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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.

MATTHEW ANTHONY ATILANO,

Defendant and Appellant.

G050427

(Super. Ct. No. FSB1004965)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Kyle S. Brodie, Judge. Affirmed and remanded with directions.

Suzanne G. Wrubel, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and
Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Matthew Anthony Atilano appeals after a jury found him guilty of first degree murder and possession of a firearm by a felon. The jury also found true gang and firearm enhancement allegations.

We affirm the judgment of conviction, but remand with directions as explained *post*. As to his conviction for first degree murder, Atilano contends he received ineffective assistance of counsel because his trial counsel failed to (1) object, under Evidence Code section 352, to the admission of evidence of three incidents of jailhouse misconduct by Atilano, offered by the prosecution to impeach his trial testimony; and (2) request the jury be given CALCRIM No. 316. Even if we were to assume trial counsel's representation was deficient in these respects, Atilano was not prejudiced.

Substantial evidence supported the jury's findings as to the gang enhancement allegation because sufficient evidence showed the primary activities of West Side Verdugo, and the Sir Crazy Ones clique of West Side Verdugo to which Atilano belonged, consisted of crimes identified in Penal Code section 186.22, subdivision (f). (All further statutory references are to the Penal Code unless otherwise specified.)

We remand to the trial court to determine whether Atilano was entitled to a *Marsden*¹ or *Faretta*² hearing for the limited purpose of Atilano possibly filing a motion for a new trial. At the sentencing hearing, Atilano made a statement to the court, suggesting his desire to either obtain new counsel or to represent himself to file a motion

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

² *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

for a new trial; Atilano's trial counsel expressed the opinion that he could find no grounds for such as motion.

FACTS

On November 27, 2010, a group of Jose Vincent Castro's friends and family, including his cousin, Victor Greene, and friend, Gerard Mitchell, gathered at a bar in San Bernardino to celebrate Castro's birthday. Atilano and his friends, who are Hispanic, were also at the bar that night. Atilano was a member of the Sir Crazy Ones clique of the West Side Verdugo gang in the City of San Bernardino. Castro and Greene are African-American. There had been tension between members of West Side Verdugo and African-American individuals in the area.

A car, carrying 13-year-old K.C., her 16-year-old sister, G.U., G.'s boyfriend, Mark, and Mark's friend, stopped near the bar; the car was low on gas. K. went to the patio of the bar to ask someone for money to buy gas. Castro's friend, "Tick," told her he would give her money for sex. Atilano was also on the patio and reacted to Tick's comment. Castro saw there was trouble between Tick and Atilano; Castro had observed Atilano and his group engage in disturbances at the bar that evening.³ Castro went to the patio to calm things down. Atilano told Castro that he and Tick were okay and they got along after that. Atilano's stepfather, Carmelino Filippini, offered to buy Castro and his mother a drink.

Atilano told K. he would give her money for gas if she showed him the car she claimed was low on gas. They walked into the parking lot. As they were walking, Greene, who had left the party a few minutes earlier, started to back up the car he was driving; he apparently did not see Atilano and K. walking nearby.

³ Castro heard members of Atilano's group use the "word n[]" that night.

K. testified that she saw Atilano kick the back bumper of Greene's car and heard him start yelling. Greene got out of the car and it looked to K. as though Greene and Atilano were going to fight. She saw Atilano remove a gun from his waistband, and point it down and then toward Greene. K. thought she heard three or four shots altogether.

G. was in the parking lot waiting for K. to return when K. and Atilano walked out of the bar and through the parking lot. G. told the police⁴ that she too had seen Greene start to back up his car and get close to hitting K. and Atilano; she thought Greene must not have seen them. G. told the police that Atilano got angry, kicked the back of the car, went up to Greene's front window and banged on it, and told Greene to open the car door. After Greene opened the car door, Atilano pulled out a gun, put it to Greene's head, and started yelling at him. Atilano pulled Greene out of the car, and Greene put his hands up. G. heard Atilano fire the gun twice before she saw Greene fall to the ground. She saw that Greene tried to pull himself to get inside the car; Atilano kicked him and then shot him.

Castro had left the bar and was in the parking lot retrieving something out of his truck when he heard a gunshot. He ducked behind a car and saw "someone on the ground" who he later found out was Greene. Castro stated that after Atilano walked away toward his right, Atilano turned around, walked back to Greene who was lying on the ground, stood over him, and shot him. Castro then saw Atilano walk away.

