

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN MARK MAGEE,

Defendant and Appellant.

H037508

(Santa Cruz County

Super. Ct. No. F19723)

A jury found Stephen Magee (appellant) guilty of one count of first degree residential burglary (Pen. Code, § 459, count one), two counts of attempted robbery (§§ 644/211, counts two and three),¹ two counts of making criminal threats (§ 422, counts four and five), one count of dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1), count six), one count of assault with a deadly weapon with force likely to produce great bodily injury (§ 245, subd. (a), count seven) and one count of attempting to dissuade a witness from testifying (§ 136, subd. (a)(1), count eight). As to counts one through six, the jury found true the allegation that appellant personally used a deadly weapon during the commission of each offense; and as to count six the jury found true the allegation that appellant used force of fear or an express or implied threat of force in the commission of the crime.

¹ All unspecified section references are to the Penal Code.

Subsequently, the court sentenced appellant to five years, eight months in state prison. Appellant filed a timely notice of appeal.

On appeal, appellant contends that the trial court denied him his right to testify on his own behalf in violation of the Fifth, Sixth and Fourteenth Amendments where he unequivocally asserted this right during a *Marsden* hearing.² Alternatively, appellant argues that the court abused its discretion in denying his *Marsden* motion.³ For reasons that follow we affirm the judgment.

Facts

Approximately, a week before September 5, 2010, Svend Cavanaugh took appellant to the home of his parents Patrick Cavanaugh and Debbie Granger at Camp Harmon in Boulder Creek. Patrick and appellant talked briefly.⁴

On September 5, Patrick and Debbie were barbequing in the backyard. At one point, Patrick walked into the house. He saw a car pull up to the front of the house. Patrick opened the door and appellant jumped out of the car. Appellant started yelling at Patrick telling him that Svend owed him \$500. Appellant told Patrick he would kill him if he did not get it. Patrick told appellant that he did not know anything about the money he was owed. Patrick noticed that appellant had a knife with a five or six inch blade that appellant was flicking in and out.

Patrick pushed the front door shut, but appellant kicked it open causing it to split. Appellant grabbed Patrick and wrapped his arms around Patrick's neck in a choke hold so that Patrick had difficulty breathing. Appellant and Patrick fell to the ground and out the door. Appellant put his legs around Patrick's neck and told him he could snap his neck

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

³ Appellant made two *Marsden* motions, one at the end of the evidentiary portion of the case and one on the day sentencing was scheduled. We are concerned here only with the first *Marsden* motion.

⁴ We will refer to Patrick Cavanaugh and Debbie Granger by their first names for ease of reading.

"like a pretzel." Appellant tightened his legs as much as he could and told Patrick that he wanted to choke him to death. Patrick sustained cuts on his arm from either the knife or from falling to the ground.

Eventually, Patrick was able to tell Debbie to call for the police. Appellant ran after Debbie and put a knife to her neck; he threatened to kill her if she called the police and told her he was going to slit her throat. Appellant asked Debbie for money, specifically, \$500. Debbie screamed for assistance from JB the camp doctor. When Debbie told appellant that JB was a police officer appellant said that he did not care and threatened that he would kill JB too.

When JB arrived he told appellant to leave, but there was some "yelling at each other." Appellant jumped into the car and "tore out of the driveway." The police arrived at the house about 30-45 minutes later.

Dagoberto Cuevas testified that he was appellant's acquaintance from work. On September 5, he drove appellant to Boulder Creek. Upon arriving at a house an elderly gentleman, who Cuevas identified in court as Patrick Cavanaugh, was standing outside. According to Cuevas, Patrick screamed at them to leave. Cuevas heard appellant tell Patrick that Patrick's son owed him money, but Patrick said that he did not know where his son was. The two started arguing. At some point appellant was handling a knife.

According to Cuevas, Patrick tried to go into the house, but appellant blocked his way; Patrick "swung" at appellant. Appellant pinned Patrick to the floor. Cuevas heard appellant say that he did not want to hurt Patrick all he wanted were the things that belonged to him. Eventually, appellant let Patrick go and Patrick went into the house and slammed the door shut. Appellant kicked open the door and went inside. Cuevas claimed to have followed him in. Once inside he saw appellant hold a knife to Debbie's neck.

