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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ERICK JULIAN ORTEGA,

Defendant and Appellant.

B278160

(Los Angeles County
Super. Ct. No. YA087978)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Affirmed.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Erick Julian Ortega (defendant) appeals from his convictions of murder and possession of a firearm by a felon, both found to be gang related. He contends: that the trial court's denial of a continuance infringed upon his constitutional rights to counsel, self-representation, and due process; that the trial court failed to conduct a sufficient *Marsden* inquiry¹; that the gang enhancement must be stricken because there was insufficient proof of the primary activities of defendant's gang; that hearsay evidence was erroneously admitted to prove a pattern of criminal gang activity; that the sentence for count 2 should have been stayed; and the sentence per Penal Code section 667, subdivision (a) associated with count 2 was in error.² Finding no merit to any of defendant's contentions, we affirm the judgment.

BACKGROUND

Defendant was charged with the 2013 murder of Bobby Reynolds (Reynolds), in violation of section 187, subdivision (a) (count 1), and with possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1). It was also alleged that defendant personally used and discharged a firearm, causing great bodily injury and death to the victim, within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e), and pursuant to section 186.22, subdivision (b)(1), that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. It was further alleged that defendant had suffered a

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

² All further statutory references are to the Penal Code, unless otherwise indicated.

prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 1170.12, subd. (b) & 667, subd. (b)-(j)).

A jury convicted defendant of first degree murder and found true both the gang allegation and the firearm allegation. Defendant admitted the prior strike conviction. On August 3, 2016, the trial court sentenced defendant to a term of 94 years to life in prison. With count 2 as the base term, the court imposed the upper term of three years, doubled, plus a gang enhancement of three years, and a consecutive prior serious felony enhancement of five years, under section 667, subdivision (a)(1). The court imposed a consecutive term of 80 years to life as to count 1, comprised of 25 years to life, doubled, plus a firearm enhancement of 25 years, and an additional five years pursuant to section 667, subdivision (a)(1). Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On June 16, 2013, Reynolds and his wife Monica were outside her apartment in Redondo Beach when defendant, slowly driving a gray Chrysler 300 automobile, passed them. Defendant returned minutes later, stopped in front of the couple, and asked Reynolds, “Hey, where you from?” When Reynolds replied, “I’m from Diamond Street,”³ defendant replied, “Well, this is North Side Redondo right here.” Five days later, around 8:00 p.m., defendant returned and shot Reynolds five times, four times in the back and once in the head, as Reynolds was waiting for Monica outside her apartment. Reynolds died as a result of the shooting.

The investigation established that defendant was seen immediately after the shooting getting into the passenger seat of

³ In her testimony, Monica explained that in the early 1990’s, Reynolds had been affiliated with the Diamond Street gang located in an area near Dodger Stadium.

the gray Chrysler, and that defendant later called the Auto Club to have his car towed, gave his name, address, and Auto Club account number, and said he was the Chrysler's registered owner and had left the area. The police arrived at the Chrysler before it was towed and found a Colt .45-caliber handgun in a hidden compartment in the vehicle. Expert evidence confirmed it as the weapon that fired the bullets at Reynolds. DNA evidence linked defendant to the gun.

Gang evidence

Detective Robert Carlborg of the Redondo Beach Police Department (RBPD) testified as the prosecution's gang expert, in particular about the culture and activities of the North Side Redondo Beach 13 (North Side Redondo) gang. Detective Carlborg had been a police officer for 22 years, and spent six years primarily investigating the North Side Redondo gang and gang crimes. As part of his work, he spoke daily to gang members and got to know many of them. He explained that gang members are proud of their gang and were often willing to give him information, particularly in exchange for small favors.

Detective Carlborg testified that as the City of Redondo Beach became more gentrified, some North Side Redondo members moved to other cities in the South Bay, including Lomita. However, some continued to live in Redondo Beach, and the gang still claimed it as its territory. Detective Carlborg explained that territory is important to gangs and gang members feel they must defend their territory from outside gangs, usually for business reasons such as preventing rivals from selling drugs within their claimed territory.

In 2013, North Side Redondo had approximately 150 members, and Detective Carlborg had contact with approximately 100 of them. The gang's members do not include "wannabes" or associates. Although an associate is not a member

of the gang, he usually provides some service to the gang, socializes with its members, and is trusted to a point. The wannabes are those who want to be members of the gang, but have not yet been admitted. Gangs are hierarchical, with older gang members serving as the “shot callers” and the younger members serving as “soldiers.” The soldiers do the “dirty work,” called “putting in work,” to support the gang’s activities, ranging from selling drugs, stealing cars, and all manner of other crimes, such as identity theft, beating, shooting, or killing rivals.

Reputation and respect are very important to gang members and to the gang. The more work a soldier puts in on behalf of the gang, the more respect and prestige he gains within the gang, as it demonstrates his allegiance and reliability. Gangs value their reputations for violence as it helps maintain control over a neighborhood through fear and intimidation, making it less likely that witnesses will come forward, thus enabling gang members to openly commit crimes. Every gang member is expected to protect his fellow gang members on pain of suffering discipline from the gang, such as a beating or being killed if the offense is severe. Killings must usually be sanctioned by the older members of the gang, as unsanctioned killings can interfere with alliances.

