandez to ask whether *"u guys need the car"* and an *"extra person. Or just the car."* Hernandez answered, *"Just the car."* Hernandez asked her, *"What is he saying why he doesn't want to do it or what."* At 5:45, Casteneda texted back, *"I'm sorry d. This is why I wanted u GUYS to go without him. Erase the textes."* She followed up at 6:03 p.m., *"I guess he's back but he has the keys. Did u GUYS leave already."*

After the robbery, Casteneda texted Hernandez, *"Plz tell me they not chasing. The guys."* She then sent this text to another phone number: *"Mom call the police and report my car stolen say that I'm at my grandpa house. N u just got home from wk n the car was gone."*

² "IDK" is a common text messaging abbreviation for "I don't know." (Quenqua, *Alphabet Soup*, N.Y. Times (Sept. 25, 2011) p. ST10.) Both counsel assumed this when discussing the texts in closing argument.

The police staked out defendant's house. A car left, they followed it, the car hit a tree, and the driver fled. The officers tracked the driver to a shed. Inside the shed they found defendant, hiding under a pile of clothes.

At trial, Hernandez testified against defendant.³ He explained he asked Burgin about making some money, and Burgin suggested robbing the jewelry store. Hernandez recruited defendant for the robbery. Hernandez asked defendant to get the car from Casteneda, but defendant "didn't want to do it" and was "giving us the run around," so Hernandez got it from her. Defendant's job during the robbery was to close the front doors and tie up anyone inside the store. When the three men arrived at the store, defendant "got scared" and argued with Burgin. Yet defendant still came into the store and closed the doors, but then started screaming "hurry up." Hernandez and Burgin went to the car. Defendant met them there and they all drove away.

The jury found defendant guilty of one count each of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)),⁴ second degree burglary (§§ 459, 460, subd. (b)), and street terrorism (§ 186.22, subd. (a)). It found the robbery and burglary were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) And it found defendant was a gang member who vicariously used a weapon during the robbery. (§ 12022.53, subs. (b), (e)(1).) The court found defendant had suffered one prior felony strike (§§ 667, subs. (d), (e)(1), 1170.12, subs. (b), (c)(1)), one prior serious felony conviction (§ 667, subd. (1)(a)), and one prior prison term (§ 667.5, subd. (b)).

After the court heard argument from counsel at the sentencing hearing, defendant asked the court "to delay [his] sentencing as far as for conflict of interest and

³ An Orange County jury previously convicted Hernandez of the robbery. The prosecutor agreed to seek a shorter prison term if Hernandez testified truthfully against defendant. Hernandez received use immunity for his testimony in this case, including his testimony about another robbery in Escondido. But he understood his testimony could be used against him by prosecutors in San Diego County.

⁴ All further statutory references are to the Penal Code.

communication,” “[o]n regards with my attorney.” Defense counsel stated, “I think what [defendant] is talking about is a Marsden hearing.” The court asked defendant, “You mean for things that your lawyer did not do during the trial, that kind of thing?”

Defendant answered, “Yes, sir.” The court sought clarification: “That is your main — your main issue concerning [defense counsel] that you felt that there were things that could have been done in the trial differently to represent you in these charges?”

Defendant replied, “Yes, sir.”

The court explained defendant’s right to appeal. It stated, “Those — you still have that issue protected for you reserved on appeal. In other words, if there is going to be an appellate lawyer looking at that, looking at [defense counsel’s] performance and determine whether or not he should have called other witnesses, should have done other things, did not engage in solid representation of you concerning the general standard in the community for a lawyer defending someone in these types of charges. You’re going to have that protection. [¶] In other words, somebody can make that argument for you and try to convince the Court of Appeal this trial should be reversed, the conviction should be reversed because of that issue. So you still have that protection. You understand that?” Defendant answered, “No, Sir.”