Santa Cruz County Deputy Sheriff Christopher Clark interviewed appellant after he was arrested. Appellant told him that Svend had taken his backpack, which contained

keys to his vehicles, keys to his residence and a bottle of Vicodin. Appellant carried a knife, but denied putting it to anyone's neck. Appellant said that he pushed open the door of the Cavanaugh residence with his foot, but denied causing any damage to the door. Deputy Clark identified telephone calls that appellant placed from jail to various people including Cuevas. The recordings of the telephone calls were played for the jury.

In the telephone calls, among other things, appellant tells Cuevas that if Cuevas had not been with him he would have broken Patrick's neck. In another telephone call to "Orlando," appellant admitted that he went to Boulder Creek and became involved in an argument with Svend's parents and put a knife to Debbie's neck. In a third telephone call to "Diane," appellant explained that Svend owed him money and told her where Patrick and Debbie lived. Appellant said, "But if they don't make it to court on December—for the trial, I mean I would be set. So if you could help me with that?" Diane can be heard saying that she would do what she could.

In a fourth telephone call on November 10, 2010, appellant told Cuevas to "take some homeboys up there and just smash those people. And then I won't have to go to trial."

Deputy Sheriff Casandra Cassingham testified for the defense that she interviewed Patrick after the incident with appellant. Patrick smelled of alcohol and his story was "bouncing around." Deputy Cassingham did not see any injury to Debbie's neck.

Discussion

Right to Testify

As noted, appellant contends that the trial court denied him his right to testify.

Without doubt, a criminal defendant has a constitutional right to testify on his or her own behalf, and defense counsel has no power to prevent a defendant from testifying. (U.S. Const., 5th Amend.; *People v. Lucas* (1995) 12 Cal.4th 415, 444; *People v. Robles* (1970) 2 Cal.3d 205, 214-215.)

The United States Constitution does not provide criminal defendants with an explicit right to testify in their own defense. That right, however, is inherent in three provisions of the United States Constitution—the due process clause of the Fourteenth Amendment, the compulsory process clause of the Sixth Amendment, and the Fifth Amendment's privilege against self-incrimination. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-53; *People v. Gutierrez* (2009) 45 Cal.4th 789, 821-822.) A defendant has the right to testify, even if testifying is contrary to counsel's advice. (*People v. Nakahara* (2003) 30 Cal.4th 705, 719.)

" [T]he decision to place a defendant on the stand is ordinarily within the competence and purview of trial counsel, but . . . a defendant who insists on testifying may not be deprived of doing so even though counsel objects. [Citation.] While the defendant has the right to testify over his attorney's objection, such right is subject to one significant condition: The defendant must timely and adequately assert his right to testify. [Citation.] Without such an assertion, ' . . . a trial judge may safely assume that a defendant who is ably represented and who does not testify is merely exercising his Fifth Amendment privilege against self-incrimination and is abiding by his counsel's trial strategy.' [Citations.] When the record fails to show such a demand, a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to his counsel his desire to testify, he was deprived of that opportunity." (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1231-1232 (*Hayes*); see also *People v. Guillen* (1974) 37 Cal.App.3d 976, 984-985 (*Guillen*).)

Background

After the evidentiary portion of the trial concluded, but before the court instructed the jury, appellant made a *Marsden* motion. During that motion, after the court clarified that appellant wanted his public defender replaced, the following exchange occurred between appellant and the court.

"THE COURT: And do you feel that Mr. Vinluan has not properly represented you in the case?

THE DEFENDANT: Yes, sir.

THE COURT: Tell me why you feel that way.

THE DEFENDANT: For one I believe, I think I should have 'tooken' the stand."

After appellant made more claims outlining how he thought he had not been adequately represented, defense counsel addressed the issue of appellant taking the stand.

"MR. VINLUAN: I just felt his responses, we practiced and I've asked questions, and he just didn't - - I don't think he would have held up very well. Maybe on direct he would have been fine. I felt like cross-examination by the prosecutor I think he would have done more harm. So it is a strategic choice. I asked Mr. Magee and he said, you know, he left that up to me. It wasn't that I overbore his will and prevented him from testifying. He sort of left it up to me and then my call was that I don't think he should go and testify.

THE DEFENDANT: Can I say something?

THE COURT: Yes

THE DEFENDANT: I asked him yesterday why I didn't testify. He said I don't think it was -- I told him I thought I should."

