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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARI SOR DIAZ–HUERTA, Defendant and Appellant.	B282413 (Los Angeles County Super. Ct. No. TA137144)

APPEAL from a judgment of the Superior Court for Los Angeles County, Michael J. Shultz, Judge. Affirmed.

Arno Akobyan for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Days before trial, defendant and appellant Mari Sor Diaz–Huerta moved for a continuance and sought to substitute in newly retained counsel. The trial court denied the motion. Defendant contends that the court's denial of her substitution request deprived her of the right to be represented by her counsel of choice. Defendant also contends that she received ineffective assistance of counsel by virtue of her court–appointed counsel's failure to conduct a proper examination of the coroner. We affirm.

PROCEDURAL BACKGROUND

An amended information alleged that defendant and her son codefendant Alex Diaz-Huerta, committed one count of murder (Pen. Code, § 187, subd. (a)),[1] and one count of accessory after the fact (§ 32).[2]

A jury acquitted defendant of murder, but found her guilty of a lesser included offense of involuntary manslaughter (§ 192, subd. (b)), and of being an accessory after the fact. Defendant was sentenced to 18 months in county jail on the involuntary manslaughter conviction, and her sentence on the remaining count was stayed under section 654. She filed this timely appeal.

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[1] Unless otherwise stated, statutory references are to the Penal Code.

[2] The initial information alleged only that defendant was an accessory after the fact.

FACTUAL BACKGROUND

The Prosecution Evidence

On the afternoon of May 6, 2015, Erica Estrada was with her friends Angel Espinoza, Jorge Esteban and others in a rented motel room in Lynwood. Estrada had recently ended a romantic relationship with her boyfriend, Alex Diaz–Huerta, defendant's son. She told Espinoza she "was hiding from" Alex, but also that she had "called him and he was . . . on his way" to the motel.

When Alex arrived at the motel, he insisted that Estrada leave with him. She refused to go. Alex took Estrada's bags downstairs where defendant waited with a car. When Alex returned, he demanded that Estrada leave with him. He moved toward Estrada putting a hand into his jacket pocket, and she ran to the bathroom. Alex followed her. Espinoza and Esteban tried unsuccessfully to stop Alex from getting into the bathroom. Espinoza heard Estrada "scream . . . you stabbed me, you stabbed me." Alex walked out of the bathroom with a knife in his hand, followed by Estrada who was "all pale," had a large "gash in her stomach," and passed out. Espinoza covered the gash in Estrada's stomach with a towel, and Esteban called 911.

Alex began "screaming . . . that [Estrada] was his girlfriend . . . . He was going to take her with him no matter what." Espinoza backed away, afraid he might be stabbed. Defendant entered the motel room. She began crying and asked why they had "let [Alex] in the room." Alex picked up Estrada and left the room, followed by defendant. Espinoza

told defendant to get Estrada to a hospital and gave her directions to the closest one, which could be seen from the motel.

Alex and defendant put Estrada into a car and drove away, but did not take her to the hospital to which Espinoza had directed defendant. Phone records showed that, after leaving the motel, defendant and Alex used their cell phones near their home in Paramount, and defendant also used her phone near the Kaiser Permanente hospital in Downey (hospital) to which she delivered Estrada about 90 minutes after leaving the motel.

Dr. Vincent Han was the emergency room physician at on duty at the hospital when Estrada arrived. Dr. Han testified that, with a wound like the one Estrada suffered, the chances are best if the victim is treated within an hour of the time she received the injury (the "golden hour"). Estrada was not responsive when she arrived at the hospital. Her body was warm, but she was not moving or breathing, and emergency room staff scrambled to try to resuscitate her. Dr. Han did not observe "rigor mortis or edema," either of which would have indicated that Estrada "had been dead for a while." When Dr. Han began working on Estrada she had no pulse or detectable blood pressure. Her pupils were dilated, her eyes were fixed and she did not move. Dr. Han testified that Estrada could be considered dead given the lack of a pulse or detectable blood pressure. But, she might still have been alive, so he and the nurses tried "to save her at all costs." Dr. Han recorded "a few minutes of electrical activity" from Estrada's heart while employing life–saving measures. Dr. Han's team worked for

about one hour trying to resuscitate Estrada before he pronounced her dead. The cause of death was cardiac arrest. Estrada suffered acute blood loss. Dr. Han believed that, had defendant gotten Estrada to the hospital sooner, it was unlikely she would have lost as much blood as she did. He also believed that he could have saved Estrada's life had she lost less blood.