Detective Carlborg explained North Side Redondo gang’s common signs, symbols, and colors, and named several rival and affiliated gangs. Regarding gang tattoos, he explained that they show pride in the gang, especially visible tattoos, and serve to intimidate the public and rival gangs. Recognized members of a gang who are putting in work for the gang may have tattoos, however, associates and wannabes are unlikely to have gang tattoos, as the gang would require that they be covered. Detective Carlborg was familiar with the Diamond Street gang, located near Glassell Park and Dodger Stadium. He knew of only

one incident between the two gangs which occurred in the late 1980's or early 1990's. Some Diamond Street gang members became lost while going to the beach, and were confronted by North Side Redondo gang members. A knife fight ensued, and one of the North Side Redondo members was stabbed to death. There has been no active rivalry since then as the two gangs are located too far apart.

Detective Carlborg had prior contact with defendant, who admitted to the detective during a residential parole search that he was a member of North Side Redondo, and that his moniker was Bones.⁴ Defendant had several gang related tattoos, including "Redondo" across his abdomen, a skull wearing a headband or bandanna with an "R" on it, a skeleton hand giving the gang's hand symbol on his shoulder, and "R" on the top of his head. Based on defendant's admission, his tattoos, and information from other officers, it was Detective Carlborg's opinion that defendant was a member of the gang.

In 2013, North Side Redondo's primary activities were drug dealing, robbery, witness intimidation, extortion, and homicide. Detective Carlborg presented certified court records which established the convictions of three North Side Redondo gang members for some of the crimes described as the gang's primary activities. The first record of conviction was for Jorge Roberto Millan Jr. (Millan), for possession of a controlled substance for sale, and possession of PCP, committed in 2010. Detective Carlborg was familiar with Millan as the detective participated in an investigation of Millan's sale of methamphetamine in San Pedro, and his arrest in Redondo Beach. Millan admitted that he was a member of North Side Redondo to the detective.

⁴ Detective Carlborg defined "moniker" as a nickname, traditionally given in Hispanic gangs to a younger gang member by an older one.

The second conviction record belonged to Armando Joseph Tinajero (Tinajero), for attempted murder, assault with a deadly weapon, and felon in possession of a firearm, committed in January 2010. Tinajero admitted his membership in North Side Redondo after Tinajero had shot at a bicyclist in North Side Redondo territory.

The third conviction record belonged to David Matthew Contreras (Contreras), who was convicted of murder, felon in possession of a firearm, and eight counts of possession of an assault weapon, committed in November 2010. Though Detective Carlborg did not speak to Contreras himself, other RBPD personnel verified that he was a documented North Side Redondo gang member.

Detective Carlborg was personally involved in the investigation of the murder of Reynolds. The day after the shooting a press release was issued, giving the suspect's name and description, but intentionally omitting details only the killer would know, such as the type of gun used and the hidden compartment in the car. When defendant was located in Utah, Detective Carlborg went with another officer to extradite him to California. In Utah the detective participated with the FBI in a search of the room in the house where defendant had been living. The evidence recovered included a counterfeit California driver's license bearing defendant's photo and the name Michael Hammond, a Greyhound Bus ticket receipt, and a piece of paper with words that appeared to be rap lyrics.⁵ There was also a list

⁵ Detective Carlborg explained the slang used in the lyrics, which included the following phrases: "They're piling evidence against me"; "He put the hit because you lied"; "Five days later, five shots to your spine. Paralyzed before you died"; "I'm a catch another murder for my ass get caught"; "G Mod black boxed [car had hidden compartment] with the *huras* [police] behind me";

of monikers of five North Side Redondo gang members known to Detective Carlborg.

When defendant's apartment in Lomita was searched, Detective Carlborg participated. Officers found four letters with envelopes addressed to defendant from incarcerated North Side Redondo gang members, including Contreras. Also found were photographs, including one which depicted Eddie Losa, with his arm around defendant. Losa's moniker "Chato" was among those found on the list in Utah.

Given a hypothetical question mirroring the facts in evidence in this case, Detective Carlborg gave his opinion that the crime was committed in association with, for the benefit of, and at the direction of the North Side Redondo gang.

Defense evidence

Defendant testified and denied that he was a member of North Side Redondo, claiming instead that he was an associate of the gang. He admitted having received the letters from incarcerated North Side Redondo gang members, but claimed not to know the authors, explaining that the letters were in response to his "introductory" letter in which he offered to give the prisoners money to help them out, because defendant had just been released from prison himself. Defendant admitted owning the Chrysler involved in the crime, but claimed he had lent it to his friend Oscar on the day of the shooting. Defendant also admitted that he kept a gun in a hidden compartment in the car,

"Hit you with the .45"; "I saw your body jolt right before you hit the ground, another victim of the Colt"; "It was on Fox 11 and Channel 7 say I'm runnin' from the 187"; "Empty out a clip and then disappear like Houdini"; "You thought you had a case, I disappeared without a trace"; "New name, no prints, new state, the same face"; "And the same gang"; and, "Real riders put in work and I will bomb on you first."

but explained that it was there for protection because he sold drugs.

Defendant denied shooting Reynolds, and claimed that instead he had been drinking with friends in Gardena. When Oscar failed to return the car as expected, defendant called Oscar who said he had left the car in Redondo Beach because it was “burnt,” meaning it was not working. Defendant then got a ride to the Chrysler’s location. Once there, hearing several sirens, he left the car and went to the nearby home of a friend who was a North Side Redondo gang member. There defendant called for a tow before leaving the area with an unidentified person. About an hour later Oscar told him about the shooting.

Defendant claimed he moved to Salt Lake City in order to better support his daughter, but admitted using the name Michael Hammond so the police would not find him. Defendant also admitted that he wrote the lyrics found in Utah, but claimed that he made up many of the details contained in them, including calling himself a “shooter” and “murderer.”