The court explained to appellant that "one of the most dangerous decisions that a defendant can make is the decision to testify in his own behalf. I've talked to the jury some about why that's not a good idea, but the fact is that decision to not have you testify is a tactical decision normally left to the attorney because he's not emotionally involved in the case. He has much more experience in determining whether [*sic*] the impact is likely to be on a jury of having a defendant testify and not do well as a witness. And I understand that you feel that tactically it might have been better for you to testify from your viewpoint but generally speaking your attorney, who's not emotionally involved in the case the way you are, is in a much better to position to evaluate whether that's a good

idea or bad idea. Anything else that you want to tell me at all?" After appellant said that there was not, the court continued: "All right basically two grounds for considering a Marsden motion. One is that counsel simply isn't providing adequate representation or otherwise that the relationship between the parties is broken down such that they simply can't communicate anymore. There is no indication of the latter ground here. So my consideration is limited to whether or not I believe that Mr. Vinluan's representation here wasn't adequate. I'm not going to find it was inadequate because given what I've heard of the evidence, I don't have problems with his tactical decision not to call defendant . . . I certainly don't have any difficulty in his decision not to have his client testify. [¶] Additionally, given the timing of this case - -"

After appellant interrupted the court, the court continued, "[I] agree with Mr. Vinluan it would not be in your best interest to testify in this case given what I heard about what happened and the few instances I've seen of your behavior including the fact that before we began this motion you were basically enunciating your desire and your reasons for having Mr. Vinluan removed such that everybody in the courtroom could hear including Mr. Gill, the prosecutor, and myself, which is an impulse control problem. . . . [¶] In any event, the other factor here is that you've already rested in this case. I really don't have the authority to open this case at this point absent some determination that your rights have been gravely violated in some way by the way the case has proceeded. But you were present yesterday when your attorney rested after putting on only Deputy Casingham as a witness. And technically the case is ready to be delivered to the jury subject to my instructions and counsel's closing arguments. And in essence what you're asking for is a continuance at the eleventh hour or later at a time when the case simply isn't in a proper posture where I could be considering continuing it on the basis of the issues you've raised here including your desire to have some other attorney represent you whether it's the Public Defender or private counsel." Accordingly, the court denied the *Marsden* motion.

As an initial matter, we note that to demonstrate a denial of the right to testify, a defendant must establish that he communicated his or her desire to testify to trial counsel. (See *Hayes, supra*, 229 Cal.App.3d at p. 1235, fn. 12.)

In contrast to *Hayes, supra*, 229 Cal.App.3d 1226, we have no doubt based on the foregoing colloquy that appellant communicated his desire to testify to trial counsel and that the court accepted that appellant had told his attorney that he wished to testify. In *Hayes*, a court trial, the defendant engaged in several outbursts during the course of the victim's testimony, in which he expressed anger, claimed the victim was biased and untrustworthy, and attempted to cross-examine the victim directly or argue his case. During these outbursts he made several comments, such as " 'Could I speak? Could I speak?' "; he stated that he wanted " 'to speak on [his own] behalf.' " (*Id.* at p. 1232, fn. 8, fn. 9.) The defendant was removed from the courtroom, the prosecution rested, and then the defense rested without presenting any evidence. Defense counsel confirmed that he had never intended to put defendant on the stand to testify. On appeal, the defendant argued the court denied him his right to testify. The *Hayes* court held that the defendant never adequately nor timely asserted his right to testify. His outbursts and statements during the trial, read in context, did not "reflect any unequivocal statement [that] he wished to take the stand to testify." (*Id.* at p. 1232.)

Respondent argues that the record does not show that appellant timely and effectively demanded the right to take the witness stand.

*Timeliness*⁵

Although the California Supreme Court has endorsed the need for "a timely and adequate demand to testify . . ." (*People v. Alcala* (1992) 4 Cal.4th 742, 805 (*Alcala*)) [trial courts are not required to obtain an affirmative, on-the-record waiver of right to

⁵ For purposes of this discussion we are assuming for the sake of argument that appellant made an adequate demand to testify. We will address that part of the requirement later.

testify]), the court has not adopted an explicit test for determining whether a defendant's demand to testify is timely. Decisions published since *Hayes* typically quote the statement from *Hayes* regarding timeliness, that is, "When the record fails to show such a demand, a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to his counsel his desire to testify, he was deprived of that opportunity." (*Hayes, supra*, at pp. 1231-1232; see *Guillen, supra*, 37 Cal.App.3d at pp. 984-985 [defendant first told court of his desire to testify at posttrial hearing; assertion was untimely].)