Dr. Han talked to defendant, but said "it was really hard . . . to get the full story . . . from her." She claimed someone had called her "to pick up her son's girlfriend in the Compton area." When she got there, Estrada "complain[ed] of abdominal pain" and, "on the way to the hospital, started gasping for air and stopped talking." Defendant said "she didn't know what happened," and would not explain why she did not call 911.

Dr. Ukpo, the coroner who supervised Estrada's autopsy, testified that the cause of death was the stab wound to her abdomen. Dr. Ukpo was unable definitively to say that moving Estrada from the motel room exacerbated her injuries or increased her blood loss, but agreed with Dr. Han that there was a "golden hour" within which a victim should receive treatment.

Los Angeles Sheriff Department (LASD) Deputy Andrew Hagewood spoke to defendant at the hospital. Defendant said her son and Estrada had "a troubled relationship with at least two prior domestic violence incidents." She said Estrada called her at 4:10 p.m., asking to be picked up at 4:50 p.m. "on Atlantic just north of Compton

Boulevard,"[3] then called her again at 6:15 p.m., to say she was still waiting. Defendant told Deputy Hagewood that she picked Estrada up 20 minutes later, and that Alex was not with her. When defendant arrived to get her, Estrada's clothes were bloody and she said she had been "shanked." In light of the blood, and because Estrada was having trouble breathing, defendant decided "to seek medical treatment" and took Estrada to the hospital in Downey, "the only hospital she knew."

At the hospital, defendant told LASD Deputy Sheriff Jorge Ortiz and his partner that Estrada had called her at 6:30 p.m. to be picked up "off of Garfield by Somerset." She agreed to show the deputies where she picked up Estrada. However, when they arrived at that intersection, and defendant was asked to point out where she picked up Estrada, defendant replied, "it's not—it wasn't here. I don't know," and did not recognize any business at the location. Defendant then claimed that Estrada had "told [her] to pick her up on Atlantic by San Vicente" in Compton. At Atlantic Avenue and San Vicente Street, the deputies looked for blood or other evidence, but found none. As they searched, the deputies asked defendant for details about the exact location where she picked up Estrada. Defendant was nervous, and Deputy Ortiz did not believe she was being cooperative.

Deputy Ortiz testified that, as they continued talking, defendant "changed her story a few times." At first, she claimed not to know

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[3] Phone records refute this claim.

Estrada. Later, she said Estrada was the friend of a neighbor. Not until after they left the area of Atlantic Avenue and San Vicente did defendant admit that Estrada had been her son's girlfriend. She was unable or unwilling to explain why she tried to delay the deputies from finding the location where she had picked up Estrada. Defendant told Deputy Ortiz that, when she stopped to pick up Estrada, the girl approached the car bent over, saying she had been "shanked," before getting inside. Defendant refused to provide any more information, and was taken to the LASD station.

When interviewed by detectives at the station, defendant reported that Estrada called her at home. She told Alex she was going to pick up Estrada, and claimed he did not go with her. At first, defendant said she waited about 40 minutes before leaving. Later, she said it was two hours before she picked up Estrada. When defendant picked Estrada up, her hands were bloody and she told defendant her stomach hurt and she had been shanked. Defendant panicked and took Estrada to the hospital without calling 911. She dropped Estrada at the hospital and left to get a drink. When she returned, she learned Estrada had died. She called Alex and told him to come to the hospital, but he did not. Defendant said that Alex and Estrada had often argued, and admitted that Estrada's mother had told her that Alex hit Estrada. Defendant said Alex had a violent history and was on probation, but claimed he had nothing to do with Estrada's stabbing, and denied knowing his current whereabouts.

Alex surrendered at defendant's residence when the LASD arrived to conduct a search. During that search, a detective saw Alex's bloody sneakers, bloodstains on a counter and recovered a pocketknife. Deputies observed that the washing machine recently had been used. There were still clothes inside, including a pair of bloodstained jeans.

The Defense Case

Defendant testified that Alex has schizophrenia and bipolar disorder. Estrada had terminated her relationship with Alex by May 6, 2015.

On May 6, 2015, defendant and Alex went to pick up Estrada after 6:00 p.m. Alex told defendant to stop the car near a motel, and went in. He returned with Estrada's luggage, then went back upstairs to the second floor of the motel. While in the car, defendant heard "guys fighting, arguing, rumbling." She heard Estrada "scream[] for them to stop." As defendant ran upstairs, she saw her son whose face was "all red, like if somebody had choked him or beat him up." He was screaming, "They jumped me, they jumped me, let's go."