Filippini and others from inside the bar came outside. When Atilano reappeared in the parking lot, without the hat or jacket he had been wearing, Filippini told Atilano to leave, "get out of here; go, go, go." Atilano drove away.

⁴ At trial, G. denied much of what she had told law enforcement after the shooting. She testified that she had several family members who belonged to West Side Verdugo, she had been told not to testify, and she was afraid. The trial court had to issue a bench warrant to secure her appearance.

Mitchell too had been walking in the parking lot when he noticed Atilano and Greene arguing. Mitchell heard a gunshot and saw Greene fall; he did not know whether Greene had been shot or not. Mitchell saw Atilano walk away, but then turn around, walk up to Greene, push him down (Greene's hand was attempting to fight Atilano off), and shoot him in the head pointblank, less than two inches away.

An autopsy established Greene died from a single gunshot wound to the head, which was fired at close range, that could "easily have been a couple of inches" away but likely four to six inches away. Greene had also suffered six or seven blows to his head and had abrasions on his right forearm, left elbow, and left knee.

Atilano testified in his defense. He testified that he is a member of the Sir Crazy Ones clique of the West Side Verdugo gang. He brought a gun with him to the bar because San Bernardino is a dangerous city "because of guys like [him]."

While at the bar, Atilano heard an African-American man make a comment to a girl that he would give her money for sex. Atilano told the man that she was a minor. The man agreed with Atilano that he had done wrong, and he and Atilano got along after that exchange.

Atilano testified he told the girl that he would give her money but needed to confirm that she was telling the truth about running out of gas. While in the parking lot with the girl, he saw Greene talking to the girl's sister. He confronted Greene by telling him that she was a minor. Greene challenged Atilano "like . . . it wasn't any of [his] business." Atilano and Greene started to fight. Atilano landed a couple of punches before pulling out a revolver. He pistol-whipped Greene across the face. He testified that Greene reached for the gun and they fell to the ground, wrestling each other for control of it. Atilano said the gun accidentally discharged during the struggle, striking Greene.

PROCEDURAL HISTORY

Atilano was charged in an information with murder in violation of section 187, subdivision (a), and possession of a firearm by a felon in violation of section 12021, subdivision (a)(1). As to the murder offense, the information alleged, inter alia, Atilano personally and intentionally discharged a firearm, which caused great bodily injury and death to Greene, within the meaning of section 12022.53, subdivision (d); personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); and personally used a firearm within the meaning of sections 12022.53, subdivision (b), 1203.06, subdivision (a)(1), and 12022.5, subdivision (a).

The information also alleged that pursuant to section 186.22, subdivision (b)(1), the murder offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. The information further alleged, pursuant to section 186.22, subdivision (b)(1), the possession of a firearm by a felon offense was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members.

The information alleged Atilano had suffered a prior conviction of a serious or violent felony or juvenile adjudication.

The jury found Atilano committed both first degree murder and the offense of possession of a firearm by a felon. The jury found the gang and firearm enhancement allegations true. Atilano admitted the prior conviction allegation.

Atilano was sentenced to a total prison term of 75 years to life plus a five-year consecutive term. Atilano appealed.

DISCUSSION

I.

ATILANO'S CONTENTIONS HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ARE WITHOUT MERIT BECAUSE EVEN ASSUMING HIS TRIAL COUNSEL'S REPRESENTATION WAS DEFICIENT, IT DID NOT SUBJECT ATILANO TO PREJUDICE.

Atilano argues he received ineffective assistance of counsel as to his conviction for murder because his trial counsel failed to (1) object, under Evidence Code section 352, to the admission of evidence of three incidents of jailhouse misconduct used by the prosecution to impeach Atilano's testimony; and (2) request that CALCRIM No. 316 be given to the jury. To prevail on a claim of ineffective assistance of counsel, the defendant must prove (1) the attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) the attorney's deficient representation subjected the defendant to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.) We do not need to decide whether Atilano's counsel's representation was deficient in either respect because even assuming it was, Atilano was not prejudiced by his counsel's omissions.

A.