The defense called RBPD Officer Aaron Plugge, who spoke to the witness who testified that she saw defendant and another man park the Chrysler near her home soon after the shooting. Officer Plugge testified that the witness had told him at the time of the investigation that she would not be able to identify either man.

Defendant’s gang expert, Martin Flores, opined that the shooting might not be gang related, because no gang names were mentioned and no gang signs were displayed during the incident. Flores testified that a tattoo of the city name “Redondo” is not necessarily gang related, and that gang members sometimes make up fantasized rap lyrics. He also testified that a person who asks another where he is from, and then responds “This is North Side Redondo right here,” to that person’s “Diamond

Street,” would be identifying himself as a member of the North Side Redondo gang. Flores agreed that considering those facts together with the fact that the first person had both “Redondo” and “NSR” tattoos, as well as possession of a list of North Side Redondo gang members and photographs depicting himself with North Side Redondo gang members, point to the possibility that he is a North Side Redondo gang member.

Pretrial *Faretta*⁶ motion and motions for continuance

From the June 2015 preliminary hearing, until February 2016, defendant was represented by three different deputy public defenders. When the third deputy public defender requested a continuance in March 2016 the trial court, over the prosecutor’s objection, granted the motion to May 31, 2016, but stated that “[u]nless there’s something that is really exigent I will not agree to any further continuances.”

On April 21, defense counsel told the trial court that defendant had “indicated a *Marsden* motion.”⁷ In an in camera hearing for that purpose, defendant instead made a *Faretta* motion, asking to represent himself in pro. per. in place of appointed counsel, and requested a continuance in order to prepare his defense. The trial court warned defendant that there would be no continuance beyond May 31. The court explained that current counsel would be discharged, that defendant would not have the assistance of counsel, and that standby counsel would not be advising or assisting him. Defendant insisted that

⁶ A “*Faretta* motion” is a request by a criminal defendant to waive his constitutional right to counsel and represent himself. (*Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*).)

⁷ A “*Marsden* motion” (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) is one for substitution of new appointed counsel. (See *People v. Smith* (2003) 30 Cal.4th 581, 604.)

he wanted to go pro. per., but asked for and received assurance that standby counsel would not be from the public defender's office.

Defendant waived counsel, signed the *Faretta* waiver form, and initialed each box, signifying his understanding of his constitutional rights and the charges against him, as well as his understanding of 13 listed dangers and disadvantages of self-representation and the court's advice against self-representation. Included with other dangers and disadvantages listed, defendant initialed the form: "F. I understand that because of my custodial status, it will be difficult for me to contact witnesses and investigate my case. I understand that I will have limited access to a telephone, which will make preparations for trial more difficult, and that I will be provided no more access to the law library than any other pro. per. inmate"; "G. I understand that no continuance will be allowed without a showing of good cause, and that such requests made just before trial will most likely be denied."

Defendant then asked for an additional pretrial hearing in two weeks "to make sure that I can handle the case load and make sure that everything is correct." The trial court acceded to the prosecutor's request that the current date of May 12 remain, and said to defendant: "There will be no continuance beyond May 31st. . . . You need to understand that . . . there is no further continuance The trial will begin [within] ten days of May 31st. If you [say] in two weeks, 'I can't handle it. I need a continuance.' That's denied. If you want to represent yourself, you better be ready to go May 31st." The court then reviewed defendant's signed waiver form, and defendant assured the court that he had read and understood each paragraph he initialed. After additional discussion of the disadvantages, defendant confirmed that he still wished to waive counsel and represent

himself, and the court granted the request. The court appointed Attorney Bakari (who was not a deputy public defender) as standby counsel.

On May 12, defendant told the court that the case was too much for him to handle by May 31, that he had not yet hired an investigator, and wanted to give the case to Mr. Bakari. When the trial court replied that the public defender's office would be reappointed,⁸ defendant decided to remain in pro. per., and reversing his claim that he needed a continuance, said that he could handle the case, as he had already done a lot of work. Defendant denied the court's suggestion that he was "playing a game." Defendant stated that although he had intended to file a motion for continuance, he could handle and take care of the case. Later in the hearing, defendant asked for an additional pretrial hearing date so that he could file motions, including a motion for continuance. The court set the hearing for May 20.

On May 20, defendant filed several motions, including a motion to continue, which has not been included in the appellate record.⁹ Defendant told the court that in his declaration supporting the motion, he referred to a number of recorded interviews that he needed to have transcribed. The prosecutor offered to obtain and turn over transcripts, but objected to the continuance. The trial court again granted defendant's request to appoint an investigator, but denied his motion for continuance.

On May 31, the prosecutor advised the court that she would have the transcripts the next day, and would give them to

⁸ See section 987.2, subdivisions (d), (e); Government Code section 27706.

⁹ Defendant's appellate counsel made post-oral argument efforts to secure copies of motions for continuance from the trial court to supplement the record on appeal.

defendant's investigator. Defendant brought several more motions, including another motion for continuance. Defendant told the court that he had not been issued a "pro. per. pin" to make telephone calls, and needed to call his investigator, who had been out of town over the Memorial Day weekend, and he needed 30 days to question witnesses, view the crime scene, investigate defendant's alibi, and review the evidence. The prosecutor objected, cited the trial court's prior warnings and the victim's family's right to a speedy trial under Article 1, section 28 of the California Constitution. She also advised the court that witness schedules had been difficult to coordinate, and could not be rescheduled and coordinated again in just 30 days; arguing that a 30-day continuance would result in a delay until late summer or fall. The trial court denied the continuance on the grounds argued by the prosecutor, and set the matter for a readiness conference on June 7.