Defendant and Alex returned to the car, but defendant went back for Estrada. Alex followed her. When someone opened the motel room door, defendant asked the people inside why they "beat up [her] son, [who] has mental problems." Four men whom defendant did not know were in the room with Estrada, who was bleeding and fell suddenly. Defendant grabbed her and asked what had happened. No one answered, and the men scrambled out of the room. One man told

defendant to get Estrada out, and ordered her not to tell anyone she had been at the motel. Alex helped carry Estrada to the car. As they put Estrada into the car, defendant noticed that the men had changed their clothes. None of the men said anything about a nearby hospital, and defendant did not know about one.

Defendant did not think Estrada was seriously injured. She started driving to the Kaiser hospital in Downey, but got lost. At some point, Alex told her to pull over and got out of the car. Defendant delivered Estrada, who was still breathing, to the hospital just before 8:00 p.m. Defendant left to get a drink, and returned later to speak with LASD deputies. They asked her to take them to the spot where she had picked up Estrada. Defendant agreed to do so, but took them to the wrong location because she feared the man at the motel who threatened her. Defendant admitted that she had lied when she told deputies that Estrada claimed to have been "shanked" when she picked her up

DISCUSSION

Defendant maintains that the trial court erred in rejecting her two requests to substitute in privately retained attorney Arno Akobyan, to be her defense counsel at trial. We disagree.

1. *Relevant Proceedings*

Defendant and Alex were arraigned on June 2, 2015. After the arraignment, the case dragged on for about 18 months over more than

20 hearings, largely due to competency issues related to Alex. Defendant had retained counsel (Mr. Musante) at the preliminary hearing in October 2016, but he no longer represented her by the time the November 2016 information was filed adding the murder count, and defendant requested the court to appoint counsel. On November 7, 2016, the court appointed attorney Richard Klink, a member of the Los Angeles County Bar Association Panel, to represent defendant. In mid–December 2016, defendant's case was severed from her son's case, and trial was scheduled to begin January 31, 2017. At a hearing on January 23, 2017, Klink informed the court he would be ready for trial on January 31.

On January 23, 2017, attorney Arno Akobyan purportedly filed a substitution of counsel and a motion to continue the trial.[4] Akobyan did not appear at the hearing on January 23, but sent stand–in counsel who said Akobyan was "tied up all of today and [would be] starting a case in San Diego on the 30th of January." The court acknowledged that defendant had a right to an attorney of her choice. However, citing section 1050, the court also observed that it had discretion to refuse such a request when used for purposes of delay or when the substitution and resulting necessary continuance would cause disruption of trial proceedings. The court observed that defendant had already "had the lawyer of her choice," and had not mentioned hiring other private

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[4] These documents are not in the appellate record.

counsel since Klink's appointment. The court stated that it had "no doubt" that defendant's purpose in seeking Akobyan's appointment, a week before her trial was to begin, was "to delay the case." Nevertheless, the court permitted Akobyan to make an appearance later that day to argue the matter.

When Akobyan appeared, the court explained the history of these proceedings, weighing defendant's right to request counsel of choice against the court's discretion to refuse her request, if made for the purpose of delay or disruption. Akobyan argued that defendant had been denied a meaningful opportunity to contribute to her defense, because she knew nothing about the case or the trial strategy. Akobyan acknowledged, however, that he had "no doubts [Klink] is a very competent counsel and he would do an amazing job."

The court rejected Akobyan's assertion that defendant remained in the dark, noting that she had been in court 23 times over the past 31 months. The court had observed her conferring with counsel during those proceedings, and she had been present for "all the discussions about discovery problems," and knew "exactly what [had] been happening." Thus, it was "ludicrous" to claim she had "no knowledge about anything of the case." The court rejected Akobyan's claim that discovery had to be redone, and a three-month continuance was necessary. Rather, the court concluded that defendant "simply . . . doesn't want to face the case and the best way to do that is to hire [Akobyan] to come in here on the eve a week away from the trial date."

In response, Akobyan said he would be "perfectly comfortable" and ready for trial after a one-month continuance. The judge was dubious, noting that, in his 52 years of legal experience, lawyers often had claimed they would be trial ready in one month, but were not. Akobyan tried to assure the court he would not seek additional continuances, would clear the rest of his calendar and that he already knew "plenty about this case" based on what defendant told him.

The court believed that Akobyan's assurances that he would not take on new matters, and could proceed in one month were made in good faith. Nevertheless, his existing caseload was heavy and not wholly within his control.[5] When Akobyan then promised he could be trial ready in two weeks, the court said he was only "making your hole deeper," and denied the request to substitute counsel. On January 30, 2017, Akobyan filed a writ petition seeking relief from the trial court's order. This Court summarily denied that petition.

