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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.

GEORGE RUSSELL COCKERHAM,

Defendant and Appellant.

G049786

(Super. Ct. No. 13WF1482)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John S. Adams, Judge. Reversed with directions.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant George Russell Cockerham on three counts: count 1: indecent exposure with two prior convictions for the same offense (Pen. Code, § 314, subd. (1)); count 2: loitering on private property (Pen. Code, § 647, subd. (h)); and count 3: peeking at an inhabited building (Pen. Code, § 647, subd. (i)). At defendant's request, the court provided a bifurcated trial on the prior prison term allegations. The trial court sentenced defendant to four years in prison.

Defendant's appeal raises several issues. First, he contends the trial court failed to conduct a hearing on his request for substitute counsel. Second, he claims the court erred by allowing the prosecution to admit prior acts evidence. Third, he challenges the sufficiency of the evidence to support his conviction on all three counts. Finally, defendant asserts the court erred in finding the prior prison term allegations were true.

The first of these contentions is meritorious. The trial court failed to provide a hearing as required under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We therefore reverse the guilty verdicts and remand for the court to conduct a hearing on whether the facts supported defendant's request for substitute counsel. The fourth contention is partially correct because the record does not reflect the court ensured defendant was advised of and voluntarily waived his constitutional rights before accepting his admission of the prior prison term allegations. But this error is not reversible per se, and we shall also direct the trial court to reconsider whether under the totality of the circumstances defendant's admission of the prior prison term allegations knowing and voluntary. Since there is a possibility the judgment will be reinstated, we also review defendant's remaining contentions. We conclude none of them have merit.

FACTS

The victim observed defendant in her neighbor's yard which was separated from her property by a brick wall. Looking outside from her bedroom window, she noticed defendant making eye contact with her. She saw defendant moving his hand up and down at the waist. She was unable to see his genitals. After she called 911, the police arrived and she subsequently identified defendant as the person she had observed in her neighbor's yard.

DISCUSSION

1. The trial court erred in denying defendant a hearing on his Marsden motion.

On the first day of trial, before prospective jurors were admitted into the courtroom, defendant's lawyer stated, "I'm not sure if the court knew that Mr. Cockerham was requesting a *Marsden* hearing. I'm prepared to go forward, but I wanted to let the court know that he's requesting a *Marsden* hearing." (Italics added.) The court responded, "I would deem that request at this juncture to be untimely filed, and I would not look with favor upon that request. [¶] A *Marsden* is something that could have or should have and likely would have come up a long time ago if there was, in fact, the basis for a *Marsden* which is a standard in which there has been irreparable breakdown in the relationship between counsel and the defendant. [¶] It's difficult for me to comprehend how that could be addressed at this point in the proceeding, and I'm not prepared to entertain a *Marsden* at this late date. I have jurors waiting outside. [¶] . . . I would not look with favor given the fact that we are standing by with jurors on a *Marsden*. This is

the first I've been made aware of this. I would not look with favor upon it." (Italics added.)

The court then said "you are welcome to place whatever you want to say on the record." Defendant responded, "I would have requested this yesterday had I thought I was coming up here yesterday, your honor." (There were some proceedings on the case the previous day, but defendant was not personally present.) The court's immediate response: "So noted. I would deem it untimely at that point." Although the court purported to have defendant "place whatever [he wanted] to say on the record," the foregoing exchange makes it clear he was not truly given an opportunity to do so and, in any event, the court had already indicated its intention to deny the motion. This was error.

As our Supreme Court stated in *People v. Smith* (1993) 6 Cal.4th 684, "It is the very nature of a *Marsden* motion, at whatever stage it is made, that the trial court must determine whether counsel has been providing competent representation." (*Id.* at pp. 694-695.)

But, although the court erred in failing to provide an adequate opportunity for a hearing, this does not automatically entitle defendant to a new trial. In *People v. Minor* (1980) 104 Cal.App.3d 194, the "appellant was not given an opportunity to state his reasons [for requesting substitute counsel]. The court summarily denied the request while knowing only, so far as the record shows, that appellant desired new counsel and that the reason as related by appointed counsel was insufficient as stated." (*Id.* at p. 198, italics omitted.) The court concluded "[t]he procedure followed . . . does not meet the *Marsden* standard." (*Ibid.*) But there, as here, "[w]hile the record does not exclude the possibility that appellant, if he had been permitted to speak, would have been able to state a good reason for the appointment of new counsel, it is also entirely possible that no valid

reason could have been stated and that in truth the verdicts . . . are free of any constitutional deficiency.” (*Id.* at pp. 198-199.) Citing *People v. Vanbuskirk* (1976) 61 Cal.App.3d 395, the court stated that ““when the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand.”” (*Id.* at p. 405.)

We follow this advice. We will reverse the judgment and remand the matter to the trial court for the purpose of conducting a hearing to permit defendant to state any facts supporting his denied *Marsden* motion. If the court determines the motion was not supported, it shall reinstate the judgment or take other lawful proceedings to give effect to the verdicts heretofore returned. If the court determines the motion was supported, the reversal of the judgment shall stand.