Atilano Was Not Prejudiced by His Trial Counsel's Failure to Assert Evidence Code Section 352 as a Ground for Objecting to the Admission of the Three Incidents of Jailhouse Misconduct.

Shortly before the prosecution completed its case-in-chief, Atilano's trial counsel informed the court that he anticipated Atilano would testify in his defense and counsel wished to discuss potential impeachment issues. Atilano's counsel stated that the prosecution had provided him with information on Atilano's "prior shenanigans in jail," and that because they involved open investigations, he would need to advise his client not

to discuss them. Acknowledging the prosecution's right to impeach Atilano, and Atilano's right under the Fifth Amendment to the United States Constitution not to incriminate himself as to the allegations of his misconduct in jail, the court tentatively ruled that Atilano would need to choose whether to take the risk of incriminating himself by being impeached or standing on his right to remain silent. Before Atilano took the stand, the trial court announced that its tentative ruling was its final ruling.

During Atilano's cross-examination, the prosecutor asked about three separate incidents of misconduct involving Atilano while he was in custody. First, Atilano was asked whether he and another gang member beat up a man whom Atilano believed to be homosexual. Atilano initially answered "[n]o," but later testified that when he saw his cellmate fighting, he hit a man in the chest area one or two times. After the prosecutor asked Atilano for more details regarding the incident, the trial court interjected, "I will say, regarding this incident, unless you wanted to make an offer of proof at the bench, I'm inclined to sustain my own [Evidence Code section]352 objection to further details about this particular inquiry." The prosecutor told the court, "I'm moving to the next one very soon."

After Atilano testified he had not heard his cellmate call the man, whom they were beating up, a "faggot," the prosecutor asked Atilano about a second incident involving the stabbing of an inmate. Atilano refused to answer the question whether he and another inmate had assaulted a person who was ultimately stabbed during the attack. Atilano stated he could not answer questions about that incident because "[i]t's a case to charge me."

Finally, the prosecutor asked Atilano whether "[y]ou had methamphetamine, heroin, and kites stuffed in your rectum yesterday when you came to court, didn't you?" After Atilano initially refused to answer and was directed by the trial court that he needed to answer the question, he answered the prosecutor's question in the affirmative.

In the prosecution's rebuttal, as to the incident involving a stabbing, a deputy sheriff testified that he had seen Atilano and another inmate, appearing to be the aggressors, hitting another inmate. Another deputy sheriff testified that Atilano was summoned by another inmate to attack the homosexual inmate. Atilano's counsel moved to strike that testimony on the ground it lacked foundation as to, inter alia, the deputy sheriff's ability to see the summoning. The trial court held a brief hearing outside the jury's presence, under Evidence Code section 402. Following that hearing, the trial court sustained "most of [Atilano's counsel]'s objection" under Evidence Code section 352. The court concluded the deputy sheriff's testimony that Atilano was summoned to join the attack would be admitted as "it . . . has more relevance because it does seem to impeach Mr. Atilano's testimony."

Atilano does not contend the evidence of the three jailhouse misconduct incidents lacked relevance, foundation, or violated his Fifth Amendment right not to incriminate himself. He solely argues that evidence should have been excluded under Evidence Code section 352 and his trial counsel was ineffective for failing to object to its admission on that ground.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Even assuming Atilano's trial counsel was ineffective for failing to object to the evidence based on Evidence Code section 352, the record does not show a substantial probability the trial court would have excluded it.

Evidence of the three jailhouse misconduct incidents was probative on the issue of Atilano's credibility, as each involved an offense of moral turpitude; Atilano does not contend otherwise. The presentation of that evidence required a minimal amount of time—spanning about 26 pages of approximately 400 pages of trial testimony.

Given the testimony of multiple eyewitnesses that Atilano walked up to Greene and fatally shot him at close range, evidence that on two separate occasions Atilano joined an inmate in attacking another inmate combined with evidence he once concealed drugs and “kites” in his rectum, did not result in undue prejudice to his case. On this record, the jury could not have been confused or misled by that evidence to find him guilty of first degree murder based on his jailhouse misconduct, as opposed to the substantial direct evidence supporting his guilt for committing first degree murder.

