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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>KEITH DWAYNE LEWIS,<br><br>Defendant and Appellant. | B269597<br><br>(Los Angeles County<br>Super. Ct. No. BA406579) |

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

Barbara A. Smith, 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, Victoria B. Wilson and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Keith Dwayne Lewis was convicted of the attempted murders of Daniel and Miguel Meza (Pen. Code,[1] §§ 664/187) and the assault with a firearm on Alejandro Arroyo (§ 245, subd. (a)(2)), and various sentence enhancements were found to be true. He was sentenced to consecutive terms of life in prison on the attempted murder convictions, plus 25 years to life for a firearm enhancement (§ 12022.53, subd. (d)), and a consecutive term of 18 years to life on the assault with a firearm conviction and a gang enhancement (§ 186.22, subd. (b)(1)(C)). He appealed from the judgment.

In June 2015, we issued an unpublished opinion in which we found the evidence was sufficient to prove that he aided and abetted the attempted, deliberate, premeditated murders and the assault with a firearm, but we found that the trial court improperly denied defendant's request for a *Marsden*[2] hearing to allow him to convey his dissatisfaction with his court-appointed lawyer and state the reasons he should be granted a new attorney. (*People v. Lewis*, case No. B255077, filed June 2, 2015 (*Lewis I*).) We reversed the judgment and remanded the case to the trial court to conduct a *Marsden* hearing, and directed that if the court determined that good cause for the appointment of new counsel was not shown at the hearing, the court must reinstate the verdicts and judgment, but if the court found there was good cause for

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1 Further undesignated statutory references are to the Penal Code.

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

the appointment of new counsel, the court must appoint new counsel and set the case for retrial.

On remand, the trial court conducted the *Marsden* hearing, found that good cause was not shown, and reinstated the judgment. Defendant now appeals from the reinstated judgment, challenging the trial court's denial of his *Marsden* motion. Finding no abuse of discretion, we affirm.

## BACKGROUND

A. *Evidence Relating to the Crimes*

The evidence presented at trial relating to the crimes was set forth in *Lewis I* as follows.

"Defendant belonged to the East Side Trece gang. Attempted murder victim Daniel Meza belonged to the rival Loco Park gang. Around 8:30 p.m. on January 5, 2013, Daniel and his younger brother Miguel (who was not a gang member) entered a family market near 25th and Hooper in Los Angeles, which was in Loco Park territory. After buying beer, they were leaving when Daniel saw appellant and two other men whom he recognized as East Side Trece gang members outside: defendant, Robert Grandos (who Daniel knew as Little Rob) and an unidentified third man. When they saw Daniel, defendant and Grandos called out confrontationally 'East Side Trece,' and said (among other things) 'Fuck lollypops,' an insult 'dissing' Daniel's gang, Loco Park. Daniel was standing next to his brother, perhaps a foot away from defendant. He then saw defendant wave with his hand as if to demand that Daniel come outside, and heard defendant say, 'Get him.'

Daniel started to go outside, and at the doorway heard shooting. He did not see anyone with a gun. He turned and ran into the store. He was shot seven times (three in his chest, two in his back, and two in his arm), but survived. Daniel's brother, Miguel, was shot once in the shoulder. A third victim, Alejandro Arroyo, who happened to be in the store, was shot in the wrist.

"The events were captured by video security cameras at the market and an edited video compilation was played for the jury during testimony. The video (Exh. 3A) showed the following. Defendant and two companions walked past the front window of the market. Defendant (identified as the heavy set one of the group) looked in through the window as they passed, and did a double take, craning his neck as if to look again more closely through the window. All three men stopped, and then walked back to the front door, stopped, and separated, defendant standing in the doorway facing the market, Grandos a few feet to defendant's right on the sidewalk, and the unidentified man on the sidewalk a few feet to defendant's left. According to Daniel, who viewed the video while testifying, it was at this point that defendant hurled insults against the Loco Park gang. Shortly thereafter, the video showed defendant stepping away from the doorway. Miguel Meza walked out the door onto the sidewalk. Daniel appeared on the sidewalk at the doorway. At that point, defendant's unidentified companion approached from behind defendant and started shooting in the direction of the store. Defendant, who was only a few feet away from the shooter, appeared to flinch slightly and step aside toward the street. Miguel and Daniel fled inside the store. The shooter

approached nearer to the store and fired several more times. Then he, defendant, and Grandos ran off.

"Defendant was wearing an ankle bracelet monitored by the Department of Corrections and Rehabilitation. On the date of the shooting, GPS tracking data showed that at 8:38 p.m. he was at 25th Street and Hooper (the approximate time and site of the shooting), and that approximately five minutes later he was at 1225 and 1227 West 27th Street, the location of the home of Robert Grandos.