2. *The trial court did not err in admitting evidence of prior acts of misconduct.*

“In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense is not barred by Evidence Code section 1101, provided such evidence is not excludable under Evidence Code section 352. [Citation.] Unlike evidence admitted under Evidence Code section 1101, subdivision (b), evidence of uncharged sex crimes admitted under Evidence Code section 1108 may be used in a sex offense prosecution to demonstrate the defendant’s disposition to commit such crimes.” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1095.) The trial court here considered defense counsel’s argument evidence of prior misconduct was to be excluded as too prejudicial under Evidence Code section 352 (all further statutory references are to this code unless otherwise stated), and overruled the objection

except as to the 1997 and 1998 convictions for indecent exposure. It was agreed counsel would stipulate to a sanitized version of these incidents.

The parties' stipulation presented the jury with the following facts:

“Number one. On October 26th of 2000, defendant was observed masturbating in an alleyway just outside the kitchen window of a female civilian. This conduct resulted in a felony conviction for a violation of Penal Code section 314, subsection one, known as indecent exposure.

‘Number two. On August 26th of 2001, defendant was observed masturbating outside the bedroom window of a male civilian. This conduct resulted in a felony conviction for a violation of Penal Code section 314, subsection one, known as indecent exposure.

‘Number three. On October 29th of 2005, the defendant was observed peeking into a private yard from an alleyway. When confronted, the defendant fled on his bicycle and was later detained by police.

‘Number four. On January 15th, 2007, the defendant was observed peeking into the bedroom window of a female civilian. Police responded and detained defendant who fled on his bicycle.

‘Number five. On April 24th, 2009, defendant was observed peeking into the window of a female civilian. Police responded and detained defendant.

‘Number six. On February 3rd, 2011, defendant was observed peeking into the bedroom window of a female civilian. Police responded and detained defendant who fled on his bicycle.

‘Number seven. On March 12th of 2012, defendant was observed peeking in the sliding glass door of two male civilians. Police were contacted and defendant was detained.’”

The first two instances were admitted under section 1108 and the remaining five instances under section 1101, subdivision (b). We reject defendant's contention that the court abused its discretion in admitting this evidence.

Defendant contends admission of the prior indecent exposure convictions violated section 352 because their potential prejudice outweighed their probative value.

But, as the Attorney General points out, “Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of defendant’s possible disposition to commit sex crimes.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.) This evidence was highly relevant here in light of the witness’s inability to see defendant’s penis; she observed him making hand movements indicative of masturbation. His history of earlier convictions for indecent exposure lent credence to the contention he engaged in the same conduct in this instance. We cannot conclude the trial court abused its discretion in ruling the probative value of this evidence outweighed its potential prejudice.

The five remaining instances of prior misconduct (the “peeking” offenses) were admitted under section 1101(b). This subdivision provides in part “[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .).” Again, we review admission of evidence under this subdivision for an abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 667-668.)

Section 1101(b) permits evidence of prior misconduct to show defendant acting under a “common scheme or plan.” (*People v. Lucas* (2014) 60 Cal.4th 153, 215.) The prior conduct provides evidence explaining defendant’s presence in the neighbor’s yard. It demonstrates a common scheme or plan to invade other people’s properties to engage in his sexual misconduct. The court did not err in admitting this evidence.

3. Sufficient evidence supports defendant’s conviction of indecent exposure.

Defendant relies on the victim’s statement that she observed him in a position indicating masturbation but did not actually see his genitals. A verdict is supported by substantial evidence, which may be based on reasonable inferences, if a

reasonable trier of fact could find a defendant guilty beyond a reasonable doubt. (*People v. Tully* (2012) 54 Cal.4th 952, 1006-1007.) It was reasonable for the jury to infer that defendant, with a history of indecent exposure, exposed himself indecently when engaging in masturbation.

4. Sufficient evidence supports defendant's conviction of misdemeanor loitering and misdemeanor peeking.

A person “[w]ho loiters, prowls, or wanders upon private property of another, at any time, without visible or lawful business with the owner or occupant” is guilty of a misdemeanor. (Pen. Code, § 647, subd. (h).) As defendant notes, to convict under this statute, “it must . . . be shown that [defendant’s] intent or purpose in being there was to commit a crime ‘as opportunity may be discovered.’” (Citing *In re Joshua M.* (2001) 91 Cal.App.4th 743, 747.) Defendant claims insufficient evidence to show he had such intent. But his intent to commit the crime of indecent exposure was clearly demonstrated by his engaging in this crime after entering the neighbor’s backyard. Again the evidence admitted under section 1108, in addition to the victim’s testimony supports the conviction on these counts.

5. Sentencing on the Prior Prison Term Allegations.

The information alleged defendant had served prior prison terms, but had failed to remain free from custody for at least five years after each one. The trial court granted his pretrial request to bifurcate these allegations from the trial on the substantive charges.