Furthermore, notwithstanding Atilano’s trial counsel’s failure to expressly cite Evidence Code section 352 when he articulated his objection to the jailhouse misconduct evidence, the record shows Evidence Code section 352 was very much on the trial court’s mind in considering the admissibility of that evidence. During the prosecutor’s cross-examination of Atilano as to the first incident, the trial court informed the prosecutor that the court was considering sustaining its own Evidence Code section 352 objection to the prosecutor’s efforts to elicit further details. In discussing the second incident, the court sustained what it construed to be an Evidence Code section 352 objection by Atilano’s counsel to some of the deputy sheriff’s testimony. It is therefore not reasonably probable the jury would not have convicted Atilano of first degree murder had Atilano’s counsel asserted an Evidence Code section 352 objection to that evidence. As Atilano’s counsel’s omission did not prejudice Atilano, his ineffective assistance of counsel claim fails.

B.

Atilano’s Counsel’s Failure to Request CALCRIM No. 316 Was Not Prejudicial.

Atilano next contends that given the admission of evidence of not only the three jailhouse misconduct incidents, but also of his prior convictions for possession of a controlled substance for sale, active participation in a criminal street gang, and receiving

stolen property, his trial counsel was ineffective for failing to request that the jury be instructed with CALCRIM No. 316. CALCRIM No. 316 limits the consideration of prior crimes evidence to the issue of credibility (*People v. Anderson* (2007) 152 Cal.App.4th 919, 940-941), and states as follows: “<Alternative A—felony conviction> [¶] [If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness’s testimony. The fact of a conviction does not necessarily destroy or impair a witness’s credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.] [¶] <Alternative B—prior criminal conduct with or without conviction> [¶] [If you find that a witness has committed a crime or other misconduct, you may consider that fact [only] in evaluating the credibility of the witness’s testimony. The fact that a witness may have committed a crime or other misconduct does not necessarily destroy or impair a witness’s credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable.]” (CALCRIM No. 316.)

The trial court is not required sua sponte to instruct the jury with CALCRIM No. 316. (See *People v. Collie* (1981) 30 Cal.3d 43, 64; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.) The instruction, however, must be given upon request. (*People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278.)

Assuming Atilano’s counsel was ineffective by failing to request CALCRIM No. 316, it is not reasonably probable, however, that counsel’s alleged error altered the outcome of this case. Atilano testified that he got into a physical confrontation with Greene during which he admittedly struck Greene several times, including once in the head with a gun. The issue then left for the jury to resolve, was whether to believe Atilano’s testimony that his gun accidentally discharged during his and Greene’s struggle to attain control of it, or, as supported by the testimony of several witnesses, Atilano shot Greene pointblank in the head. In light of Atilano’s admissions, his prior convictions and incidents of jailhouse misconduct could only be relevant on the

issue of his credibility. Hence, the failure to provide the jury with CALCRIM No. 316 saying so did not prejudice Atilano.

Furthermore, the jury was instructed with CALCRIM No. 220 on reasonable doubt and CALCRIM No. 226 on witness credibility. On this record, Atilano's claim that his trial counsel rendered him ineffective assistance for failing to request CALCRIM No. 316 fails.

II.

SUBSTANTIAL EVIDENCE SHOWED WEST SIDE VERDUGO'S PRIMARY ACTIVITIES ARE OFFENSES IDENTIFIED IN SECTION 186.22, SUBDIVISION (f).

Atilano argues the gang enhancement allegations relating to West Side Verdugo found true by the jury were unsupported by substantial evidence. Specifically, he contends substantial evidence did not show West Side Verdugo was a criminal street gang within the meaning of section 186.22, subdivision (f), because insufficient evidence showed its primary activities consisted of one of the offenses identified in section 186.22, subdivision (f).

The gang enhancement of section 186.22, subdivision (b)(1) provides in relevant part: “[A]ny person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows”

The gang enhancement of section 186.22, subdivision (b)(1) requires the finding of the existence of a “criminal street gang.” Section 186.22, subdivision (f) defines “criminal street gang” as “any ongoing organization, association, or group of

three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.”