"The prosecution gang expert, Los Angeles Police Officer David Dixon, who was familiar with the East Side Trece gang, was asked a hypothetical question based on the evidence of the shooting. He testified that such a shooting would have been committed to benefit the East Side Trece gang as a means of gaining respect and instilling fear. He further testified that gang members entering a rival gang's territory would typically be armed in anticipation of violence. Similarly, Daniel testified that a gang member would enter a rival gang's territory 'I guess to go put in work . . . to go shoot somebody,' and 'no one would ever walk into another neighborhood without no gun . . . because you will get shot.'" (*Lewis I*, *supra*, at pp. 3-5.)

B. *First Appeal*

In his first appeal from the judgment, defendant contended there was insufficient evidence to support his convictions for attempted murder and assault with a firearm under an aider and abettor theory, and that the trial court erred in not holding a *Marsden* hearing. As noted, we found there was sufficient evidence to support defendant's

convictions. With regard to regard to the *Marsden* hearing, we set forth the facts as follows: "Outside the presence of the jury, after the first two witnesses had testified, the court stated: 'I got a note [from the bailiff] this morning as the jury was in the box and were ready to start the case [stating] "Defendant says he wants to make a *Marsden* motion right now." I did not recess the case for that purpose, and I just want to explain why. I felt that it was untimely. We are in the middle of trial. I don't think that that's an appropriate time to make a *Marsden* motion, so that's why the court did not interrupt proceedings.' Defense counsel stated that '[t]his is the first I have heard about it, Judge. I would have brought it to the court's attention.' The issue did not arise again." (*Lewis I*, *supra*, at p. 9.)

We found that the trial court erred in denying defendant's request for a *Marsden* hearing, but concluded that the proper remedy was a limited remand to allow the court to conduct such a hearing. We noted that "[d]uring trial, defendant never voiced dissatisfaction with his attorney and never again asked for a *Marsden* hearing. Further, the record gives no indication of ineffective assistance of counsel." (*Lewis I*, *supra*, at p. 10.) In our disposition, we instructed that, in conducting the hearing, "[t]he trial shall have discretion to consider defendant's complaint in light of the manner in which his counsel actually performed at trial." (*Lewis I*, *supra*, at p. 11.)

C. *Marsden Hearing*

On remand, the trial court began the *Marsden* hearing by asking defendant what were his concerns when he asked for the hearing. Defendant told the court that before he came into the courtroom on the first day of trial, he told his attorney, Leo B. Newton, that he did not want him as his counsel. He said that Newton responded by telling him, "they're ready to make a deal, 27 years. You want to take that or we're going to trial right now." Newton then turned and walked back into the courtroom.

The court then asked defendant what he found deficient in Newton's representation. Defendant identified four issues: (1) Newton did not object when the prosecutor referred to defendant as a "stupid criminal"; (2) the victim, Daniel Meza, should not have been allowed to testify because he was an admitted gang member; (3) the investigating officer who sat next to the prosecutor was coercing or badgering a witness (he explained that after the witness would say something, the officer would say something to the prosecutor, who would then ask the witness if he remembered it differently, i.e., to correct what the witness originally said); and (4) Newton made no effort in the case, noting that he did not get an investigator to go to the scene to investigate and take photos, and he never came to talk to defendant.

The trial court, which noted that it did not remember the prosecutor referring to defendant as a stupid criminal, asked Newton about defendant's complaint; Newton said he did not recall the prosecutor saying that. The court also asked Newton whether he observed the investigating officer badgering the prosecutor as described

by defendant; Newton said that he did not, and the court agreed that it did not observe such conduct, either.

In response to the court's question about hiring an investigator, Newton admitted that he had not hired one, but explained that he did not do so because the story defendant told him about what happened did not line up with the video of the crime. Defendant told him that he saw these two groups, belonging to different gangs, and knew there was going to be a problem, so he left. He said he went home by taxi. He could not, however, provide any information about the taxi; he said it was a pirate taxi, that he got the phone number from a phone booth, and he could not remember which phone booth he got the number from. Newton said he told defendant that he would not suborn perjury, and that defendant would have to give him something that would allow him to challenge the prosecution's case from a factual point of view.

Newton also addressed defendant's statement that he told Newton before trial started that he did not want Newton as his attorney. Newton told the court that if defendant had told him that he did not want him as his attorney, he would have informed the court, but he stated that he did not have any recollection of defendant telling him that.

The court then asked Newton whether he had visited defendant. Newton said that he had, both at the courthouse and at the jail. Finally, the court asked Newton if he believed he was prepared to defend the case. Newton said he believed he was, and that he believed he defended it to the best of his ability.