After the jury returned guilty verdicts on the substantive charges, the court discharged it. The court stated, “[W]e have some issues to deal with in this

case” Defense counsel informed the court defendant wanted “to be sentenced as soon as possible” and to also waive his right to a probation report, and “a jury trial as to the priors.”

At the sentencing hearing a few days later, the trial judge said, “It’s my understanding just as a procedural matter that we’ve got essentially a court trial on the priors at this juncture.” In response, defense counsel declared defendant “is prepared to admit the prior convictions.” The trial court then sentenced defendant, adding a year for one of the prior prison term allegations.

5.1 Defendant forfeited his right to raise the failure to provide a jury trial on the prior conviction allegations for the first time on appeal.

Defendant claims he did not waive his right to a jury trial on the prior prison term allegations; the record does not support his argument. As noted, the court bifurcated the allegations from the main charges. Once the verdicts were returned, defendant waived a jury trial on the prior prison term allegations and requested to be sentenced immediately. The court scheduled an expedited sentencing hearing. At that time, defense counsel stated defendant admitted the prior prison term allegations. Defendant did not weigh in, except to present a profanity-laced diatribe. The court proceeded to impose sentence.

We agree with the Attorney General that, under the holding in *People v. Vera* (1997) 15 Cal.4th 269, defendant forfeited his right to a jury trial on the prior prison term allegations. As our Supreme Court stated, “Absent an objection to the discharge of the jury or commencement of court trial, defendant is precluded from asserting on appeal a claim of ineffectual waiver of the statutory right to jury trial of prior prison term allegations.” (*Id.* at p. 278.) The prior conviction exception to the federal constitutional

right to a jury trial for any fact “that increases the maximum penalty for a crime” (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476 [120 S.Ct. 2348, 147 L.Ed.2d 435]), applies to prior prison term allegations. (*People v. Thomas* (2001) 91 Cal.App.4th 212, 220-223.)

5.2 The court erred in failing to advise defendant of his constitutional rights before accepting a waiver of a trial on the prior prison term allegations.

Before a court may accept a plea of guilty to a crime, the defendant must be informed of and knowingly and voluntarily waive three constitutional rights: (1) the privilege against compulsory self-incrimination; (2) the right to trial by jury; and (3) the right to confront one’s accusers. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243 [89 S.Ct. 1709, 23 L.Ed.2d 274]; *In re Tahl* (1969) 1 Cal.3d 122, 132.) In *Boykin*, the defendant was represented by an attorney. (*Boykin v. Alabama, supra*, 395 U.S. at p. 245 (dis. opn. of Harlan, J.)) Yet the Supreme Court held a trial court may not accept a guilty plea until it determines the defendant had been advised of the foregoing rights and has validly waived them. This rule equally applies where a defendant admits the truth of a prior prison term allegation. (*People v. Howard* (1992) 1 Cal.4th 1132, 1174.)

Here, although defendant was also represented by counsel, the record fails to indicate he was personally advised of or asked to waive any of his constitutional rights. Thus, we conclude the trial court erred in relying on defense counsel’s statement to find the prior prison term allegations true.

The remaining question is whether this error requires reversal. *People v. Howard, supra*, 1 Cal.4th 1132 stated, citing *North Carolina v. Alford* (1971) 400 U.S. 25 [91 S.Ct. 160, 27 L.Ed.2d 162], “error involving *Boykin/Tahl* admonitions should be reviewed under the test used to determine the validity of guilty pleas under the federal Constitution,” wherein “a plea is valid if the record affirmatively shows that it is

voluntary and intelligent under the totality of the circumstances.” (*People v. Howard, supra*, 1 Cal.4th at p. 1175; *People v. Mosby* (2004) 33 Cal.4th 353, 360-361.)

Since we are remanding this case for a reconsideration of the *Marsden* claim, we further direct the trial court to also determine whether, under the totality of the circumstances, defendant was aware of his constitutional rights and knowingly and voluntarily waived them in admitting the prior prison term allegations. If the court finds this is not the case, he is entitled to a court trial on the allegations. In the alternative, if defendant expresses a willingness to admit the allegations, the court shall ensure he is personally aware of his constitutional rights and knowingly and voluntarily waives them before entering true findings on them.

DISPOSITION

The judgment is reversed and the matter is remanded to the superior court with directions to conduct a hearing at which appellant shall have an opportunity to state his reasons for having desired the appointment of new counsel. If the court determines good cause existed to support appellant’s request for appointment of new counsel, he shall be entitled to a new trial on the charges. If the court concludes good cause has not been shown to support appointment of new counsel, the guilty verdicts shall be affirmed.

Upon remand, the court shall also determine whether, under the totality of the circumstances, appellant voluntarily and intelligently admitted the truth of the prior prison term allegations. If the court determines the admissions were not knowingly and voluntarily made, appellant shall be entitled to a bench trial on the truth of the allegations. If appellant chooses to admit the allegations, the court shall ensure he is

properly advised of his constitutional rights and obtain a knowing and voluntary waiver of them before entering sentence.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.