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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEWAYNE BLANKS, Defendant and Appellant.	B282344 (Los Angeles County Super. Ct. No. BA437695)

APPEAL from judgment of the Superior Court of Los Angeles County, Mildred Escobedo and Michael D. Abzug, Judges. Affirmed.

Mark S. Givens, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Defendant and appellant Dewayne Blanks was convicted by jury of second degree robbery, in violation of Penal Code section 211.[1] In a bifurcated proceeding, the trial court found that defendant suffered a prior conviction under the three strikes law (§§ 1170.12, subd. (d) & 667, subds. (b)–(i)), and a prior serious felony conviction (§ 667, subd. (a)). Defendant was sentenced to 15 years in state prison, comprised of 5 years on the robbery, doubled due to the strike prior conviction, plus 5 years for the section 667, subdivision (a) prior conviction.

Defendant raises the following issues on appeal: (1) the trial court violated his Sixth Amendment right under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) by terminating self-representation without cause and later denying multiple reassertions of his requests to reinstate self-representation; (2) the trial court abused its discretion when it denied defendant's motions under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*); and (3) the trial court abused its discretion by allowing the prosecution to call a rebuttal witness who was not on the prosecution's witness list. We affirm.

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[1] Statutory references are to the Penal Code unless otherwise indicated.

FACTS

Prosecution

The victim, 17-year-old Dayonna Howard, was walking home on Western toward Vernon to catch a bus at 9:00 p.m. on June 26, 2015. Defendant was at the corner of Western and 41st Street by the Mustang Motel. Defendant wore a white V-neck shirt and brown cargo pants. Defendant started a conversation with Howard, asking where she was going, and whether they could hang out and be friends. Defendant asked why Howard was walking so fast; she replied that she was going home. Defendant told Howard he was 26 or 27 years old. Howard was concerned about the age difference. Howard was carrying a purse, her phone, and a bag. Howard was on the phone with her best friend. She ignored defendant and sped up her walk, concerned for her safety.

Defendant called out to someone, and an unidentified man ran toward Howard, catching up to her by a U-Haul business. The man asked Howard if she had a dollar for the bus; she said no. The man grabbed Howard's right arm for five seconds. She ducked when he raised a fist. Defendant then grabbed Howard's purse from her shoulder and took off running. Howard did not fight back because she was scared for her life—the man who grabbed her was much bigger than her and she was outnumbered two to one.

Howard ran toward Vernon. She looked back and saw defendant and the man going through her purse. Cars stopped to help Howard, who was given a ride to nearby police on Vernon and Western. She returned to the area of the U-Haul in a police car, and other officers arrived.

As Howard spoke to Officer Edwin Corpuz, defendant walked by, within 15 feet, on the same side of the street. Howard identified defendant to the officer. The identification was made within 15 minutes of the robbery. Defendant at the time was wearing a hat and his head was down. After defendant was searched, Howard was shown a bank card bearing her name, and she identified the card as one she carried at the time of the robbery. Her purse was recovered, but her bank card, identification, five or six dollars, and earphones were missing.

Sergeant Mike Richardson was the first officer to arrive at the scene, followed by Officer Corpuz. Officer Corpuz met Howard and obtained suspect descriptions from her. When defendant walked near them, Howard pointed and said, "that's him." Defendant was detained and searched. Officer Nguyen recovered Howard's bank card from defendant's right pocket. Howard's purse was recovered at 4213 South Western.

Defense

Defendant testified he did not commit the robbery.[2] He had been in the area of the Mustang Motel, ready to meet a friend (named Star), but she did not show up. Defendant saw Howard walking on the street, she looked attractive, and he approached her. They exchanged names, and he asked if she wanted to hang out and where she was coming from. She did not want to hang out. Defendant, who considers himself a ladies' man, asked her age. She said she was 17, but he thought she was 12.

Defendant heard someone yell "hey, hey, hey," so he stopped. Howard kept walking up Western toward Vernon. A man caught up to defendant and asked if Howard was his girl. Defendant said she was not. Defendant heard Howard scream. When he looked from a position almost at the Mustang Motel, he saw the man "going through her stuff."