The California Supreme Court explained in *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, that “[s]ufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v.*] *Gardeley* [(1996)] 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant *Gardeley* had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with *Gardeley* and fellow gang members, and on ‘his personal investigations of hundreds of crimes committed by gang members,’ together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]”

Here, the gang expert witness testified about his training and years of involvement with West Side Verdugo. He testified he has focused on enforcing gang injunctions against members of West Side Verdugo. He has spoken to West Side Verdugo members more than 400 times. He has arrested “probably around” 200 to 300 West Side Verdugo members. After explaining that Sir Crazy Ones is the name of a clique within West Side Verdugo, he testified as follows:

“Q Are there specific, primary activities that Sir Crazy Ones engage in?”

“A Yes.

“Q What are those?”

“A Not just Sir Crazy Ones, but also West Side Verdugo as a whole?”

“Q Yes.

“A Yes. They have been investigated for murders, kidnappings, robberies, burglaries, witness intimidation, carjackings, vehicle theft, possession of firearms, the sales of illegal narcotics.”

Each of the offenses cited by the expert witness is identified in section 186.22, subdivision (f).

As quoted *ante*, the California Supreme Court in *People v. Sengpadychith*, *supra*, 26 Cal.4th at page 324, held that sufficient proof of a gang’s primary activities can be in the form of an expert opinion based on the expert’s conversations with fellow gang members, his or her personal investigations of crimes committed by gang members, and reliance on information received from colleagues. Here, the expert opined on West Side Verdugo’s primary activities based on his years of involvement with West Side Verdugo, including the training he received, talking to colleagues about the gang, talking to gang members, arresting them, and enforcing gang injunctions against them. The expert’s testimony was therefore sufficient to support the finding that West Side Verdugo’s primary activities involved offenses identified in section 186.22, subdivision (f).

Defendant cites *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611, in support of his argument that substantial evidence failed to establish West Side Verdugo’s primary activities. *In re Alexander L.*, however, is factually distinguishable. In that case, the gang expert witness never stated what the primary activities of the subject gang were at the time of the charged offense. When asked about the primary activities of the gang, the expert witness stated: “I know they’ve committed quite a few assaults with a deadly weapon, several assaults. I know they’ve been involved in murders. [¶] I know they’ve been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.” (*Id.* at p. 611.)

Here, in contrast, in response to the question, “[a]re there specific, primary activities” in which Sir Crazy Ones and West Side Verdugo engage, the expert witness

unequivocally answered, “[y]es” followed by the statement that members of the gang have been investigated for several statutorily enumerated offenses. A reasonable interpretation of the expert’s testimony is that the crimes, for which, he stated, members of both West Side Verdugo and Sir Crazy Ones have been investigated, are the primary activities of that gang.

In re Alexander L. is further distinguishable from the instant case because in that case, “[n]o specifics were elicited as to . . . where, when, or how [the expert] had obtained the information.” (*In re Alexander L.*, *supra*, 149 Cal.App.4th at pp. 611-612.) As discussed *ante*, in the instant case, the expert testified at length about his extensive and personal experience with West Side Verdugo.

Substantial evidence supported the gang enhancement allegation finding.

III.

WE REMAND TO THE TRIAL COURT TO DETERMINE WHETHER ATILANO IS ENTITLED TO A *MARSDEN* OR *FARETTA* HEARING FOR THE LIMITED PURPOSE OF FILING A MOTION FOR A NEW TRIAL.

Atilano argues that at the sentencing hearing, the trial court abused its discretion and violated his rights under the Sixth Amendment to the United States Constitution “by ignoring [his] request to either substitute counsel or represent himself for the purposes of filing a new trial motion.” (Boldface & capitalization omitted.)

At the sentencing hearing, Atilano’s counsel asked to make a record as to concerns Atilano had articulated. Counsel stated: “First, his folks aren’t here today. I had told them yesterday that I wasn’t sure that it would happen or not today. Second, he wanted to pursue issues in regard to—to a motion for new trial. In reviewing the case, I cannot think of anything, with the possible exception of ineffectiveness of counsel, which I can’t review, but there is that possibility that I did something that could merit a new trial. And then, thirdly, Mr. Atilano did want to address the family, and as he was not

prepared, today, to go forward, he's unsure that he would be able to address them coherently today, without having preparation."

The following discussion ensued:

"[The prosecutor]: Your Honor, obviously, the People would like to proceed today. Counsel articulated that he does not, in his professional opinion, see any other basis—and I think as the Court was the one who observed the entire trial, clearly Counsel was effective in his representation. He presented a defense. The jury saw it differently. But I don't believe that's a basis for [ineffective assistance of counsel]. Other than that, Counsel was effective in his representation, as an attorney, in my opinion. I don't believe that would be a basis.