Plainly, this statement from *Hayes* means that a defendant's request to testify is untimely per se when made after the defendant learns the jury has returned a guilty verdict. What is not so plain is whether a demand made before the jury has stated its verdict is untimely. Also, it does not inform practitioners or trial courts how they should go about determining whether a pre-verdict demand is timely; the statement in *Hayes* regarding timeliness is too general to resolve the timeliness questions with which we are faced in this appeal.

We are mindful that the right to testify on one's own behalf is not without limitations. (*Rock v. Arkansas, supra*, 483 U.S. at p. 55.) States have legitimate interests in the fairness and reliability of the criminal process used to ascertain guilt or innocence. (*Id.* at pp. 55-56.) Thus, in certain situations state procedural and evidentiary rules can restrict the defendant's right to testify without violating the Constitution. (*Id.* at p. 56, fn. 11.) Nevertheless, the restrictions "may not be arbitrary or disproportionate to the purposes they are designed to serve." (*Id.* at p. 56.) In other words, the interests of the state served by a particular rule's application must be sufficient to justify the limitation imposed on the defendant's right to testify. (*Ibid.*)

Penal Code section 1093 provides the order of procedure for a jury trial. Thus, it is logical to assume that demands to testify that are made during the defendant's case-in-chief are to be regarded as timely per se. (See § 1093, subd. (c) [order in which

defendant offers evidence].) Similarly, where defense counsel does not intend to present any evidence, a demand to testify made at the close of the People's case-in-chief must be considered timely per se. In *People v. Harris* (1987) 191 Cal.App.3d 819 (*Harris*), the defendant asked to testify after the close of the People's portion of the guilt phase and before defense counsel told the court that the defense rested. (*Id.* at p. 821.) The trial court, supported by arguments from defense counsel, denied the defendant's request to testify. (*Id.* at p. 823.) On appeal, the court stated the defendant had been denied his constitutional right to testify and that it had no option but to reverse. (*Id.* at p. 826.) In *Harris*, the parties did not raise and the appellate court did not address the issue of timeliness; this leads us to infer that the timeliness of the request to testify was obvious. Based on *Harris*, we conclude that a defendant's request to testify is timely per se when made before the defense rests.

We recognize that courts from other jurisdictions have used language that suggests that demands are timely per se if made before the close of evidence. For instance, the Eighth Circuit Court of Appeals stated: "The right to testify must be exercised at the evidence-taking stage of trial. Once the evidence has been closed, whether to reopen for submission of additional testimony is a matter left to the trial court's discretion." (*U.S. v. Jones* (8th Cir.1989) 880 F.2d 55, 59; see *State v. Mulske* (2007) 2007 N.D. 43, ¶ 5 [729 N.W.2d 129, 130] [the right to testify must be exercised at the evidence-taking stage of trial]; *Henson v. State* (2006) 94 Ark. App. 163, 170 [227 S.W.3d 450, 455] [same].)

Here the trial court was under the impression that it did not have the authority to reopen the case absent a determination that appellant's rights had "been gravely violated in some way."

However, section 1094 provides in full: "When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the Court, the order prescribed in Section 1093 [for the presentation of a case] may be departed from."

One commentator summarized this procedural rule as follows: "The allowance or denial of a request to reopen the case after one of the parties has rested, after the close of the evidence, during or after the argument to the jury, or after submission of the case to the jury, for the purpose of admission of further evidence, rests in the discretion of the trial court." (21 Cal.Jur.3d (2001) Criminal Law: Trial, § 400, pp. 672-673, fns. omitted.)

Based on the foregoing, we conclude that whether appellant's demand to testify should have been granted was a question committed to the discretion of the trial court. Furthermore, we conclude that the trial court's exercise of this discretion must be based on an analysis that weighs the state's interests in not reopening the evidence against the interests of the defendant in exercising a fundamental constitutional right. (*Rock v. Arkansas, supra*, 483 U.S. at p. 56, fn. 11.)

It follows therefore that the trial court's determination regarding the timeliness of appellant's demand is subject to appellate review under an abuse of discretion standard.

Here, the record shows that after the prosecutor finished cross-examining defense witness Deputy Cassingham, defense counsel rested the defense case. Immediately, without even asking the prosecutor if there was any rebuttal testimony (§ 1093, subd. (d) [the parties may offer rebutting testimony respectively]), the court adjourned for the evening and dismissed the jury. The record of the *Marsden* hearing, which was held first thing the next morning, before closing began, supports the inference that appellant had told counsel during the defense case in chief, if not before, that he wanted to testify, but counsel made a tactical decision to not call him after Deputy Cassingham testified. On this record, we see no opportunity for appellant to have raised the issue with the court earlier than he did.