Defendant kept walking toward Vernon. He went into a liquor store and then across the street to buy a cheeseburger. He walked back toward the motel to eat the cheeseburger and check if Star had arrived. He was arrested while walking back from Master Burger. He saw Howard with Officer Corpuz, and heard her say, "That's him." Defendant never had Howard's bank card, but an officer pretended to pull it out of defendant's pocket. Defendant

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[2] Defendant admitted he had suffered several prior felony convictions.

was framed by the officers. He was pretty sure the other man did the robbery.

Rebuttal

Sergeant Mike Richardson was flagged down in the area of Western and Vernon at around 9:00 p.m. on June 26, 2015, by a man in a car. Howard was in the rear seat of the vehicle. The man, who refused to be identified or further involved, said Howard had been robbed. Howard entered Sergeant Richardson's police vehicle. The two drove to 42nd and Western to meet responding Officers Corpuz and Nguyen, who arrived at the location of the offense four to eight minutes later. Howard was crying, upset, scared, and "clearly hysterical." Sergeant Richardson saw defendant arrested. Officer Nguyen reached into defendant's right front pocket and recovered a debit card. The officer had nothing in his hand before searching defendant. Sergeant Richardson and Officer Corpuz recovered Howard's purse on a parkway between the sidewalk and the street.

Officer Corpuz advised defendant of his *Miranda* rights at the police station. Defendant indicated he did not want to talk. Defendant made a spontaneous statement that an unknown person reached into his pocket, removed money, and placed a card in the pocket.

DISCUSSION

Faretta Issues

Defendant argues Judge Escobedo's ruling terminating his pro per status at a hearing conducted pursuant to *Wilson v. Superior Court* (1978) 21 Cal.3d 816 (*Wilson*), violated his Sixth Amendment right to self-representation as interpreted by *Faretta*. Defendant further argues Judge Abzug violated the right to self-representation by denying defendant's renewed request to proceed in pro per. We conclude Judge Escobedo erred in revoking defendant's self-representation status without making the required findings, but defendant's subsequent unequivocal statements that he wished to proceed with appointed counsel cured what otherwise would have been a structural error requiring reversal. We also hold that Judge Abzug did not abuse his discretion in denying defendant's in-trial requests for self-representation as untimely and intended to inject error into the proceedings.

The Right to Self-Representation

"In *Faretta,* the United States Supreme Court declared that a defendant 'must be free personally to decide whether in his particular case counsel is to his advantage,' even though 'he may conduct his own defense ultimately to his own detriment . . . .' (*Faretta, supra,* 422 U.S. at p. 834.)

'The Sixth Amendment . . . implies a right of self-representation.' (*Id.* at p. 821.) Thus, a state may not 'constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense.' (*Id.* at p. 807.)" (*People v. Butler* (2009) 47 Cal.4th 814, 824 (*Butler*); see *People v. Dunkle* (2005) 36 Cal.4th 861, 908 disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22 (*Doolin*).) "Erroneous denial of a *Faretta* motion is reversible per se. (*People v. Dent* (2003) 30 Cal.4th 213, 218.)" (*People v. Williams* (2013) 58 Cal.4th 197, 253.)

"It is settled that the *Faretta* right may be waived by failure to make a timely request to act as one's own counsel (*People v. Windham* [(1977)] 19 Cal.3d [121,] 128–129), or by abandonment and acquiescence in representation by counsel (*People v. Stanley* (2006) 39 Cal.4th 913, 929; *People v. Dunkle* (2005) 36 Cal.4th 861, 909–910)." (*Butler*, *supra*, 47 Cal.4th at p. 825.) "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. (*People v. Windham* (1977) 19 Cal.3d 121, 127–129.)" (*Doolin*, *supra*, 45 Cal.4th at p. 453.)

