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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DENNIS MARTIN WAIGHT,

Defendant and Appellant.

B292046

(Los Angeles County  
Super. Ct. No. YA096318)

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

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, Gregory B. Wagner, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Dennis Martin Waight of three counts of first degree burglary, one count of attempted first degree burglary and one count of receiving stolen property. On appeal Waight contends the trial court committed reversible error by failing to hold a hearing on his request for a substitute attorney. Waight also argues remand for resentencing is necessary to allow the trial court to exercise its discretion under new law, effective January 1, 2019, to strike or dismiss the prior serious felony convictions for sentencing purposes. We affirm the convictions and remand for resentencing.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. The Information*

Waight was charged by information on August 3, 2017 with three counts of first degree burglary (Pen. Code, § 459),<sup>1</sup> attempted first degree burglary (§§ 459, 664) and receiving stolen property worth \$950 or less (§ 496, subd. (a)). The information specially alleged Waight had suffered two prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and two serious felony convictions for purposes of section 667, subdivision (a), and had served two prior separate prison terms for felonies as defined in section 667.5, subdivision (b).

### *2. Waight's Request for Substitute Counsel*

During a pretrial conference on August 30, 2017 the deputy public defender representing Waight informed the court Waight wished to waive his right to counsel and represent himself. Upon further inquiry the court determined Waight was asserting a

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<sup>1</sup> Statutory references are to this code.

conflict with his counsel and cleared the courtroom for a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

During the *Marsden* hearing Waight stated he had asked his attorney to file motions to dismiss the information and to suppress evidence. The attorney had refused. Waight said, “[I]t seems like she’s tried to prove my guilt rather than my innocence. I don’t think she’s trying to work for me at all.” Waight stated that every time he spoke to his attorney, they argued. He also complained the attorney had reprimanded him because he had his daughter’s mother call the attorney to give her information and he had not received discovery from his attorney in a timely manner.

Waight’s attorney responded by explaining to the court why she believed the motions to dismiss and to suppress were frivolous and the arguments Waight wanted to make were not relevant. She also stated she had given him discovery as soon as it was possible for her to do so, and she admitted being “annoyed” with Waight for directing his daughter’s mother to call her because she had previously told him not to discuss his case with anyone on the jail telephone.

After hearing from Waight and his attorney, the trial court denied the motion for substitute counsel. The court told Waight, “it sounds like [your attorney] is giving you sound advice. . . . I don’t see any basis to have her removed from the case to replace her with another attorney. Just because you want something to happen, doesn’t mean it’s the right thing. I don’t see she’s done anything but what she’s supposed to do.”

Once they were back in open court the trial court asked Waight if he still wanted to pursue his request for self-

representation. Waight responded he did not, and the court continued with the pretrial conference.

### *3. Waight's Request for Self-representation*

The parties next appeared for a readiness hearing on September 21, 2017. Waight's assigned deputy public defender was unavailable, so another deputy public defender stood in for her during the hearing. The deputy public defender informed the court Waight's assigned counsel was requesting a continuance of 30 days to complete her investigation, but Waight was unwilling to waive time for the continuance. When the court explained the situation to Waight, he responded, "I would rather represent myself then." The deputy public defender conferred with Waight off the record and then advised the court Waight wished to continue without counsel, despite counsel's advice to the contrary.

The court advised Waight of the serious disadvantages of self-representation, especially given that, if convicted, he could be sentenced to multiple 25-year-to-life sentences. The court suggested Waight put off his decision a few days until his assigned counsel was available to discuss the matter. Waight refused and reiterated repeatedly that he wished to represent himself.

After a recess for Waight to review the Advisement and Waiver of Right to Counsel (*Faretta* Waiver), the court questioned Waight as to whether he understood the effects of relinquishing his right to counsel. Waight said he understood, and the court granted his request for self-representation.

#### 4. *Waight's Discussions with the Court During Trial Regarding Representation*

On October 2, 2017 the case was transferred to a new judge for trial. The court began by asking Waight why he “would want to do anything so stupid” as represent himself when facing a sentence of more than 100 years to life. Waight responded he did not believe his attorney had been “fighting for me.” After discussing pretrial motions and witness lists, the court again asked Waight if he was certain he wanted to represent himself. Waight said he was “pretty sure” and explained he had tried to replace the deputy public defender who had been assigned to him, but his motion had been denied. Waight said he had chosen to represent himself because, after his *Marsden* motion had been denied, his attorney had told him he would lose his case and he was a “bitch ass.”

The court took a recess during which it asked the previously assigned deputy public defender to confer with Waight and try to convince him to be represented by counsel. After speaking with Waight, the deputy public defender reported Waight was not amenable to her being reappointed as counsel. Waight told the court he did not want anyone from the public defender’s office representing him. The court requested stand-by counsel from the county bar panel be present the following day and proceeded with jury selection.