Defense counsel asked to interject, but the court told him “No, it’s not necessary.” The court continued, “I mean I don’t know how much more straight forward I can put it. You know, when you’re going to have 60 days, whatever I give you, you’re going to have 60 days from today’s date to appeal. You understand that?” Defendant replied, “Right.” The court stated: “You will have a lawyer appointed to represent you. Not [defense counsel]. It will be a different appellate lawyer that will review everything, including whether there was ineffective assistance of counsel. So you’re going to be able to attack that issue. In other words, you can still argue that. [¶] I — just so the record is clear, I didn’t see anything in this trial in terms of his performance as a defense lawyer that would warrant a new trial based on what I saw in this trial. I was here throughout the

entire trial. Whether or not he should have called other witnesses, things of that nature, I wouldn't know that. I am not privy to attorney-client type of information. But you can still have that issue protected on appeal, okay. So you can attack that issue on appeal. I don't see anything here that would warrant a new trial, but go ahead."

Defendant and the court had one last exchange. Defendant stated: "That is what I want to do is what I am asking. That is what I am asking for. I am asking just for it to be on record as far as that fact that that's what I — for what he said a Marsden hearing as far as not the conflict interest, as far as not calling witness[es] that I feel would have benefit me, as far as like a gang expert, the owner of the car, certain things that would have changed the outcome." The court responded: "You might be right. What I am telling you, you're still going to have that issue. You can challenge that. It's not going to happen today. It's not going to. You're not going to get a new trial."

Defendant asked, "But I would like to delay because I am in the process of getting a new attorney, so it would — I would like to do that." The court ruled, "That is denied."

Defendant stated, "So as far as like I say it would be on record. I appreciate it. That is what I am asking." The court responded, "Your request is on record, and there is no attorney here. Now's the time for sentencing. There is nobody else been retained to come in so we are here, the victim is here. I have taken the impact statements. Today is the day for sentencing. So your request to continue the trial is denied."

The court then sentenced defendant to a total term of 25 years in state prison. The court informed defendant of his right to an appeal with an appointed attorney. Defendant apologized to the court, stating it "wasn't [his] intention" to make the court mad. Defendant just "want[ed] things for the record." The court assured defendant it was "not mad at [him] or anything like that." Defendant continued, "Not giving the gang expert, certain witnesses." The court stated, "It's on record for you." Defendant replied, "Thank you, sir. I appreciate."

DISCUSSION

No Substantial Evidence Supported Instructing the Jury on Withdrawal from Conspiracy

The court instructed the jury on the liability theories of aiding and abetting and conspiracy, as well as the affirmative defense of withdrawal from aiding and abetting. But it did not give an instruction on the affirmative defense of withdrawal from conspiracy. Defendant contends the court had a sua sponte duty to do so.

“It is well settled that a defendant has a right to have the trial court . . . give a jury instruction on any affirmative defense for which the record contains substantial evidence [citation] — evidence sufficient for a reasonable jury to find in favor of the defendant [citation] — unless the defense is inconsistent with the defendant’s theory of the case [citation]. In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether ‘there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt’” (*People v. Salas* (2006) 37 Cal.4th 967, 982.)

“‘Generally, a defendant’s mere failure to continue previously active participation in a conspiracy is not enough to constitute withdrawal. An affirmative and bona fide rejection or repudiation of the conspiracy must be communicated to the coconspirators. [Citation.] Once the defendant’s participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove, as a matter of defense, that he effectively withdrew from the conspiracy.’” (*People v. Lowery* (1988) 200 Cal.App.3d 1207, 1220.)

No substantial evidence raised a reasonable doubt whether defendant withdrew from the conspiracy. Defendant primarily relies upon the text messages between Castaneda and Hernandez. But the texts show only that defendant had refused to take Castaneda’s car, leading Castaneda and Hernandez to question defendant’s commitment to the robbery: “[*Defendant*] said we cant take [*the car*] whats going on

doesn't he want to come up that's what's holding us up"; *"FUCK Man what an idiot. Idk what his deal is"*; *"What is he saying why he doesn't want to do it or what"*; *"I'm sorry d. This is why I wanted u GUYS to go without him."* Casteneda's and Hernandez's uncertainty whether defendant would go through with the robbery does not sufficiently show defendant effectively withdrew. None of the messages contain or refer to any "affirmative and bona fide rejection" that defendant communicated to his coconspirators. (*People v. Lowery, supra*, 200 Cal.App.3d at p. 1220.)

