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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER TODD JOHNSON,

Defendant and Appellant.

B269742

(Los Angeles County
Super. Ct. No. TA136954)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Rhu and Eleanor J. Hunter, Judges. Affirmed.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Peter Todd Johnson appeals from the judgment entered following a jury trial in which he was convicted of attempted first degree murder (Pen. Code, §§ 664, 187, subd. (a))¹ and shooting at an occupied vehicle (§ 246). Defendant contends the trial court coerced the jury into rendering a verdict by ordering continued deliberation after a deadlock was announced. He also argues that the court erred in denying his motion to substitute counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). We disagree and affirm.

FACTUAL AND PROCEDURAL SUMMARY

The Los Angeles County District Attorney filed an information on September 24, 2015 charging defendant with four counts of attempted first degree murder (§§ 664, 187, subd. (a); counts 1-4), one count of shooting at an occupied motor vehicle (§ 246; count 5), and one count of second degree robbery (§ 211; count 6). The information further alleged as to counts 1 through 5 that defendant personally discharged a firearm. (§ 12022.53, subds. (b)-(c).) Defendant pleaded not guilty to all charges and denied the special allegations. The case proceeded on a time-not-waived basis. Defendant rejected the district attorney's plea offer of 27 years.

On November 9, 2015, Judge Tammy Chung Rhu held a *Marsden* hearing. Defendant sought to replace his public defender because they were "not compatible." Defendant explained that when he asked questions, his attorney had an "attitude," but defendant admitted that he too had an "attitude at times" and got "frustrated." When asked by the judge whether his attorney was taking his phone calls, defendant responded: "I

¹ Undesignated section references are to the Penal Code.

don't call her." But defendant admitted that when he did ask questions, his attorney answered them. When asked for specific examples of why he wanted substitute counsel, defendant said he felt that his attorney was showing "favoritism" to the district attorney. He faulted his attorney for not making section 995, *Pitchess*,² and discovery motions. He said his attorney was trying to get him to accept the plea offer. He also said his attorney did not provide him with discovery materials, but acknowledged that she told him what she had received. Defense counsel responded that there were no grounds for a section 995 or *Pitchess* motion and no outstanding discovery issues. Judge Rhu denied the *Marsden* motion.

A jury was empanelled on November 23, 2015 and the case proceeded to trial with Judge Eleanor J. Hunter presiding. The People's first witness, Traci Dupre (the victim in count 3), was reluctant to testify. Dupre's cousin, Eljawnique Hawkins (the victim in count 1), previously was in a relationship with defendant and they had one child together. Dupre testified that on April 11, 2015, at about 2:00 p.m., she and another cousin, De'aria Cole (the victim in count 2), were driving in a black SUV to pick up Hawkins from the Lighthouse Healthcare Center where she worked as a security guard. A five-year-old girl, Rawiyh O. (the victim in count 4), was in the back seat of the vehicle. Cole was driving and parked the SUV across the street from the entrance to the building. Dupre saw a white car pass by, and Cole said, "that's him." Dupre asked, "who?" and Cole responded, "Peter." Cole went into the building to get Hawkins, came back alone, and started the car. A short time later,

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Hawkins came out of the building, jumped in the car, and said: “Drive. Drive. Drive.” As they drove off, Dupre heard gunshots, but testified that she did not see the shooter. However, she acknowledged identifying defendant as the shooter in a photo array at the police station on April 15, 2015, and identified him in court as the person who shot at the vehicle.

Glenn Gibson worked as a security guard with Hawkins at the health center and also testified. He was in the lobby of the building when a young woman entered and told Hawkins that her “baby daddy was outside.” Gibson asked if Hawkins needed him to walk her outside, but she said “no.” Gibson walked out anyway, and saw Hawkins walk to the black SUV. He saw a young man run towards her. As Hawkins was trying to get into the vehicle and close the door, the young man struggled with her and tried to open the door. Gibson then heard four or five shots being fired and saw the young man raising a small handgun towards the car. Gibson could not describe the shooter beyond the fact that he was a young black man. He described the vehicle the man was driving as a white, four-door car.

A video recording from the health center’s security cameras showed a white car pull up outside the health center and Cole entering the building. It showed Cole leave the building, and several minutes later Hawkins and Gibson walking out. It showed an individual getting out of the white car with an object in his hand and running, but did not show the black SUV or the shooting. It showed Gibson running back into the building, and the individual running back to the white car and driving away.

On November 25, 2015, several Los Angeles Police Department officers testified regarding their investigation. Officer Angelo Marzan stated that he reported to the scene and

found six .22-caliber casings on the street outside the health center. Officer Kenneth Scott had interviewed Dupre at a police station on April 15, 2015, and testified that she identified defendant as the shooter in a six-pack photo array. Officer Nicholas Cho also reported to the scene of the shooting, and described interviewing the victims and inspecting the black SUV, which had its back window shot out and additional bullet holes in the body of the vehicle. Officer Cho testified that Dupre identified defendant as the shooter. Officer Ruben Gonzalez interviewed Dupre by telephone on April 13, 2015 and confirmed that her statement to Officer Cho was accurate.