On June 7, defendant again requested a continuance. Defendant repeated that he asked to represent himself because prior counsel had rendered ineffective assistance, and since prior counsel had not represented him in any meaningful sense, defendant believed he could not be deemed to be prepared for trial. Defendant further argued that allowing him to represent himself, particularly so close to trial, without also giving him reasonable time to prepare his defense, was an abuse of process and denial of due process. The prosecutor again objected to any further continuance, observing that the case was two years old.

The trial court denied the request, and defendant asked whether the case would go to the public defender if he relinquished his pro. per. status. When the court replied that it would not, and that standby counsel would take over, defendant asked to relinquish his status and have standby counsel appointed. Asked whether he was ready to try the case, counsel

replied, “I’ll try it, but ready is not the word I would use.” However, he assured the court that he was able to represent defendant, although not as effectively as he would want. The court appointed him as counsel of record for defendant. Jury selection began on June 15, 2016.

DISCUSSION

I. Denial of requests for continuance

Defendant contends that the trial court’s denial of three of his requests for a continuance infringed upon his constitutional rights to counsel, self-representation, and due process.¹⁰

Defendant’s reasoning is unclear. He relies on cases which essentially held that when a trial court grants a *Faretta* motion that is untimely because it is made *during trial or very close to trial*, it may be an abuse of discretion and a violation of due process to deny the defendant’s request for a reasonable continuance, *if a continuance is necessary* to allow the defendant to prepare his defense. (E.g., *People v. Clark* (1992) 3 Cal.4th 41, 110; *People v. Maddox* (1967) 67 Cal.2d 647, 653 (*Maddox*); *People v. Schulz* (1992) 5 Cal.App.4th 563, 574; *People v. Wilkins* (1990) 225 Cal.App.3d 299, 303; *People v. Hill* (1983) 148 Cal.App.3d 744, 757; *People v. Fulton* (1979) 92 Cal.App.3d 972, 976; *People v. Cruz* (1978) 83 Cal.App.3d 308, 324-325.)

In *Maddox* (a pre-*Faretta* case) the self-representation motion was granted on the day the case was called for trial; defendant was not given a reasonable opportunity to prepare a defense, and had not been given the statutorily required five days to prepare for trial (§ 1049), an error of constitutional dimension. (*Maddox, supra*, 67 Cal.2d at pp. 648, 653.) *Maddox* explained that to deny a reasonable continuance would “render his right to

¹⁰ Defendant made a total of four requests for continuance but assigns error only to the denial of the last three.

appear in propria persona an empty formality.” (*Id.* at p. 653.) Thus, when an *untimely* motion for self-representation is made *too close to trial or during trial*, the trial court may deny it, but if the court chooses to grant it, a refusal to give the defendant reasonable time, if necessary to prepare a defense, can be an abuse of discretion and a denial of due process. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1039-1040 (*Jenkins*).)

Here, however, defendant insists that his *Faretta* motion was timely. The trial court granted defendant’s request for self-representation on April 21, 2016, over a month before the trial date. Defendant asked for a continuance then and he does not now contend that the trial court erred by denying it. Presumably a continuance was not necessary at that time. On May 12, defendant concluded he did not need a continuance, and told the court that he had done a lot of work on the case and could proceed. Again, a continuance was unnecessary.

This case does not present the same circumstances as those cases on which defendant relies, as his *Faretta* motion was granted well before trial. Thus, when defendant requested a continuance on May 20, he was required to make a showing of good cause. (See *Jenkins, supra*, 22 Cal.4th at pp. 1037-1040; § 1050, subd. (e).) “Whether good cause exists is a question for the trial court’s discretion but requires at a minimum that the party seeking continuance demonstrate it has prepared for the hearing with due diligence. [Citations.]” (*People v. Johnson* (2013) 218 Cal.App.4th 938, 942; *Jenkins, supra*, at p. 1037.) In evaluating good cause, the court must consider ““not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on the other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.” [Citation.]” (*People v. Henderson* (2004) 115 Cal.App.4th 922,

934, fn. omitted.) “Particularly, when the party seeks a continuance to secure a witness’s testimony, the party must show that he exercised due diligence to secure the witness’s attendance, that the witness would be available to testify within a reasonable time, that the testimony was material and not cumulative.’ [Citation.]” (*Johnson*, at p. 942.)

On May 20, nearly one month after becoming pro. per., defendant filed a written motion to continue. Defendant did not make the motion part of the appellate record, and does not refer to it in his briefs, until his post-oral argument letter brief. At that hearing, defendant requested the appointment of an investigator, and claimed that he needed to have a number of recorded interviews transcribed. Defendant added that he had known for three weeks that not all the discovery had been provided to him, but he failed to explain why he had not requested the appointment of an investigator or the transcripts earlier. As defendant made no effort to demonstrate diligence, we discern no abuse of discretion by the trial court.¹¹

Defendant’s request to appoint an investigator was then granted. His motion for continuance was denied. On May 31, the prosecutor represented to the court that she would give the requested transcripts to defendant’s investigator the following day. Defendant does not contend that she failed to do so. Defendant told the court that he needed a continuance because he had not been issued a pro. per. pin for use making telephone calls, and needed to call his investigator, who had been away over the Memorial Day weekend. He added that the investigator had said he needed 30 days to question witnesses, view the crime

¹¹ We find unavailing defendant’s letter brief argument that his need for a continuance was “uncontested” by the trial court as the burden to establish good cause for a continuance was on defendant.

scene, investigate defendant's alibi, and review the evidence. Defendant did not explain how or to what extent the lack of a pin had interfered with his preparation, how much the investigator had done prior to the holiday weekend, or what witnesses remained to be questioned and why their testimony might be material. The trial court denied the continuance on the grounds argued by the prosecutor: the trial court's prior warnings; the victim's family's right to a speedy trial; and the difficulty in rescheduling witnesses. We conclude that not only was the denial of a continuance justified by defendant's failure to demonstrate diligence or necessity, it was "a reasoned assessment of the need for delaying the trial in light of the potential problems such delay might cause." (*People v. Fuiava* (2012) 53 Cal.4th 622, 651.)