Trial in this matter before Judge Shultz, began on the morning of February 1, 2017, when the court and counsel addressed various pretrial matters. When trial reconvened after lunch, defendant informed the court that she had hired Akobyan, who was present, to represent her at trial. The court informed Akobyan that he was "not a participant in the trial," and would not be permitted to disrupt the proceedings.

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[5] Akobyan had informed the court he had "11 other court appearances between now and a trial date 30 days from today, [and would] be engaged in something . . . in one of those 11 cases and maybe more."

Despite the court's admonition, Akobyan argued that he should be permitted to substitute in and said he would not seek a continuance. The court informed him trial had begun and asked if he was prepared to substitute in immediately; Akobyan said he was. However, when the court demanded to know if he could state "unequivocally 100 percent that [he was] competent [to represent defendant] and ready to go to trial right now," Akobyan said both, "[n]ot in so many words," and that he was ready for trial. After learning that Akobyan had not even seen any discovery, the court asked how he believed he could competently, currently represent defendant. Akobyan said he would "unequivocally [be] ready to begin trial within a matter of hours." However, when the court demanded "an unequivocal declaration that [he had] reviewed all the evidence [and had] seen all the documents," Akobyan conceded that he had not read any police reports, but would be ready for trial the following Monday. In response to the court's inquiry about what he would do after reviewing the reports and realizing he needed additional time to subpoena unavailable witnesses, Akobyan cavalierly responded that he would "improvise." The court dismissed this response, observing that there was every likelihood that Akobyan would seek a continuance, which it would not entertain.

Akobyan then argued that he should be permitted to represent defendant because she and he were "on the same page," and she lacked confidence in Klink. Akobyan also blamed "the Court [for] putting me in this position," if he were to be denied a chance to call a witness because the court refused to grant a continuance. The court responded,

"I'm not putting you in any position. How dare you say that." The court observed that, to the extent anyone was to blame, that blame rested squarely on Akobyan's shoulders, as the attorney trying "to substitute in at the 11th hour on the 9th day that the case has been set for trial after a year and five months [when he hadn't] even read the police reports." In response, Akobyan conceded that "Klink [had] worked up this case well," and there were a number of "things weighing against [his] argument." Still, he insisted he could provide defendant more effective representation than Klink. The court denied the substitution request.

After doing so, however, the court instructed counsel to share the voluminous discovery with Akobyan, and gave him permission to return the following morning and inform the court if he was ready to go to trial. The next morning, Akobyan stated that he was prepared to proceed. The court again denied substitution. The judge explained to Akobyan, who had been practicing law for fewer than nine months, and had done only one felony trial, that, to "substitute in after we've started [Evidence Code section] 402 motions, . . . on [defendant's] behalf, is incredibly short [sighted]. And it is reckless behavior. Given the amount of discovery . . . given the issues of facts . . . . [¶] . . . given the complexities of the theory of the murder . . . given your level of experience, you tried one jury trial, given the amount of time that you've been an attorney, given the fact that there are hundreds, if not thousands of pages of discovery and audio files, given the fact that you've just simply received the discovery out of . . . my courtesy last

night . . . , the Court is denying your request. . . . [Defendant] will suffer as a result of having you as an attorney."

Akobyan was permitted to substitute in as counsel after the jury reached its verdict, but only after the court sanctioned him for failing to file a motion to continue, failing to provide the requisite notice and failing to appear at court on time.

2. *The Court Did Not Abuse Its Discretion in Denying Defendant's Request to Substitute Akobyan in as Defense Counsel at Trial*

Defendant argues that the trial court erred by denying her request to substitute Akobyan in as trial counsel. The court determined—and even Akobyan agreed—that defendant had been well–represented by Klink to date. The record does not reflect that defendant complained of problems with Klink's representation at any point, nor did she request a *Marsden* hearing. The court concluded it would not be beneficial to the defense case to relieve defendant's appointed attorney, who, in stark contrast to Akobyan, was fully "prepared to go to trial."

We review the court's decision whether to permit a defendant to discharge her appointed counsel and substitute another attorney during trial for abuse of discretion. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 786.) "The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing." (*People v. Smith* (1993) 6 Cal.4th 684, 696.)