A pro per defendant's access to a jail library or other services may be terminated for out-of-court misconduct, but only after a hearing satisfying due process, and if the hearing is held in an administrative setting, judicial

approval of the administrative finding is required. (*Wilson*, *supra*, 21 Cal. 3d at pp. 827–828.) Pro per status in court (as distinguished from pro per privileges in jail) may be terminated for out-of-court misconduct that "seriously threatened the core integrity of the trial." (*People v. Carson* (2005) 35 Cal.4th 1, 13.) "[I]t is incumbent on the trial court to document its decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." (*Id.* at p. 11.)

The *Faretta* right, "'once asserted, may be waived or abandoned.'" (*People v. Trujeque* (2015) 61 Cal.4th 227, 262 (*Trujeque*), quoting *Dunkle*, *supra*, 36 Cal.4th at p. 909.) "A defendant's waiver or abandonment of this constitutional right should be voluntary, knowing, and intelligent (*People v. D'Arcy* (2010) 48 Cal.4th 257, 284); such waiver or abandonment may be inferred from a defendant's conduct. [Citations.]" (*Trujeque*, *supra*, at pp. 262–263.)

Defendant's Faretta Invocation and Judge Escobedo's Termination of Self-Representation

On September 15, 2015, defendant executed a *Faretta* waiver form and was granted the right to self-representation. On February 2, 2016, defendant was present in the courtroom of Judge Escobedo, with standby counsel, Victoria Clemans. Judge Escobedo stated the Sheriff's Department had submitted documentation that defendant's pro per privileges at the jail had been revoked following an

administrative *Wilson* hearing. The hearing officer concluded defendant delivered one sexually inappropriate letter to jail staff and two sexually inappropriate letters were recovered in defendant's jail cell. Judge Escobedo stated that she had to decide whether to accept the Sheriff's findings and whether the court would terminate defendant's pro per privileges. She ruled, "And I will let you know, Mr. Blanks, that I am going to revoke your pro per privileges. [¶] The question now is are you ready to proceed with Miss [Clemans]?" Defendant replied, "Yes. [¶] I am ready to proceed with Miss [Clemans]." Judge Escobedo stated: "[P]ro per privileges suspended and revoked. [¶] He is no longer pro per to be represented by Miss [Clemans]." The case was set for trial on February 24, 2016.

Judge Escobedo erred in revoking defendant's pro per status, because she made no finding defendant's jail misconduct "seriously threatened the core integrity of the trial." (*Carson*, *supra*, 35 Cal.4th at p. 13.) While out-of-court misconduct may be the basis for termination of pro per status, Judge Escobedo was obligated "to document [her] decision to terminate self-representation with some evidence reasonably supporting a finding that the defendant's obstructive behavior seriously threatens the core integrity of the trial." (*Id.* at p. 11.) Judge Escobedo's only finding was, "I am going to revoke your pro per privileges."

The improper termination of the right of self-representation is structural error, requiring reversal, unless the record establishes a subsequent voluntary waiver or

abandonment of the right of self-representation. "Defendant further asserts that, in any event, reversal of the judgment is required because the trial court's error in denying his *Faretta* motion resulted in his being forced to accept unwanted representation by counsel for an entire year, during which period resolution of the case was delayed, against his wish to plead guilty. But he cites no authority for the proposition that a defendant who, following an erroneous denial of his assertion of *Faretta* rights, validly waives the right to self-representation and proceeds to trial represented by counsel is entitled to relief on appeal. Indeed, such decisions as *McKaskle v. Wiggins* [(1984)] 465 U.S. 168, and *Brown v. Wainwright* [(5th Cir. 1982)] 665 F.2d 607, are to the contrary, and we therefore reject the contention." (*Dunkle*, *supra*, 36 Cal.4th at p. 910; see also *Trujeque*, *supra*, 61 Cal.4th at pp. 262–263.) For the reasons discussed below, what would have been a structural error was cured by defendant's subsequent unequivocal requests for counsel.