Noting the issue is whether substantial evidence supports the withdrawal defense, not the judgment, defendant asserts the jury could have rejected Hernandez's testimony that defendant helped rob the store. But even if it had, "[d]isbelief [of a witness' testimony] does not create affirmative evidence to the contrary of that which is discarded." (*People v. Loewen* (1983) 35 Cal.3d 117, 125.) "If a witness testifies, for instance, that *it was not raining* at the time of the collision, and if the jury disbelieves that testimony, such disbelief does not provide evidence that it was raining at the time of the collision." (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 48.) So even if the jury generally discredited Hernandez, that disbelief would not constitute substantial evidence that defendant actually stayed home⁵ — let alone that he had timely communicated an affirmative rejection to his coconspirators. Thus, the record did not support a withdrawal instruction.

The Court Adequately Heard — and Permissibly Denied — Defendant's Marsden Motion

Defendant contends the court wrongly deprived him of a *Marsden* hearing. "When a defendant seeks discharge of his appointed counsel on the basis of inadequate

⁵ Besides Hernandez's testimony, other substantial evidence implicated defendant. The bystander saw a third man enter the getaway car, which had defendant's identification card, cell phone, and zip ties in it. And defendant later fled the police, evidencing a consciousness of guilt.

representation by making what is commonly referred to as a *Marsden* motion, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of counsel's inadequacy. [Citations.] 'A defendant is entitled to have appointed counsel discharged upon a showing that counsel is not providing adequate representation or that counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.' [Citations.] [¶] We review a trial court's decision declining to discharge appointed counsel under the deferential abuse of discretion standard." (*People v. Cole* (2004) 33 Cal.4th 1158, 1190 (*Cole*).

Contrary to the Attorney General's claim, defendant did in fact make a *Marsden* motion. Defendant gave "at least some clear indication" he "want[ed] a substitute attorney." (*People v. Sanchez* (2011) 53 Cal.4th 80, 90 (*Sanchez*)). He began by asserting a "conflict of interest" and poor "communication" with defense counsel. He answered "Yes, sir" when the court asked, "You mean for things that your lawyer did not do during the trial, that kind of thing," and "you felt that there were things that could have been done in the trial differently to represent you in these charges?" He clarified he wanted to make a record "as far as not the conflict interest, as far as not calling witness[es] that I feel would have benefit me, as far as like a gang expert, the owner of the car, certain things that would have changed the outcome."

Thus, defendant triggered the court's obligation to conduct a *Marsden* hearing.⁶ (*Cole, supra*, 33 Cal.4th at p. 1190.) Defendant was not merely seeking a continuance to replace appointed counsel with retained counsel of his choice. (Cf. *People v. Courts* (1985) 37 Cal.3d 784, 790.) While defendant once asked for a "delay

⁶ The court must hold a *Marsden* hearing "at any time during criminal proceedings, if a defendant requests substitute counsel . . ." (*Sanchez, supra*, 53 Cal.4th at p. 90.) Thus, defendant could timely request a new lawyer at sentencing. (*Id.* at pp. 85-86 [*Marsden* motion made at sentencing].)

because I am in the process of getting a new attorney,” the overall tenor of his discussion with the court does not suggest defendant was merely invoking his right to retain counsel. Rather, defendant’s comments show he wanted defense counsel discharged for not calling certain witnesses — i.e., for “not providing adequate representation or [because] counsel and defendant have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.”” (*Cole*, at p. 1190.)