On June 7, defendant again requested a continuance. Rather than attempt any demonstration of diligence, defendant blamed prior counsel and the court. Defendant argued that prior counsel's failure to prepare should be deemed sufficient grounds for a continuance, and that the court should not have allowed him to represent himself so close to trial without also giving him more time to prepare his defense. Again, defendant failed to make any showing of good cause, and we discern no abuse of discretion.

II. *Marsden* hearing

Defendant contends that the trial court failed to conduct an adequate *Marsden* inquiry. In particular, defendant contends that the court failed to inquire into and evaluate the substance of his complaints against the three assigned deputy public defenders, failed to question counsel about the complaints, failed to make an adequate record of defendant's grievances and the court's response, and erroneously denied the motion despite a

sufficient showing that counsel had provided ineffective assistance.

“When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation -- i.e., makes what is commonly called a *Marsden* motion ([*Marsden, supra*,] 2 Cal.3d 118) -- the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance.” (*People v. Smith, supra*, 30 Cal.4th at p. 604.) No formal motion is necessary to trigger the trial court’s duty to inquire; however, the court is obligated to conduct a full *Marsden* hearing only “when there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ [Citation.]” (*People v. Sanchez* (2011) 53 Cal.4th 80, 89-90.)

When defense counsel told the trial court that defendant had “indicated a *Marsden* motion,” an in camera hearing was held. At the beginning of the April 21 hearing however, instead of requesting the appointment of new counsel, defendant announced, “I would like to exercise my *Faretta* rights.” Defendant explained that three successive deputy public defenders had provided inadequate representation, in that they had not “investigate[d] the case adequately” and were not familiar with his case. He asked that the deputy public defender currently representing him be removed, instead “preferring a state appointed attorney due to prior relationship.”¹²

Contrary to defendant’s claim that the trial court made an inadequate inquiry, the court allowed defendant ample

¹² Later in the hearing, when the court asked defendant what he meant by a “state appointed attorney,” defendant explained that he meant counsel not employed by the public defender’s officer.

opportunity to voice his reasons for dissatisfaction with the public defender's office. Defendant explained that the deputy assigned at the preliminary hearing (in June 2015), was about to begin a trial in another department, did not have all the discovery or notes with him, and had not hired a private investigator or questioned defense witnesses. Defendant complained that a new deputy was assigned temporarily (in November 2015), when the first was transferred, and again no investigator was hired and no progress was made on the case. Defendant alleged that the third deputy public defender had no familiarity with the case, did not know when the crime had occurred or who the "significant players" were, did not hire a private investigator, and was not speaking to defendant about the case or sharing the discovery with him. Defendant advised that he had spoken to an investigator, but the investigator did not do the things that defendant had wanted done. Defendant wanted new counsel appointed: "As it stands preferring a state appointed attorney due to prior relationship, all counsel from public defender's office have not come to visit me to review my discovery." Defendant then asked for a continuance so that he could review all the prosecution's evidence, and said, "I feel as though I properly noted my dissatisfaction and perform the following: employ sole practitioner." Defendant construes these comments as asking for new counsel, although defendant's very next statement was, "I would like to go pro per."

Defendant contends that his complaints as to defense counsel's competency were sufficient to trigger the trial court's obligation to question counsel. "[W]hen a defendant asserts 'specific important instances of alleged inadequacy of [counsel's] representation' such as failure to secure potentially exonerating evidence, the court cannot deny a *Marsden* motion without inquiry into counsel's reason for not introducing the evidence.

But, . . . inquiry into the attorney's state of mind is required only in those situations in which a satisfactory explanation for counsel's conduct toward his client is necessary to determine whether counsel can provide adequate representation. Further, that a defendant disagrees with the trial preparation and strategy adopted by his appointed counsel does not trigger any duty of inquiry by the trial court.' [Citation.]" (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219.) Defendant wanted private counsel and a private investigator, and to be more involved and more in control of the investigator and his own defense. We agree with respondent that the court was not required to conduct any further *Marsden* inquiry.

Defendant opined that it was unfair to disallow a continuance or advisory assistance from standby counsel, and that if he was unable to be ready for trial, he would turn the case over to standby counsel. Defendant construes these comments to mean that he resorted to self-representation only because the trial court would not appoint private counsel. Defendant made it clear that he did not want to be represented by either attorneys or investigators from the public defender's office. It was also clear that defendant wanted to delay the trial. Assuming that defendant asked for and undertook self-representation solely because he did not want a public defender, defendant did not describe any complaint or reason resembling a conflict of interest or other justification for disqualifying the entire public defender's office. Without such an indication, even if the trial court had inquired further and found the current deputy had not provided adequate assistance, it would not have appointed private counsel. (See *People v. Christian* (1996) 41 Cal.App.4th 986, 998; § 987.2, subds. (d), (e); Gov. Code, § 27706.)