Proceedings After the Revocation of Faretta Rights and before Jeopardy Attached

On February 24, 2016, Clemans attempted to declare a doubt as to defendant's competency to stand trial, but Judge Escobedo found no basis for the declaration. The case was set for trial in Department 100 on March 3, 2016.

On March 3, 2016, the case was transferred from Department 100 to Judge Abzug in Department 112 for jury

selection and trial. Clemans complained to Judge Abzug that defendant had been denied due process in part because Judge Escobedo had arbitrarily revoked defendant's pro per status due to a jail incident. Judge Abzug asked defendant, "[A]re you ready to proceed with Ms. Clemans as your attorney?" Defendant replied, "Yes."

Defendant's unequivocal response that he was ready to proceed with Clemans as his attorney constitutes a voluntary acceptance of counsel and a waiver of his right to self-representation. Although counsel stated that Judge Escobedo had arbitrarily revoked defendant's pro per status, defendant never asserted that he wished to represent himself, and to the contrary, he told Judge Abzug he was prepared to proceed with Clemans as counsel. In this context, there is "no suggestion that defendant did not understand what he was giving up in confirming that he wished to be represented by counsel, or that he might in fact have wished to represent himself notwithstanding his statements to the contrary . . . ." (*Dunkle, supra,* 36 Cal.4th at p. 910.)

Jury selection commenced during the morning session of March 3. Later in the day, Clemans asked to be relieved, stating that defendant "does seem to want to represent himself" and she did not want co-counsel. Judge Abzug denied Clemans' request, noting that counsel had not been relieved, defendant had a right to communicate with her, and defendant had already told the court that he wanted to proceed with counsel. At the end of the court day Judge

Abzug reiterated that jeopardy had not yet attached, and defendant had said he was satisfied with going forward with counsel.

On March 4, 2016, a motion to suppress evidence was heard and denied. Defendant had told Clemans that he believed the failure of the police to preserve the bank card taken from Howard resulted in a denial of due process. Clemans told Judge Abzug that she had asked defendant if he wanted to represent himself, but "he said no." Jury selection continued. The state of the record, as jury selection progressed, was that defendant had expressly told both Judge Abzug and defense counsel he wanted representation and did not want to represent himself. Again, this is a clear indication that defendant had voluntarily elected to forego the right to self-representation.

On the afternoon of March 4, the court returned to the issue of Clemans's motion to withdraw as counsel, which had been made on the basis that defendant was "overly active" during jury selection. The court held an in camera hearing to explore any conflicts between defendant and counsel. After the hearing the court stated there had been no *Marsden* or *Faretta* request at the in camera hearing. Our independent review reveals that Judge Abzug's description of the hearing as not involving a *Marsden* or *Faretta* request was correct. Jury selection was continued to Monday, March 7, 2016.

On March 7, 2016, Judge Abzug referred to papers filed by defendant (but not by Clemans). Judge Abzug continued

to express concern over Judge Escobedo's termination of defendant's pro per status, but he was satisfied that defendant thereafter repeatedly stated he wanted representation. Clemans mentioned that defendant had that morning mentioned exercising his *Faretta* right. Defendant then told Judge Abzug he wanted to represent himself but keep Clemans as standby counsel. Defendant said he understood Clemans would not be able to assist him and that he had no pro per privileges in the jail. He was ready to continue with a motion he had filed. Judge Abzug stated defendant's "pro per rights were not abandoned voluntarily. Apparently they were taken away from him by Judge Escobedo." Judge Abzug decided to require a second *Faretta* waiver form from defendant. Defendant said he wanted to represent himself because he would like to "argue myself." He felt Clemans was doing a good job, but it was his life, and he studied his case for five months. Then, without prompting, defendant told the court, "I'm gonna stay with my lawyer on this case and just probably have a sidebar and speak to her on the side about this matter." The court clarified defendant was withdrawing his *Faretta* request, and defendant answered affirmatively. Jury selection, with an additional panel of prospective jurors, was then conducted.