Defendant elected not to testify. Because no evidence regarding the robbery allegation was presented, Judge Hunter granted defense counsel's section 1118 motion to dismiss count 6. Judge Hunter previously had granted another defense motion to strike the section 12022.53, subdivision (c) allegation in connection with count 5.

Following closing arguments and after being instructed, the jury began deliberations. About 30 minutes later, one of the jurors notified the bailiff that he was having difficulty understanding what was being said due to his limited English proficiency. The juror was examined, excused by stipulation, and an alternate was selected. Jury deliberations began anew for approximately 50 minutes and then were adjourned until the following Monday.

On November 30, 2015, the jury resumed deliberations for just over one hour and then requested the testimony of four witnesses and a summary of Dupre's statement to Officer Cho, which had been read into the record. Judge Hunter informed the jury that transcripts were not available, but offered to have the

court reporter provide a read back. After deliberating for approximately one more hour, the jury announced that it was deadlocked.

Judge Hunter brought out the jury and stated: “I’m going to ask that you continue with your deliberations. You’ve only been back there for a short period of time. I’m going to ask that you keep an open mind, [and] exchange your thoughts and ideas about this case.” The judge offered to have the reporter read back any testimony and provide a summary of Dupre’s statement. The judge also indicated that it could clarify any legal issues and offered further argument from counsel if necessary.

The jury resumed deliberations and received a read back of testimony. After one hour and 45 minutes of deliberation, the jury announced that it had reached a verdict. The jury found defendant guilty of attempted first degree murder of Hawkins (count 1) and found the firearm allegation to be true. The jury also found defendant guilty of shooting at an occupied vehicle (count 5), but returned not guilty verdicts as to all remaining counts.

Defendant was sentenced to life in prison with the possibility of parole on count 1, and ordered to serve an additional 20 years pursuant to section 12022.53, subdivision (c). The sentence on count 5 was stayed pursuant to section 654. Defendant was given credit for 168 days in custody and ordered to pay various fines and fees. The court also issued a protective order.

Defendant filed a timely notice of appeal.

DISCUSSION

Defendant presents two claims of error: (1) he contends the

trial court coerced the jury into reaching a verdict; and (2) he argues the court erred in denying his *Marsden* motion. Neither requires reversal of the judgment.

I

Defendant argues that the “court’s refusal to accept the jury’s determination they were deadlocked, and insistence that they continue their deliberations, without making an inquiry regarding the status of their deliberations and whether further deliberations could be fruitful,” violated his Sixth Amendment right to a trial by jury. We disagree.

“A trial court may ask jurors to continue deliberating when, in the exercise of its discretion, it finds a ‘reasonable probability’ they will be able to reach agreement.” (*People v. Howard* (2008) 42 Cal.4th 1000, 1029, citing § 1140.) “Although the court must take care to exercise its power without coercing the jury into abdicating its independent judgment in favor of considerations of compromise and expediency [citation], the court may direct further deliberations upon its reasonable conclusion that such direction would be perceived “as a means of enabling the jurors to enhance their understanding of the case rather than as mere pressure to reach a verdict on the basis of matters already discussed and considered.”” [Citation.]” (*People v. Debose* (2014) 59 Cal.4th 177, 209.)

“In 2007 the Judicial Council enacted [California Rules of Court,] rule 2.1036 to provide tools for the trial court to use in assisting the jury to reach a verdict without influencing the jury.” (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1086.) California Rules of Court, rule 2.1036(a) states that where an impasse has been reported, “the trial judge may, in the presence of counsel, advise the jury of its duty to decide the case based on the

evidence while keeping an open mind and talking about the evidence with each other. The judge should ask the jury if it has specific concerns which, if resolved, might assist the jury in reaching a verdict.” Rule 2.1036(b) further states, “[i]f the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] (1) Give additional instructions; [¶] (2) Clarify previous instructions; [¶] (3) Permit attorneys to make additional closing arguments; or [¶] (4) Employ any combination of these measures.”

Here, the trial court did not abuse its discretion when it ordered the jury to continue deliberating. Even though this case involved serious charges, a reluctant witness, and several victims who did not testify, the jury deliberated for less than three hours before announcing a deadlock. witnesses and a summary of Dupre’s police statement before it declared an impasse. Given the brief period of deliberation and the jury’s request to review witness testimony, the court properly determined there was a reasonable possibility of agreement and therefore was well within its discretion in ordering continued deliberation. (See *People v. Howard*, *supra*, 42 Cal.4th at p. 1029.)