Moreover, we agree with respondent that even if the *Marsden* inquiry had been inadequate, any error would be

harmless, “given that the ‘trial court gave defendant everything he sought’”: Mr. Bakari was appointed as counsel of record a few weeks later. (*People v. Taylor* (2010) 48 Cal.4th 574, 601, quoting *People v. Govea* (2009) 175 Cal.App.4th 57, 62) Defendant contends that he was prejudiced by the delay in appointing Attorney Bakari, because Mr. Bakari told the court that he was not sufficiently prepared to represent defendant as effectively as he would want. However, Mr. Bakari had attended court and had been supplied with all discovery since his appointment as standby counsel. Defendant has made no claim that he rendered ineffective assistance, and we find no indication in the record that counsel’s assistance was deficient. We conclude beyond a reasonable doubt that defendant was not harmed by the lack of a more thorough *Marsden* inquiry.

III. The gang’s primary activities

Defendant contends that the prosecution failed to prove that North Side Redondo was a criminal street gang, and the gang enhancement must be stricken because substantial evidence did not support a finding that any of the felonies enumerated in section 186.22, subdivision (e), were one of its primary activities.

A jury’s true finding of the gang enhancement allegation is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) We thus review the evidence in the light most favorable to the judgment and draw all inferences the jury could reasonably have drawn. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) “[B]ecause ‘we *must* begin with the presumption that the evidence . . . *was* sufficient,’ it is defendant, as the appellant, who ‘bears the burden of convincing us otherwise.’ [Citation.]” (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.)

A “‘criminal street gang’ means any ongoing organization, association, or group of three or more persons, whether formal or

informal, having as one of its primary activities the commission of one or more of the [specified] criminal acts enumerated in . . . subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f).) A “pattern of criminal gang activity” means the commission or attempted commission, or conviction of two or more enumerated offenses, where the last of such offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (§ 186.22, subd. (e).)

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.] . . . [¶] Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322-324, italics omitted (*Sengpadychith*).)

The opinion of an expert as to the gang’s primary activities may satisfy the requirement (*Sengpadychith, supra*, 26 Cal.4th at p. 323-324.) Detective Carlborg testified that in 2013, North Side Redondo’s primary activities were drug dealing, robbery, witness intimidation, extortion, and homicide. Each of these enumerated offenses is included in subdivision (e). (See § 186.22, subd.(e)(4) [drug sales], subd. (e)(2) [robbery], (subd. (e)(8) [witness intimidation], subd. (e)(19) [extortion], and (subd. (e)(3) [unlawful homicide or manslaughter].)

Defendant notes that with regard to the primary activities element, the trial court instructed that a criminal street gang has, “as one or more of its primary activities, ‘the commission of

murder and assault with a firearm.” Defendant suggests that Detective Carlborg’s testimony was insufficient because he said “homicide,” not “murder,” and he did not say that assault with a firearm was a primary activity. Defendant also contends that the convictions of Millan for drug sales, of Tinajero for armed assault and the attempted murder of a bicyclist, and of Contreras for the murder of his wife, cannot be considered as evidence of the gang’s primary activities because the prosecution introduced this evidence only to satisfy the “pattern of criminal activity” element of the gang allegation, not the “primary activities” element.

On the contrary, “[e]vidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group’s primary activities.” (*Sengpadychith, supra*, 26 Cal.4th at pp. 323-324; see also *People v. Duran* (2002) 97 Cal.App.4th 1448, 1465-1466.) Thus, the convictions admitted to show a pattern of criminal gang activity and were additional evidence of the gang’s primary activities. Also, defendant was an admitted member or associate of the North Side Redondo gang. Defendant does not challenge the sufficiency of the evidence to support his guilt of the current crimes. As present conduct is relevant to the element of primary activities, the jury was entitled to consider the murder or the assault with a firearm committed in this case.

Defendant cites no authority that would prohibit the jury from considering all evidence. We agree with respondent that when all circumstances are considered, no reasonable jury would conclude that Detective Carlborg was referring to justifiable homicide when he said “homicide,” any more than it would reasonably conclude that the gang’s primary activity was to accidentally kill rival gang members. The sole authorities cited by defendant for his arguments are *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander*), and *People v. Perez* (2004) 118

Cal.App.4th 151. Defendant's reliance on *People v. Perez* fails, as there was no expert testimony in that case regarding the primary activities of the gang. (*Perez*, at p. 160.) Any comparison to the facts of *Alexander L.* also fails, as that case is markedly different from this case. In *Alexander L.*, other than hearsay statements about two crimes committed in a single year, the entire testimony of the officer regarding the gang's primary activities consisted of the following: "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations." (*Alexander L.*, at pp. 611-613.) There were no follow-up questions, no certified records of conviction, no testimony regarding extensive experience and personal contacts with gangs, or research, as in this case. In contrast to the conclusory and insufficient offerings in *Alexander L.*, expert Detective Carlborg explained the primary activities of the gang. He gave details concerning the basis for his opinion, including his training, and his years of experience and contacts with North Side Redondo. Substantial evidence supported the jury's finding that murder and assault with a firearm were among the gang's primary activities.

IV. Expert's reliance on hearsay

Defendant challenges the evidence supporting the gang enhancement requirement that "members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

To prove a pattern of criminal gang activity, there must be proof of two or more "predicate offenses" enumerated in section 186.22, subdivision (e), not necessarily gang related, but committed on separate occasions, the last of which occurred within three years after a prior offense. (*People v. Gardeley*

(1996) 14 Cal.4th 605, 610, 622-624 (*Gardeley*), disapproved on another point in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*); § 186.22, subd. (e).)