In this instance, defendant again affirmatively stated his desire for representation by withdrawing his request for pro per status. "Of course, a defendant may withdraw his *Faretta* motion before a ruling is made. (See, e.g., *People v.*

Snow (2003) 30 Cal.4th 43, 68–70.)" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002.) Withdrawal of the request, along with defendant's earlier affirmations that he wanted to proceed with Clemans as counsel, establish that any error committed by Judge Escobedo was effectively cured.

Proceedings after the Attachment of Jeopardy

The jury was sworn on the morning of March 7, 2016. After opening statements, but before the testimony of the first witness, defendant stated in the presence of the jury, "I'd like to assert my *Faretta* rights." Outside the presence of the jury, defendant told Judge Abzug that he wished to represent himself. Judge Abzug observed the right to self-representations is not absolute when asserted in an untimely fashion, and that defendant had repeatedly stated he would proceed with counsel. Defendant said he thought "things" were going to be excluded and he could do a better job himself. Clemans stated she could not competently represent someone who does not believe in her and who continuously interrupts. The court reminded Clemans of the obligation to represent her client unless relieved as counsel. Defendant said he needed two additional days to prepare and speak with his investigator.

Judge Abzug denied the *Faretta* request, finding no valid reason for defendant's sudden change of heart. Defendant was receiving adequate representation. Defense

counsel filed the motions requested by defendant. A jury had been selected. The young victim had already been inconvenienced by missing school, and defendant was requesting a further delay. Defendant's *Faretta* request was denied as untimely, not made in good faith, and intended to disrupt the proceedings.

Judge Abzug correctly ruled that defendant's untimely request for self-representation, made immediately after jeopardy had attached, was subject to the court's discretion and was not a matter of right. There was no abuse of discretion in the ruling. Defendant had consistently said he wanted counsel, the jury had been selected and opening statements made, and the requested delay would disrupt the proceedings and further harm the victim. "'Although a necessary continuance must be granted if a motion for self-representation is granted, it is also established that a midtrial *Faretta* motion may be denied on the ground that delay or a continuance would be required.' [Citation.])" (*People v. Espinoza* (2016) 1 Cal.5th 61, 80.)

On March 8, 2016, at the beginning of the court day, Clemans advised the court defendant wanted to represent himself and had filled out a *Faretta* waiver. Judge Abzug again stated that he looked carefully at the record since Judge Escobedo revoked pro per status. He denied the current request, finding that defendant was attempting to manipulate the situation and inject error into the proceedings. Defendant told Judge Abzug he would feel more comfortable representing himself because he knew the

case better and he was now ready to proceed without delay. Judge Abzug considered the request to be "tactical" rather than a thoughtful decision. Defendant stated he was not making a claim of ineffective assistance of counsel and "she's been doing a good job." Judge Abzug rejected the truthfulness of defendant's explanation and ruled defendant could not abandon his Sixth Amendment right to counsel for the purpose of creating error. A *Marsden* hearing was then conducted, which ended with the court denying defendant's request that counsel be relieved and that he be allowed to represent himself. Judge Abzug stated, "what has transpired in this *Marsden* hearing and the timing of the *Marsden* hearing only punctuates my earlier feeling, which is that the *Faretta* request is not a genuine act of deliberate, mature, consideration; but rather a desperate and impulsive reaction that the defendant is having to what he perceived to be the failure of his attorney to do what he wants her to do."

The trial court's denial of this untimely request was not an abuse of discretion. As stated in *People v. Horton* (1995) 11 Cal.4th 1068, at pages 1110–1111: "The record amply supports the trial court's action in denying defendant's untimely request after finding a lack of any justification for the delay. The circumstances here are remarkably similar to those in *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170, where the Court of Appeal upheld the trial court's denial of the defendant's belated request for in propria persona status. The court explained that the defendant was able to delay trial 'for eight months by

juggling his *Faretta* rights with his right to counsel interspersed with *Marsden* motions. He first asserted his right to represent himself and did so until the case was sent out for trial. He then persisted in an attempt to select counsel of his choice. His meritless *Marsden* motions and his civil suit against appointed trial counsel were devised to delay proceedings and allow personal selection of appointed counsel. [¶] Contrary to his assertion on appeal, he never made a timely and unequivocal request to represent himself after abandoning propria persona status when the case was sent out for trial. He was playing the "'*Faretta* game[.]'"'