In finding that defendant made an inadequate showing to require a new trial with a new attorney, the trial court stated that it accepted Newton's reasons for not employing an investigator. It observed that the evidence against defendant was overwhelming -- defendant was seen on video gesturing to the victim, and there was no doubt it was defendant because he was wearing an ankle monitor that placed him at the scene. The court noted that it did not recall anyone calling defendant a stupid criminal,[3] that it did not perceive any badgering of a witness, and that not only was Daniel Meza eligible to testify even though he was an admitted gang member, but the court found his testimony to be relevant and very credible. The court therefore denied defendant's *Marsden* motion and reinstated his conviction and judgment. Defendant timely filed a notice of appeal from the reinstated judgment.

## DISCUSSION

The rules governing *Marsden* motions are well established. "When a defendant seeks substitution of appointed counsel pursuant to *People v. 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. A defendant is entitled to relief if

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[3] The court noted, however, that the prosecutor "may have said something about that it wasn't wise to be doing an offense with an ankle monitor on your ankle," but impliedly concluded that counsel's failure to object to such a statement would not show inadequate representation of defendant.

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.)

On appeal, defendant identifies four purported errors in the trial court's denial of his *Marsden* motion.[4] First, he argues that the fact that Newton did not recall defendant ever saying that he wanted a new attorney shows there was a breakdown in the attorney-client relationship. Second, defendant argues the court erred in asking Newton about his own subjective belief regarding his representation of defendant. Third, he contends the trial court improperly based its decision on its knowledge of how Newton performed in other cases. Finally, he contends that Newton's failure to hire an investigator demonstrates he failed to provide adequate representation. We find no merit in any of these contentions.

Defendant's first three claims of error are based, at least in part, upon unreasonable interpretations of statements made at the *Marsden* hearing.

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[4] In his reply brief, defendant expressly disclaims any other claim of error.

For example, with regard to defendant's request for a new attorney, Newton said, "If he told me before we started trial that he wanted -- didn't want me as an attorney, I would have indicated to the court -- I consider that is implying a *Marsden* motion request and I would have told the court that, but I don't have any recollection of that ever having been said." Defendant interprets this statement to mean that Newton claimed that defendant never made any request for new counsel at the trial at all, and, in effect, called defendant a liar. Not so. A more reasonable interpretation of Newton's statement is that Newton did not understand that defendant told him before trial that he did not want Newton to be his attorney -- presumably, because Newton did not hear defendant when he purportedly made the statement, or because defendant did not make any such statement to him. In either case, Newton's statement presented a credibility question between defendant and Newton, and the trial court was entitled to accept Newton's explanation. (*People v. Smith* (1993) 6 Cal.4th 684, 696 ["To the extent there was a credibility question between defendant and counsel at the hearing, the court was 'entitled to accept counsel's explanation'"].) Thus, we conclude the court did not abuse its discretion by impliedly rejecting defendant's claim that Newton intentionally ignored his statement before the start of the trial.

Defendant's second and third claims of error are based upon a short, two-question, colloquy to which defendant ascribes much importance. After asking Newton to respond to defendant's assertions, and hearing those responses, the following colloquy occurred:

"THE COURT: And now you've been around a long time and you've been an attorney for a very long time. Did you believe in your mind that you were prepared to pros -- to defend this case? Did you believe you were prepared to defend the case?

"MR. NEWTON: Yes, Your Honor.

"THE COURT: And did you defend it to the best of your ability?

"MR. NEWTON: I believe I did."

The trial court made no further mention of Newton's experience, and there is no indication that the court relied upon either Newton's belief about his representation or the court's purported knowledge of Newton's performance in other cases when it denied defendant's *Marsden* motion. Indeed, the court expressly stated its grounds for denying the motion, all of which grounds were proper considerations for the court in ruling on a *Marsden* motion.

In his final claim of error, defendant asserts that Newton's failure to hire an investigator resulted in inadequate representation because the key issues at trial -- defendant's intent and knowledge as an aider and abettor -- "could have been affected by investigation." He argues that defense counsel "cannot properly forego investigation[] on the grounds that [defendant] did not convince him of his innocence," and that an investigator could have interviewed witnesses and investigated the scene. But Newton stated that he did not hire an investigator, not because defendant did not convince him that he was innocent, but because defendant told him a version of the events that was incontrovertibly false, and Newton saw no reason to have an investigator investigate that version of events. While defendant claims

that, even if there was no reason to investigate the version of events he told Newton, an investigator nevertheless could have interviewed witnesses and investigated the scene, he fails to identify how such an investigation could have resulted in information relevant to the only real issues at trial -- whether defendant knew that the shooter intended to kill and whether defendant intended to aid the shooter in the attempted murder or assault with a firearm. We fail to see (and defendant does not explain) how an investigator would assist in the defense, since the relevant issues were based entirely upon what was in defendant's mind at the time of the offenses. We conclude that under the circumstances of this case, Newton did not provide inadequate representation by failing to hire an investigator, and that the trial court did not abuse its discretion in finding defendant had failed to show good cause for his original request to substitute new counsel.

## DISPOSITION

The judgment is affirmed.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J. COLLINS, J.