Trial continued the next day with Waight representing himself and without stand-by counsel present. In the afternoon, after six witnesses had testified for the prosecution, the court informed the parties that stand-by counsel had become available. Waight asked if he could revoke his waiver of the right to counsel and have the stand-by counsel appointed as his attorney. The

court refused, stating it would “convey a message to the jury that the defendant now realizes he’s in some serious trouble.” After a discussion off the record, the court again stated it would be impracticable to appoint stand-by counsel after six witnesses had testified; however, the court said that, if Waight was convicted and wished at that point to be represented, then counsel would be appointed for posttrial motions and sentencing. The trial continued with Waight representing himself and without stand-by counsel present.

#### *5. The Verdict and Sentence*

Waight was convicted on all counts, and the jury found true the prior serious felony conviction allegations. After the verdict Waight revoked his waiver of his right to counsel, and counsel was appointed for posttrial proceedings and sentencing. The court sentenced Waight as a third strike offender to an aggregate indeterminate state prison term of 140 years to life.<sup>2</sup>

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<sup>2</sup> On each of the three burglary counts and the attempted burglary count, Waight was sentenced to consecutive indeterminate terms of 25 years to life, plus consecutive determinate terms of 10 years on each count for the two prior serious felony convictions (§ 667, subd. (a)). On the receiving stolen property count Waight was sentenced to a concurrent term of 180 days in county jail. The court dismissed the section 667.5 prior prison term allegations in the interest of justice (§ 1385).

## DISCUSSION

### 1. *Waight Has Failed To Show the Trial Court Committed Marsden Error*

#### a. *Governing law and standard of review*

“In *Marsden*, the California Supreme Court held that the constitutional right of criminal defendants to the assistance of court-appointed counsel if they cannot afford private counsel encompasses the right to have their court-appointed counsel discharged and replaced by another one when the ““failure to do so would substantially impair or deny the right”” to assistance of counsel. [Citation.] “A defendant is entitled to [this] relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].” [Citations.]” (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1178; accord, *Marsden*, *supra*, 2 Cal.3d at pp. 123-125.)

In the context of a *Marsden* motion to replace appointed counsel, a “proper and legal motion” is not required; to the contrary, a defendant need only give “some clear indication . . . he [or she] wants a substitute attorney.” (*People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8; accord, *People v. Mendoza* (2000) 24 Cal.4th 130, 157; see also *People v. Sanchez* (2011) 53 Cal.4th 80, 89-90 [trial court is obligated to conduct *Marsden* hearing when there is “at least some clear indication” a substitute attorney is desired].) Once a defendant indicates he or she wants replacement counsel—which typically occurs because the defendant is dissatisfied with existing counsel—““the trial court

must permit the defendant to explain the basis of his [or her] contention and to relate specific instances of the attorney's inadequate performance.”” ( *People v. Lara* (2001) 86 Cal.App.4th 139, 150; accord, *Marsden*, *supra*, 2 Cal.3d at p. 125.) “Denial of that opportunity . . . is legal error that compels reversal of the defendant's conviction unless the record shows beyond a reasonable doubt that the error was harmless.” ( *People v. Armijo*, *supra*, 10 Cal.App.5th at p. 1179; accord, *People v. Knight* (2015) 239 Cal.App.4th 1, 9 “[w]here there is *Marsden* error, we must reverse, unless the record shows beyond a reasonable doubt that the defendant was not prejudiced”].)

b. *Waight did not have a right to a Marsden hearing while he was self-represented*

On appeal Waight contends the trial court erred by failing to hold a *Marsden* hearing on the first day of trial after he expressed dissatisfaction with his prior counsel. Specifically, Waight argues that, once he informed the court his prior counsel had called him a “bitch ass” and told him he would lose his case, the trial court was obligated to inquire further. Waight states, “Crude name-calling and taunting appellant about losing his case would signify a very serious conflict between this attorney and appellant, which the court could not have failed to appreciate. . . . [¶] . . . [¶] [T]he court should have acted upon appellant's assertion by holding a *Marsden* hearing.”

The fatal flaw in Waight's argument is that, at the time he told the court about the deputy public defender's statements, she was no longer representing him. Waight had waived his right to counsel two weeks earlier, and the deputy public defender had been discharged at that time. Waight has cited no authority, nor could he, for the illogical proposition a court has a duty to hold a



*Marsden* hearing when a defendant is self-represented. Accordingly, there was no error in the court's response to Waight's complaint, while self-represented, that his former counsel had been disrespectful toward him.

2. *A Limited Remand Is Appropriate for the Court To Consider Whether To Strike One or More of the Section 667, Subdivision (a), Enhancements*

Waight asserts, and the Attorney General concedes, that Waight is entitled to a new sentencing hearing to give the trial court an opportunity to exercise its discretion to strike or dismiss one or more of the section 667, subdivision (a), serious felony enhancements. At the time Waight was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss the section 667, subdivision (a), serious felony enhancements. (See Stats. 2018, ch. 1013, §§ 1 & 2.) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike any of the five-year section 667, subdivision (a), enhancements.

## **DISPOSITION**

The convictions are affirmed, and the matter remanded for the trial court to consider whether to strike or dismiss the prior serious felony enhancements under section 667, subdivision (a).

PERLUSS, P. J.

We concur:

ZELON, J.

STONE, J.\*

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