Post-Conviction Requests for Self-Representation

While the jury was deliberating, defendant waived his right to a jury trial on the recidivism allegations in the event the jury returned a guilty verdict. After the guilty verdict, and right as trial on the recidivism allegations was to commence, defendant said, "I'd like to exercise my *Faretta* rights." Judge Abzug noted that the court had filed written findings of fact and conclusions of law (12 pages), in which the court concluded defendant had made tactical assertions of the right of self-representation designed to disrupt the proceedings. Upon inquiry, defendant stated he wanted to represent himself because he was dissatisfied with representation by Clemans. Judge Abzug denied defendant's request, noting defendant's history of assertions and withdrawals of self-representation requests, and the court's

conclusion that defendant had attempted to manipulate the proceedings to create error. The court cited *People v. Marshall* (1997) 15 Cal.4th 1, at page 23 (*Marshall*) for the proposition that a "motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (See also *People v. Valdez* (2004) 32 Cal.4th 73, 98–99, citing *Marshall* with approval.)

The trial court did not abuse its discretion in denying defendant's first post-verdict request for counsel. Judge Abzug carefully articulated his reasoning, which is amply supported by the record.

Clemans was replaced as counsel for sentencing. New retained counsel, Ms. Ter Poorten, was provided with the trial transcripts, but on the day scheduled for sentencing, she told Judge Abzug she did not feel sufficiently experienced to handle post-trial motions. Judge Abzug asked defendant how he wished to proceed. Defendant said he wanted to discharge Ter Poorten and asked, if he exercised his *Faretta* rights, whether he would "be able to go to the pro per module." Judge Abzug pointed out that defendant's pro per jail privileges had been revoked after a *Wilson* hearing. The court declined defendant's request "to go back to the pro per module." Sentencing was continued for Ter Pooten to investigate whether defendant could resume pro per rights in the county jail.

Ter Pooten reported that jail authorities refused to reinstate pro per jail privileges for defendant. Judge Abzug granted defendant's requests to discharge Ter Pooten and appoint counsel to represent him. Defendant said he was not requesting to represent himself. Considering that defendant did not ask in this situation to represent himself, there was no *Faretta* motion for the court to consider.

Marsden Issues

A series of *Marsden* hearings were conducted by Judge Abzug during the course of trial. Defendant argues it was an abuse of discretion not to relieve Clemans and appoint new counsel for defendant due to irreconcilable conflicts between defendant and counsel. Defendant fails to demonstrate an abuse of discretion.

The Marsden Requirement and Standard of Review

"When a defendant seeks to obtain a new court-appointed counsel on the basis of inadequate representation, the court must permit her to explain the basis of her contention and to relate specific instances of inadequate performance. The court must appoint a new attorney if the record clearly shows the current attorney is not providing adequate representation or that the defendant and counsel have such an irreconcilable conflict that ineffective representation is likely to result. (*People v. Jackson* (2009)

45 Cal.4th 662, 682; see *People v. Marsden, supra,* 2 Cal.3d 118.) If the court holds an adequate hearing, its ruling is reviewed for abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 431.)" (*People v. Rodriguez* (2014) 58 Cal.4th 587, 623.)

Preliminarily, we note that defendant was a particularly difficult client. He was demanding of Clemans, interfered with her ability to represent him, and focused on non-meritorious issues he wanted Clemans to pursue. And while there is little doubt that Clemans's patience with defendant was stretched to the limit, the trial court reasonably concluded her performance during trial was constitutionally adequate.

The first in camera hearing pertinent to this appeal was held March 4, 2016. This was not a *Marsden* hearing, as no request for a *Marsden* hearing was made by defendant. The court held the hearing to clear the air after Clemans had asked to withdraw as counsel due to defendant's interference. Because there was no *Marsden* issue raised, there was no error.