Defendant contends that the gang enhancement must be stricken because proof of the element consisted of inadmissible hearsay under state law, as well as testimonial hearsay that violated the confrontation clause of the Sixth Amendment, under the principles stated in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Defendant does not challenge Detective Carlborg's testimony that Millan admitted to him that Millan was a member of North Side Redondo. Nor does defendant challenge the proof of the predicate convictions of Tinajero and Contreras. However, defendant argues that it was error to admit Detective Carlborg's opinion that Tinajero was a member of North Side Redondo because although Tinajero admitted his gang membership, Detective Carlborg did not testify that the admission was made directly to the detective. Defendant argues that it was also error to admit Detective Carlborg's opinion that Contreras was a member of North Side Redondo, because the detective learned that from other officers.

Respondent contends that defendant has forfeited this issue. Defendant counters that the failure to object should be excused as futile, as the trial took place prior to the publication of *Sanchez*. A failure to object may be excused where governing law at the time of trial ““afforded scant grounds for objection,”” and where requiring an objection ““would place an unreasonable burden on defendants to anticipate unforeseen changes in the law,”” such as when the new rule is rule is “flatly inconsistent with the prior governing precedent” and issued well after trial concluded. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1215.)

In *Sanchez*, the California Supreme Court reinstated a traditional hearsay rule after some of its own precedents, such as

Gardeley, had blurred the distinction between *case-specific* hearsay the hearsay sources from which experts frequently derived their knowledge. (*Sanchez, supra*, 63 Cal.4th at p. 678.) The traditional rule precluded expert witnesses “from relating case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried.” (*Id.* at p. 676; see also pp. 679, 684, 686.) In pre-*Sanchez* cases, some courts relied on *Gardeley* to admit case-specific hearsay as the basis for a gang expert’s opinion, on the ground that it was not offered for its truth, but rather to assist the jury in evaluating the expert’s opinion. (See, e.g., *People v. Hill* (2011) 191 Cal.App.4th 1104, 1122-1126 (*Hill*); *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210.) Admissibility instead focused on the relevance and reliability of the hearsay basis, and a weighing of the potential for prejudice against probative value. (*Sanchez, supra*, at p. 679.) The *Sanchez* court concluded that “this paradigm is no longer tenable because an expert’s testimony regarding the basis for an opinion *must* be considered for its truth by the jury.” (*Ibid.*; see *People v. Stamps* (2016) 3 Cal.App.5th 988, 995 [discussing *Sanchez*’s “paradigm shift”].)

Though *Sanchez* did not enunciate an unanticipated new rule that was flatly inconsistent with prior authority regarding the confrontation clause, our Supreme Court decisions in *Gardeley* and *People v. Montiel* (1993) 5 Cal.4th 877 (*Montiel*) were prior precedent, binding on lower courts until overruled by our Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Because *Gardeley* and *Montiel* were not overruled until after this trial in *Sanchez*, we do not find that defendant forfeited his *Sanchez*-based objection.

However, we note that no prejudice appears under any standard of harmless error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error]; *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error].) With regard to the former, it is defendant's burden to show prejudice, by demonstrating a reasonable probability of a different result absent the alleged state law error in admitting the evidence. (See *People v. Hernandez* (2011) 51 Cal.4th 733, 746.) Defendant has not shown that the basis testimony would have been excluded under the reasoning of *Sanchez*. As Tinajero and Contreras were not participants in the crimes committed in this case, and their crimes and gang membership do not relate to the particular events involved in this case, Detective Carlborg's testimony regarding them and their crimes was not case specific. (See *People v. Meraz* (2016) 6 Cal.App.5th, 1162, 1174-1175, review granted Mar. 22, 2017, S239442.) Defendant argues that *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, supports the view that such evidence is nevertheless case specific. Rather, it is inapposite, as the evidence in that case showed (unlike here) that the nonparty gang member *participated* in the events related to the crimes charged against the defendant, and thus came within the *Sanchez* description. (*Vega-Robles*, at pp. 382, 390, 387-398, 415.)

Furthermore, Detective Carlborg testified that he personally participated in the search of defendant's Lomita apartment where letters were found. A letter from Contreras was among them. When confronted with the letters, defendant did not deny they were from North Side Redondo gang members, instead he claimed he was not acquainted with any of those people.

Defendant has not caused the exhibits to be transmitted to this court. As the trial court's orders are presumed correct, it is

defendant's burden, not only to present a record adequate for review, but also to affirmatively demonstrate error. (*People v. Whalen* (2013) 56 Cal.4th 1, 84, disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 44, fn. 17; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564-565.) We presume that the letters support Detective Carlborg's testimony that one of them was from Contreras and his opinion that Contreras was a member of the North Side Redondo gang. (*People v. Onesra Enterprises, Inc.* (2016) 7 Cal.App.5th Supp. 7, 14.) We thus find that any *Crawford* or *Sanchez* error was harmless beyond a reasonable doubt. (See *Chapman, supra*, 386 U.S. at p. 24.)

V. Section 654

Defendant contends that the trial court erred in imposing consecutive terms for the murder and his crime of possession of a firearm by a felon.

"An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) In general, section 654 precludes multiple punishments for a single physical act that violates different provisions of law, although "what is a single physical act might not always be easy to ascertain. In some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*People v. Jones* (2012) 54 Cal.4th 350, 358.) "Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce

from the evidence. [Citation.]” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.)

Whether a felon in possession of a firearm may be punished separately for the possession and the crime in which he used the firearm “depends upon the facts and evidence of each individual case. Thus, where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.’ [Citation.]” (*People v. Bradford* (1976) 17 Cal.3d 8, 22.)