But the court did not abuse its discretion by denying the *Marsden* motion. When defendant “explain[ed] the basis of his contention” and “relate[d] specific instances of counsel’s inadequacy” (*Cole, supra*, 33 Cal.4th at p. 1190), he stated defense counsel failed to call “witness[es] that I feel would have benefit me, as far as like a gang expert, the owner of the car” He later reiterated he “want[ed these] things for the record”; “Not giving the gang expert, certain witness[es].”

Defendant thus failed to show the kind of inadequate representation or irreconcilable conflict that warrants replacing appointed counsel. “[D]efendant’s complaints regarding [his counsel’s] purported inadequate investigation, trial preparation, and trial strategy were essentially tactical disagreements, which do not by themselves constitute an ‘irreconcilable conflict.’ [Citation.] Indeed, a ‘defendant does not have the right to present a defense of his choosing, but merely the right to an adequate and competent defense.’” (*Cole, supra*, 33 Cal.4th at p. 1192.) A “disagreement as to tactics . . . by itself, is insufficient to compel discharge of appointed counsel.” (*Ibid.* [defendant complained counsel did not interview potential witnesses, present expert psychiatric testimony, or intend to call witnesses at sentencing].) Nor is a defendant “entitled to claim that an irreconcilable conflict had arisen merely because he could not veto [counsel’s] reasonable tactical decisions.” (*People v. Memro* (1995) 11 Cal.4th 786, 858 [defendant complained counsel failed to contact potential witnesses].)

On appeal, defendant does not assert he would have fared better had the court granted his *Marsden* motion. He does not claim substitute counsel could have

obtained a more favorable sentence. Nor does he contend substitute counsel could have submitted a meritorious new trial motion based on ineffective assistance or any other grounds. Instead, defendant contends the court deprived him of an adequate *Marsden* hearing, cutting him off before he could fully present his request for substitute counsel.

Defendant invokes cases condemning inadequate *Marsden* hearings, but his cases involved inquiries far more limited than the one here. “The trial court . . . made no inquiry at all” in *People v. Reed* (2010) 183 Cal.App.4th 1137, 1145. Defense counsel in that case repeatedly told the court defendant wanted ““a new trial based on [his] incompetence,”” (*id.* at p. 1142), but the court did not let defense counsel or defendant explain the grounds for the purported ineffective assistance (*id.* at pp. 1142-1143). In *People v. Mejia* (2008) 159 Cal.App.4th 1081, 1087, the “fatal flaw” was the “trial court . . . elicited comment only from counsel, not from [defendant]” (*id.* at pp. 1086-1087). In *Sanchez*, the California Supreme Court “specifically disapprove[d] of the procedure of appointing substitute or ‘conflict’ counsel solely to evaluate a defendant’s complaint that his attorney acted incompetently,” done in lieu of conducting a *Marsden* hearing. (*Sanchez, supra*, 53 Cal.4th at p. 84.) The same procedure was criticized earlier in *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367.)⁷

Here, the court made none of these errors. It made some inquiry, allowing defendant himself to explain the grounds for his request. It asked defendant whether he was concerned about “things that [his] lawyer did not do during the trial,” and whether defendant “felt that there were things that could have been done in the trial differently to represent you in these charges?” It heard defendant’s concerns about defense counsel’s failure to call “witness[es] that I feel would have benefit me, as far as like a gang expert,

⁷ In *Sanchez, supra*, 53 Cal.4th at page 90, footnote 3, the Supreme Court disapproved both *Mejia* and *Mendez*, to the extent that each case “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.’”

the owner of the car” It listened to defendant instead of automatically appointing substitute counsel and deferring to his or her conclusions. While the hearing was short, it was sufficient. The court was obligated to conduct a further inquiry only if defendant’s “causes of dissatisfaction . . . suggest ineffective assistance” (*People v. Mendez, supra*, 161 Cal.App.4th at p. 1367.) His did not. “[D]isagreement as to tactics, . . . by itself, is insufficient to compel discharge of appointed counsel.” (*Cole, supra*, 33 Cal.4th at p. 1192; accord *Memro, supra*, 11 Cal.4th at p. 858.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.