A *Marsden* hearing was held on March 8, 2016. Defendant complained because he wanted Clemans to recall the victim as a witness to answer further questions defendant proposed, but Clemans refusal to do so, which created a conflict resulting in his loss of confidence in her ability to represent him. Defendant also complained about the effectiveness of cross-examination conducted by Clemans. Clemans agreed there was a conflict because

defendant was constantly undermining everything she was doing on his behalf. He was continuing to focus on suppression of the victim's bank card because the police had returned it to the victim and not seized it as evidence, an obviously meritless argument for suppression. After hearing from both defendant and Clemans, the court made a complete record of why there was no basis to remove counsel, including a finding that there was no valid reason to recall the victim as a witness. The complete record made by the court, after patiently listening to defendant's complaints, demonstrates no abuse of discretion occurred.

The next *Marsden* hearing was held on March 9, 2016, after the prosecution rested. Defendant complained that Clemans was not being aggressive in questioning officers and had not objected to Sergeant Richardson being called as a rebuttal witness without being on the prosecution's witness list. Clemans accurately responded that she had objected to Richardson testifying, although the objection was made when defendant was not in court. She insisted she had been working very hard under difficult circumstances, and had visited defendant in custody on several occasions. Judge Abzug agreed that Clemans objected to Sergeant Richardson being called as a rebuttal witness, but the objection had been overruled. Clemans and defendant were communicating, and it was not uncommon for there to be a dispute over strategy. Clemans selectively asked some of the questions defendant wanted, but it was her role as counsel to determine, in the end, what to ask. The court's finding of no

basis to remove counsel, after a thorough hearing, was not an abuse of discretion.

In each instance, the trial court held a full *Marsden* hearing, taking care to allow defendant to state his complaints and Clemans to respond. Defendant's argument that the trial court was required to conduct a more in-depth inquiry into the nature of the conflict between defendant and Clemans is totally devoid of merit. The trial court's conclusion that there was no irreparable breakdown in the attorney client relationship is borne out by the record. Clemans's job was to provide the best defense possible, within her professional judgment; it was not her job to satisfy every whim of a difficult client. We note that despite defendant's complaints at the *Marsden* hearings on the basis of inadequate representation of counsel, on two occasions defendant told Judge Abzug that Clemans was doing a good job, and no separate claim of ineffective assistance of counsel is made on appeal. We find no abuse of discretion in the denial of defendant's *Marsden* motions.

Permitting Sergeant Richardson to Testify as a Rebuttal Witness

Defendant argues the trial court committed prejudicial error by allowing Sergeant Richardson to testify as a rebuttal witness because his name was not on the prosecution's witness list. Defendant contends the failure to

identify the sergeant as a witness violated section 1054.1[3] and defendant's right to due process of law.

Background

Although not mentioned in the briefs of either party, shortly before the case was transferred from Judge Escobedo's court to Department 112, the prosecutor told the

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[3] Section 1054.1 provides as follows:

"The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

"(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

"(b) Statements of all defendants.

"(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

"(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

"(e) Any exculpatory evidence.

"(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

court the People had four witnesses. Clemans asked the prosecutor for the names of the witnesses; the prosecutor responded that the names were in the police report. Clemans asked for clarification "because there's quite a few names." The prosecutor replied, "two police officers and the victim in this case."

At the end of the prosecution case on March 8, 2016, Clemans told Judge Abzug that defendant requested to wait until the next day to begin his testimony. The prosecutor objected, noting that the court had advised the parties to be prepared to close the case that day. Not mentioned in the briefs, the prosecutor stated, "We're ready to go for either cross examination or for closing arguments." The court found no reason to recess for the day, but in response to defendant's request for a 15-minute break, the court allowed him one-half hour, after which defendant testified. As indicated in the statement of facts earlier in this opinion, defendant testified that Howard's bank card had been planted in his pocket. This was the first time defendant asserted that evidence was planted on him.