A trial court's denial of an eleventh hour request to replace an appointed attorney with counsel of choice is not an abuse of discretion

absent a showing that the denial substantially impaired the defendant's right to assistance of counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) The right to counsel of choice is not absolute. It is necessarily limited by a countervailing state interest in proceeding with prosecutions on an orderly, expeditious basis. (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 428; *People v. Lara* (2001) 86 Cal.App.4th 139, 153 [in deciding whether to grant request to substitute counsel, court must balance the interest in new counsel against disruption in proceeding that would result from substitution].) A defendant in a criminal trial may not use her right to counsel as a means to continually delay her day of judgment by discharging prior counsel. (*Keshishian, supra,* at p. 429.) The trial court acts within "its discretion to deny a last-minute motion for continuance to secure new counsel." (*Ibid.*)

Here, the court acted well within its discretion to deny defendant's request to substitute counsel, particularly where that request was made just as trial began, or was about to begin, and was accompanied by a request to reopen discovery and further continue the trial another three months. The court observed that defendant had previously retained a private attorney, with whom she had parted ways, then requested court–appointed counsel. Prior to Akobyan's appearance, defendant expressed no desire to hire other counsel, nor any dissatisfaction with Klink's representation.

Even at the very belated date on which he appeared, Akobyan was given ample opportunities to demonstrate that substitution was

justified and that he was competent to proceed immediately to trial. He could not make that showing. Akobyan conceded he was not ready for trial, had not reviewed discovery or any police reports, and intended to "improvise" during a murder trial in the event evidence he required was unavailable. Further, the court rejected as a "sham," defendant's claim that substitution of counsel was in order because she remained ignorant about her case and Klink's trial strategy. The court had observed defendant in court 23 times, regularly conferring with counsel. In any event, defendant's complaint that Klink did not talk to her or adequately advise her of his trial strategy would not provide a basis for discharging appointed counsel. Competent representation is not established by the number of times one sees her attorney, or the manner in which she and her attorney relate. (See *People v. Hart* (1999) 20 Cal.4th 546, 604.) The determinative issues are whether appointed counsel is prepared and will provide adequate representation at trial, and whether the attorney–client relationship has deteriorated to a degree that warrants substitution of counsel. (*Ibid.*) Here, the court concluded—and Akobyan agreed—that Klink was prepared competently to represent defendant at trial, and that defendant's relationship with counsel was not marked by irreconcilable conflict. Defendant's eleventh hour effort to substitute in Akobyan was simply a dilatory tactic.

The fact that each denial caused Akobyan to shorten the length of his requested continuance, to the point that he claimed none was required, does not establish an abuse of discretion. The court found

Akobyan's shifting claims, and ultimate equivocal representation that he could adequately and immediately proceed to represent defendant, were not credible in light of his complete lack of preparation or knowledge of the case, and his inability to control how his existing caseload would affect his ability to participate in defendant's trial. Indeed, the court found that Akobyan's representations were reckless. He was a novice attorney with virtually no trial experience wholly ill-equipped to provide immediate, effective representation for defendant, and it was clearly not in her best interest to grant the request for substitution of counsel.

The court conducted a thorough analysis of defendant's request, and gave her multiple opportunities to fully explain the specific reasons why Akobyan should be permitted to substitute in. Defendant provided no evidence or argument to outweigh the substantial factors against her request, i.e., the interest of the People, the court, and defendant herself in an expeditious resolution of the case in which she received effective representation. The trial court did not abuse its discretion by denying the motion for substitution of counsel.

3. *Ineffective Assistance of Counsel*

Finally, defendant claims ineffective assistance of counsel. She argues that Klink failed to ask "the correct questions" when he cross–examined the coroner, Dr. Ukpo which, if asked would have resulted in her acquittal of both the crimes of murder and the lesser–included offense of involuntary manslaughter.

Defendant's contention is based on testimony purportedly given by Dr. Ukpo in a different case, i.e., the trial of her son. Her reliance on matters outside the record of this case is improper. An appellant's claim of ineffective assistance may only be established "based upon the four corners of the record." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *People v. Williams* (1988) 44 Cal.3d 883, 917, fn. 12 ["The scope of an appeal [based on a claim of ineffective assistance of counsel] is, of course, limited to the record of the proceedings below"].)

"The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more

appropriately raised in a petition for writ of habeas corpus.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 206–207 (*Gray*).)

The record sheds no light on the purportedly probative questions Klink failed to ask the coroner, and defendant makes no effort to demonstrate or explain what Klink should have done differently in *this* trial based on Dr. Ukpo's testimony in a *different* case. Defendant's ineffective assistance of counsel claim, grounded solely in speculation and conjecture, is not cognizable on appeal. (*Gray, supra*, 37 Cal.4th at p. 207.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.