Defendant contends that the evidence showed no more than his possession of a firearm at the time of the shooting, and that no evidence was presented to show that his possession of the gun was “antecedent and separate” from the use of the gun in the commission of the primary offense of murder. We disagree. In his testimony, defendant admitted that he kept a gun in a hidden compartment of his car for protection, because he sold drugs. Thus, a finding that defendant’s possession of the firearm was antecedent and separate from its use in the murder is supported by that substantial evidence. The trial court did not err in imposing sentence consecutively to the murder count.

VI. Serious felony enhancement

Defendant contends that count 2 (possession of a firearm by a felon) did not qualify as a serious felony for purposes of the consecutive five-year enhancement imposed pursuant to section 667, subdivision (a)(1).

Defendant was convicted in count 2 of possession of a firearm by a felon, in violation of section 29800, subdivision (a)(1). The jury found true the allegation that the crime was committed for the benefit of a criminal street gang under section

186.22, subdivision (b)(1). The trial court then enhanced defendant's sentence pursuant to section 186.22, subdivision (b)(1)(A), which provides for an additional term of two, three, or four years when the defendant has been convicted of a felony committed for the benefit of a criminal street gang. The trial court also imposed a recidivist enhancement of five years pursuant to section 667, subdivision (a). Subdivision (a)(4) of that section provides: "As used in this subdivision, 'serious felony' means a serious felony listed in subdivision (c) of Section 1192.7." Section 1192.7, subdivision (c)(28), lists as a serious felony, "any felony offense, which would also constitute a felony violation of Section 186.22."

Thus, "any felony offense that includes a gang enhancement under section 186.22(b)(1) is a serious felony as defined by section 1192.7(c)(28)." (*People v. Briceno* (2004) 34 Cal.4th 451, 463-464 (*Briceno*).) Here, possession of a firearm by a felon is not separately listed as a serious felony in section 1192.7 subdivision (c), but it became a serious felony because it was committed for the benefit of a criminal street gang. (§ 1192.7(c)(28).)

Relying on *Briceno*, defendant contends that section 1192.7, subdivision (c)(28), cannot be used to transform the current offense into a serious felony for purposes of imposing both a gang enhancement under section 186.22, subdivision (b)(1)(A), and a five-year recidivist enhancement under section 667, subdivision (a). In *Briceno*, the California Supreme Court held that section 1192.7, subdivision (c)(28), which defines any felony committed to benefit a gang as a serious felony, may not be used to "bootstrap" such a felony into section 186.22, subdivision (b)(1)(B), which provides for a five-year enhancement for serious gang related felonies. (*Briceno, supra*, 34 Cal.4th at p. 465.) The court held: "[W]hile it is proper to define any felony committed for the benefit

of a criminal street gang as a serious felony under section 1192.7(c)(28), it is improper to use the *same* gang-related conduct *again* to obtain an additional five-year sentence under section 186.22(b)(1)(B).” (*Briceno*, at p. 465.)

Here, defendant was *not* sentenced under section 186.22, subdivision (b)(1)(B). Instead, he was given the middle term (three years) pursuant to section 186.22, subdivision (b)(1)(A). Thus, the trial court did not use the jury’s finding to elevate the felon in possession count to a serious felony for purposes of imposing a five-year gang enhancement. The court then used the jury’s finding to elevate the crime to a serious felony for the sole purpose of imposing the five-year recidivist enhancement. Thus, *Briceno* does not prohibit the sentence under the facts of this case. (See *People v. Martinez* (2005) 132 Cal.App.4th 531, 536-537 (*Martinez*).)

Defendant disagrees, pointing to *Briceno*’s statements that “section 1192.7(c)(28) turns any prior gang-related felony offense into a strike if a defendant reoffends” and “any felony that is gang related is not treated as a serious felony in the current proceeding.” (*Briceno*, *supra*, 34 Cal.4th at p. 465.) Defendant construes this language to mean that a felony cannot qualify as a serious felony under section 1192.7, subdivision (c)(28), for any purpose in the current proceeding. That conclusion disregards the court’s explanation that “section 186.22(b)(1)(A), (B), and (C) speaks to an event that occurs in the current proceeding.” (*Briceno*, at p. 465.)¹³ As the *Martinez* court explained: “As we

¹³ We reject defendant’s argument that his position finds support in *Lopez v. Superior Court* (2008) 160 Cal.App.4th 824. There, the appellate court concluded that section 186.22, subdivision (d), may not be used to elevate a misdemeanor contempt of court to a felony based on violation of an injunction “issued to abate gang-related conduct,” where the same acts

recognized in [*People v. Bautista* (2005) 125 Cal.App.4th 646], a defendant cannot properly be punished for engaging in conduct that supports a gang enhancement and then, solely because that conduct makes the felony ‘serious,’ also punish him or her under subdivision (b)(1)(B) of the gang enhancement. Subdivision (b)(1)(B) of section 186.22, thus, can apply [according to *Briceno*] only where the felony is serious for some reason other than the conduct that brings subdivision (b)(1) into play. . . . This has nothing to do, however, with the question whether appellant can be punished under both section 186.22, subdivision (b)(1)(A), and section 667, subdivision (a).” (*Martinez, supra*, 132 Cal.App.4th at pp. 536-537.) We find that the trial court did not impose double punishment as prohibited by *Briceno*, and that defendant’s claim of error must be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT

comprised “both the disobedience of the injunction *and* the proof of a gang connection for the enhancing allegation under section 186.22, subdivision (d).” (*Lopez, supra*, at p. 832.) *Lopez* is inapposite here.