Before the completion of defendant's testimony, Clemans stated that the prosecutor intended to call Sergeant Richardson as a rebuttal witness. She objected that Sergeant Richardson was a surprise witness, who was not in any report, and allowing him to testify would violate due process and section 1054.1, subdivision (b). The court overruled the objection and permitted Sergeant Richardson to testify as a rebuttal witness.

Disclosure of Witnesses by the Prosecution

"California's criminal discovery statutes, which were enacted as part of Proposition 115 (Crime Victims Justice Reform Act), are found at section 1054 et seq. These provisions set forth an almost exclusive procedure for discovery in criminal cases. (*In re Littlefield* (1993) 5 Cal.4th 122, 129; *People v. Superior Court* (*Barrett*) 80 Cal.App.4th 1305, 1311–1312; *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1619 [(*Hammond*)].) Under this statutory scheme, the prosecutor must disclose: '(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence . . . of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. . . .' (§ 1054.1.) Persons the prosecutor "'intends to call as witnesses at trial'" include witnesses the prosecutor intends to call on rebuttal. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375.)" (*People v. Jordan* (2003) 108 Cal.App.4th 349, 357.) "'Absent good cause, such evidence must be disclosed at least 30 days before trial, *or immediately if discovered or obtained within 30 days of trial*.' (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1133.)" (*People v. Mireles* (2018) 21 Cal.App.5th 237, 248 (*Mireles*).)

"A trial is not a scripted proceeding. Rather, it is a process which ebbs and flows with emotion and drama as

well as stretches of boredom and tedium. However, during the trial process, things change and the best laid strategies and expectations may quickly become inappropriate: witnesses who have been interviewed vacillate or change their statements; events that did not loom large prospectively may become a focal point in reality. Thus, there must be some flexibility. After all, the "'true purpose of a criminal trial'" is "'the ascertainment of the facts.'" (*Littlefield, supra,* 5 Cal.4th at p. 131.) After hearing a witness, the necessity of a rebuttal witness may become more important." (*Hammond*, *supra*, 22 Cal.App.4th at p. 1624; *Mireles*, *supra*, 21 Cal.App.5th at p. 248.)

Defendant Has not Established Error or Prejudice

"The decision to admit rebuttal evidence over an objection of untimeliness rests largely within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion. (*People v. Carrera* (1989) 49 Cal.3d 291, 323.)" (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1232.) The trial court did not abuse its discretion in concluding that the prosecution did not intend to call Sergeant Richardson as a witness until after defendant testified.

Officer Corpuz testified in the prosecution's case-in-chief that Sergeant Richardson was the first officer on the scene and was present "when defendant Blanks passed by as well." Sergeant Richardson's presence at the scene was

therefore not a surprise at the time defendant testified. But there was no intent to call Sergeant Richardson as a witness, as evidenced by the prosecutor's statement that he was ready with "either cross examination or for closing arguments," depending on whether testified. It was not until defendant testified that Howard's bank card had been planted in his pocket by an officer that Sergeant Richardson's testimony became important. This type of scenario is why section 1054.1 provides "some flexibility" in the discovery requirement, in recognition that "[a]fter hearing a witness, the necessity of a rebuttal witness may become more important." (*Hammond*, *supra*, 22 Cal.App.4th at p. 1624.) The decision to permit the sergeant to testify was well within the trial court's considerable discretion in determining the admissibility of evidence.

We also conclude any error was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) There is no dispute that Howard was the victim of a robbery. She made an identification of defendant at the scene, shortly after the commission of the offense. While Howard's credibility was solid, defendant's was marginal. His explanation that Howard's bank card was planted on him by an officer, in the presence of two other officers and the victim, does not inspire confidence. This is particularly so, considering that defendant's trial testimony was inconsistent with his statement to Officer Corpuz that some unknown person had reached into his pocket, taken his money, and placed the card inside the pocket. Defendant has fallen short of

establishing a reasonably probability that he would have received a more favorable result had Sergeant Richardson not been allowed to testify.

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.