In *People v. Christensen* (1890) 85 Cal. 568 (*Christensen*), the defendant argued that "the court erred in not permitting the defendant to testify in her own behalf when she desired to do so." (*Id.* at p. 570.) The California Supreme Court rejected this argument by stating: "The evidence had all gone to the jury, and the court had proceeded with its

charge to that body as to the law governing the case, when this offer was made. It thus became discretionary with the court to grant or refuse the request, and we cannot declare that its action was an abuse of its discretion." (*Ibid.*)

We conclude *Christensen* is distinguishable from appellant's situation because that defendant was in a less favorable posture by the time she asserted her right to testify. There, the jury was being instructed. In this case, closing arguments had not been made and the jury had not been instructed on the applicable law.

We find the situation in this case closely analogous to the situation presented in *People v. Solomon* (1996) 220 Mich.App. 527, 536 [560 N.W.2d 651, 655] (*Solomon*), certiorari denied *sub nom. Solomon v. Michigan* (1998) 524 U.S. 930. In *Solomon*, the defendant made the request only 30 minutes after the close of proofs and before closing arguments. (*Id.* at p. 533.) The request came immediately after the trial court inquired whether the parties were ready for closing arguments before the jury. (*Ibid.*) The appellate court ruled that the trial court's refusal to reopen proofs for the defendant's testimony was an abuse of discretion. In reaching its ruling, the appellate court stated it was unable to find any indication that allowing the defendant to testify would have (1) given him an unfair advantage, (2) surprised or prejudiced the prosecution, or (3) "disrupted the flow of the trial in any significant way." (*Id.* at p. 535.)

In this case, there is no indication that appellant would gain an unfair advantage based on the timing of his request. Nor is there any indication that the prosecution would have suffered prejudice or that any surprise relating to having witnesses available to rebut appellant's testimony could not have been circumvented by obtaining a continuance.

Consequently, when we balance the negative impact that allowing appellant to reopen his case and testify would have had on the state's interests in order and fairness against appellant's interest in exercising a fundamental constitutional right, we conclude appellant's interests outweighed those of the state under the circumstances. Accordingly,

the trial court committed an abuse of discretion to the extent that it denied appellant's request to testify based on the ground his request was not timely.

Moreover, action that transgresses the confines of the applicable principles of law is outside the scope of discretion and an "abuse" thereof. (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

In this case, it is quite apparent to this court that the trial judge was mistaken as to the scope of his discretion on two grounds. First, that he did not have the authority to reopen the case absent a determination that appellant's rights had "been gravely violated in some way." That is not the standard: the court should have balanced the state's interests in order and fairness against appellant's interest in exercising a fundamental constitutional right.

Second, and perhaps more importantly, the court's explanation of why it was not a good idea for appellant to testify shows that the court denied appellant his right based on the ground that appellant's attorney was in a much better position to evaluate whether or not it was a good or bad idea for appellant to testify. In explicitly telling appellant that it was a tactical decision for his attorney to make, the court demonstrated that it misunderstood the law and was unaware that ultimately the decision rested with appellant, not defense counsel.

In conclusion, it was an abuse of discretion for the court to deny appellant's demand to testify on timeliness grounds.

Adequacy of Demand to Testify

Next we turn to the issue of whether appellant's demand to testify was "adequate." As noted, there is a requirement for "a timely and adequate demand to testify." (*Alcala, supra*, 4 Cal.4th at p. 805.) However, the adequacy of a demand to testify must be determined with reference to its purpose. That purpose is to inform the trial court of the defendant's desire to exercise the right to testify so that the trial court can either grant or deny the request.

When a demand is intertwined with a *Marsden* motion as it was here, the demand to testify might be regarded as ineffective if it is conditioned upon the appointment of new counsel. In other words, in some situations it will be quite obvious that the defendant does not want to take the stand unless a new attorney is appointed. Based on the record before us, that does not appear to be the case here.

That being said, we must determine if appellant's statement that he was inadequately represented because he thought he should have " 'tooken' " the stand, adequately informed the court that appellant wanted to testify. For reasons that follow, we determine that it was.