There is also nothing in the trial court’s comments that could be construed as an attempt to coerce a verdict. The court merely noted that the jurors had been deliberating “for a short period of time” and asked them to continue while keeping an open mind and exchanging their thoughts and ideas about the case. To further assist the jury, the court offered to provide the requested read back of testimony, a summary of Dupre’s statement, clarification of any legal issues, and further argument by the parties. The record shows that the trial court followed the guidance in California Rules of Court, rule 2.1036 and carefully

assisted the jurors without improperly pressuring them to reach a verdict. (See *People v. Debose*, *supra*, 59 Cal.4th at p. 209; see also *People v. Salazar*, *supra*, 227 Cal.App.4th at p. 1086.)

We also find no support for defendant's contention that the court was obligated to inquire as to the status of the jury's deliberations and ask whether further deliberations would be fruitful. A similar claim was rejected by the California Supreme Court in *People v. Bell* (2007) 40 Cal.4th 582, 616-617, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, footnote 13. In that case, the trial court ordered further deliberations after receiving jury notes regarding an 11-to-1 impasse and purported juror intimidation. (*People v. Bell*, at pp. 612-613.) Defendant asserted the court abused its discretion in denying a mistrial "without inquiring of the jurors whether they were hopelessly deadlocked." (*Id.* at p. 616.) Our Supreme Court found no abuse of discretion, noting that the jury had deliberated for less than two full days, and that "inquiry as to the possibility of agreement is 'not a prerequisite to denial of a motion for mistrial.'" (*Id.* at pp. 616-617, citing *People v. Rodriguez* (1986) 42 Cal.3d 730, 777.) We find no abuse of discretion in this case.

II

Defendant also contends the trial court erred in denying his *Marsden* motion. We find no basis for discharging his appointed counsel and conclude the trial court acted within its discretion.

"When a defendant seeks substitution of appointed counsel pursuant to [*Marsden*], 'the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not

providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’ [Citations.] [¶] We review the denial of a *Marsden* motion for abuse of discretion. [Citation.] Denial is not an abuse of discretion ‘unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.’ [Citation.]” (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

Defendant maintains he was entitled to substitute counsel because he and his appointed attorney “had become embroiled in such an irreconcilable conflict that ineffective representation was likely to result.” At the *Marsden* hearing, defendant stated that he and his attorney were “not compatible” and that his attorney had an “attitude.” But a defendant’s claimed inability to get along with his attorney is not sufficient to require appointment of substitute counsel. (See *People v. Myles* (2012) 53 Cal.4th 1181, 1207, citing *People v. Jones* (2003) 29 Cal.4th 1229, 1246 [“If a defendant’s claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law”].)

Defendant further complained that his attorney failed to make various section 995, *Pitchess*, and discovery motions. However, “[a] defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves

constitute an “irreconcilable conflict.”” (*People v. Jackson* (2009) 45 Cal.4th 662, 688.) Moreover, “[c]ounsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile.” (*People v. Price* (1991) 1 Cal.4th 324, 387, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) There is no indication that any of defendant’s proposed motions had merit.

Defendant also complained that his attorney did not provide him with an opportunity to review discovery. Defendant acknowledges that his attorney provided a general description of the discovery materials she received, but maintains that he was entitled to review the materials himself. Defendant does not provide any authority for the proposition that he was entitled to independently review the discovery materials. On the contrary, a defense attorney is strictly prohibited from disclosing to a defendant certain information about victims and witnesses obtained through discovery unless permitted to do so by the court after a hearing and a showing of good cause. (§ 1054.2, subd. (a)(1).)

Relying on *United States v. Mullen* (4th Cir. 1994) 32 F.3d 891, defendant suggests that his attorney’s failure to allow him access to discovery, together with their inability to communicate, resulted in an “irreconcilable conflict.” In that case, the Fourth Circuit Court of Appeals held that the federal district court abused its discretion in denying defendant’s motion to substitute counsel. (*Id.* at p. 898.) During the month before trial, defendant and his attorney had “no contact whatsoever.” (*Id.* at p. 896.) The only attempted contact occurred the day before trial when defendant sought to discuss the government’s discovery materials

but his attorney refused to see him. (*Ibid.*) The court concluded there was a “total breakdown in communication . . . making an adequate defense unlikely.” (*Id.* at p. 897.)

There was no such communication breakdown in this case. The court specifically asked defendant whether his attorney was not taking his phone calls or refusing to speak to him. Defendant responded that he did not call her. But defendant acknowledged that when they met, his attorney answered his questions. Defendant also acknowledged that his attorney provided him with a general description of the discovery she had received. Although defendant was dissatisfied and may have been unable to get along with his attorney, there is no indication of an “irreconcilable conflict” such that ineffective representation was likely to result. There is no basis to conclude the trial court abused its discretion in denying defendant’s *Marsden* motion.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P.J.

We concur:

MANELLA, J.

COLLINS, J.