"The Court: Well, I don't want to rule on a hypothetical motion that hasn't been filed. There is no new trial motion that has been filed. And [defense counsel] has represented that he sees no basis, in his professional opinion, to file one.

"I will say, Mr. Atilano, we do sometimes—in fact, I routinely grant continuances for sentencing. It's different when people are here to address the court.

"[Atilano]: I wanted to do the retrial motion and do it myself or get another attorney to do it for me, if [defense counsel] doesn't have an opinion about it. I didn't know when to address the Court. He said it wouldn't be started and (sic) be able to waive time."

The court decided to go forward with the sentencing hearing.

Atilano argues his statement to the court triggered a duty on the trial court's part to conduct an inquiry to determine whether Atilano was making a motion to represent himself under *Faretta, supra*, 422 U.S. 806, or making a motion for new counsel pursuant to *Marsden, supra*, Cal.3d 118.

"A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution, including sentencing. [Citations.] The right to counsel may be waived by a criminal defendant who elects to represent himself at trial.

[Citation.] The right of self-representation is absolute, but only if a request to do so is knowingly and voluntarily made and if asserted a reasonable time before trial begins. Otherwise, requests for self-representation are addressed to the trial court's sound discretion. [Citation.] Moreover, whether timely or untimely, a request for self-representation must be unequivocal. [Citation.] [¶] On appeal, a reviewing court independently examines the entire record to determine whether the defendant knowingly and intelligently invoked his right to self-representation." (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) "The trial court's discretion to deny a motion made at the commencement of trial or later exists to 'prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.' [Citation.] It follows ineluctably that where self-representation is requested for a legitimate reason, where there is no request for a continuance and where there is no reason to believe there would be any delay or disruption, the trial court's denial of a *Faretta* motion is an abuse of discretion." (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 593; see *People v. Valdez* (2004) 32 Cal.4th 73, 103 ["In exercising this discretion, the trial court should consider factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.""]].)

As to the right to request substitute counsel, "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.*' [Citation.]" (*People v. Sanchez* (2011) 53 Cal.4th 80, 87.)

In *People v. D'Arcy* (2010) 48 Cal.4th 257, 284, the California Supreme Court noted a "a waiver of counsel which is made conditional by a defendant cannot be effective unless the condition is accepted by the court." The court cited *Adams v. Carroll* (9th Cir. 1989) 875 F.2d 1441, 1445, as "upholding the defendant's unequivocal

request to represent himself if the trial court would not order substitute counsel.” (*People v. D’Arcy, supra*, at p. 284.)

Here, Atilano’s statement to the trial court that he would like to file a motion for a new trial himself or through substituted counsel who, unlike his current attorney, could find grounds for such a motion, was sufficiently unequivocal to, at a minimum, trigger the trial court’s obligation to inquire about the basis for his statement regarding representing himself or obtaining new counsel. As to his request to represent himself, on our record, we cannot determine whether the trial court abused its discretion in tacitly denying that request.

We therefore remand the matter to the trial court with directions that the court hold a hearing at which the court shall make such inquiry. (See *People v. Lopez* (2008) 168 Cal.App.4th 801, 815 [reversing the judgment and remanding the matter “with directions to the trial court to conduct a posttrial *Marsden* hearing and to exercise judicial discretion to order a new trial, reinstate the judgment, or proceed otherwise as authorized by law”].)⁵

DISPOSITION

The judgment is affirmed. We remand with directions that the trial court should conduct a hearing at which the court shall inquire about the reasons for Atilano’s

⁵ Citing *People v. Lopez, supra*, 168 Cal.App.4th at page 815, the Attorney General states in the respondent’s brief that should this court conclude the trial court erred by failing to inquire about Atilano’s reasons for requesting new counsel, this court should “remand the matter with directions to the trial court to conduct a post-trial *Marsden* hearing.” The Attorney General does not argue in the respondent’s brief that if the trial court’s tacit denial of Atilano’s request to represent himself constituted error, it would be harmless.

statement regarding representing himself or requesting substitute counsel for the limited purpose of possibly filing a motion for a new trial.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.