In this case, the trial court was adequately informed of appellant's desire to take the stand. His disagreement with his attorney on that point caused him to make a *Marsden* motion. (See *People v. Blye* (1965) 233 Cal.App.2d 143, 149 [when defendant wishes to take the stand contrary to advice of counsel, defendant should first request court to remove attorney and substitute a new lawyer or defendant in person].) Thus, appellant's presentation of his demand in connection with a *Marsden* motion does not render that demand ineffective.

Consequently, we conclude that appellant adequately demanded the right to testify in his own defense. The denial of his request was a violation of his fundamental constitutional right to testify in his own defense.

Appellant's opening brief acknowledges the split of authority in California on the issue whether the error is reversible per se or is subject to the "harmless beyond a reasonable doubt" standard enunciated by *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Division 2 of the Second Appellate District stated the constitutional violation left it "no option but to reverse" (*Harris, supra*, 191 Cal.App.3d at p. 826), which appears to mean the error was reversible per se. Subsequently, Division 1 of the Fourth Appellate District applied the *Chapman* standard (*People v. Johnson* (1998) 62 Cal.App.4th 608 (*Johnson*), 634-636; *Hayes, supra*, 229 Cal.App.3d at p. 1234, fn. 11).

Appellant argues that *Johnson* incorrectly characterized the denial of a defendant's right to testify as trial error. However, the California Supreme Court has concluded that the denial of a defendant's right to testify does not affect any aspect of his or her trial other than an ability to present personal testimony; it is, therefore, error that occurs during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented. For these reasons, the error is trial error rather than structural error. (*People v. Allen* (2008) 44 Cal.4th 843, 871 (*Allen*), citing *Johnson, supra*, 62 Cal.App.4th 608, 634-636.)⁶

Despite appellant's arguments to the contrary, we conclude that the denial of a defendant's right to testify is a "trial-type" error rather than a "structural error" and, therefore, *Chapman* harmless error analysis applies. We agree with the analysis in *Johnson, supra*, 62 Cal.App.4th at pp. 634-636.)

In *People v. Neal* (2003) 31 Cal.4th 63, the California Supreme Court stated: "The beyond-a-reasonable-doubt standard of *Chapman* 'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Id.* at p. 86.)

⁶ *Allen* arose in the context of a proceeding to extend a defendant's commitment as a sexually violent predator. At the trial by jury in the underlying proceeding, the defendant personally asserted a right and a desire to testify, but his counsel advised the court that for tactical reasons counsel was opposed to defendant's testifying. After informing defendant that counsel controlled this decision, the court agreed it would not be in defendant's interest to testify. For this reason, defendant did not testify. After the jury reached a verdict, the court extended his commitment. The California Supreme Court granted the defendant's petition for review to address the issue whether a defendant in a sexually violent predator proceeding has a state or federal constitutional right to testify over the objection of his or her counsel. The court concluded that a defendant in such a proceeding has a right under the California and the federal Constitutions to testify despite counsel's decision that he or she should not testify and that the denial of the right to testify is subject to harmless error analysis under *Chapman*. (*Allen, supra*, 44 Cal.4th at p. 848.)

Respondent has made such a showing here. Respondent points out that the jury was already aware of appellant's claim that he went to Camp Harmon in search of his property that he alleged had been taken by Svend Cavanaugh. Appellant's differences with Svend provided no defense to the assaults he committed on Svend's parents. Particularly damaging to appellant were the recordings of the telephone calls he made from jail in which he impliedly admitted several acts underlying the charges. We see no way that testimony from appellant could overcome this damning evidence.

Accordingly, we conclude that appellant was not prejudiced by the trial court's denial of his demand to testify.

As an alternate ground for reversal appellant contends that the trial court abused its discretion in denying him substitute counsel when he brought his first *Marsden* motion. Assuming, without deciding, that the trial court abused its discretion in denying appellant's *Marsden* motion, under California law, *Marsden* error is not reversible per se, assuming, as here, appellant was afforded an opportunity to state the reasons for his dissatisfaction with counsel. (*People v. Chavez* (1980) 26 Cal.3d 334, 348–349.) Reversal is unwarranted if a court concludes beyond a reasonable doubt that the *Marsden* error did not contribute to the defendant's conviction. (*Marsden, supra*, 2 Cal.3d at p. 126.)

Applying that standard here, we conclude that any error in denying appellant's *Marsden* motion was harmless beyond a reasonable doubt. We note that the overwhelming evidence against appellant, particularly the damning telephone conversations he had while in jail, made conviction a virtual certainty.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.