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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WAYNE WEST,<br><br>Defendant and Appellant. | B279800<br>(Los Angeles County<br>Super. Ct. No. BA444069) |

APPEAL from an order of the Superior Court of Los Angeles County. James Dabney, Judge. Affirmed.

Wayne West, in pro. per.; Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Respondent.

In the underlying action, pursuant to a plea agreement, appellant Wayne West pleaded no contest to one count of second degree robbery, and was sentenced in accordance with the terms of the agreement. After his court-appointed counsel filed an opening brief raising no issues, appellant submitted a brief. Following our independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude that no arguable issues exist. Accordingly, we affirm.

**RELEVANT PROCEDURAL BACKGROUND**

After being arrested in February 2016, appellant initially represented himself in the underlying action. At the preliminary hearing, the prosecution presented evidence that on two different dates, appellant entered a grocery store and used a knife to commit a robbery. The evidence of the robberies included victim testimony and video recordings from the stores' security cameras.

Anthony Jones testified that on December 21, 2015, he was employed as a security guard at a Ralphs grocery store. When appellant took hold of two bottles of liquor and walked toward the store's exit, Jones and the store's manager approached him. Appellant pointed a knife at them, said, "'Hey, back up,'" and left the store with the alcohol.

Orlando Garcia testified that on January 11, 2016, he was working as a supervisor at a Vons grocery store. According to Garcia, appellant placed five bottles of liquor in a bag and walked toward the exit. When Garcia asked

whether appellant intended to pay for the items, appellant said, "'Back off,'" pushed his elbow into Garcia's arm, withdrew a knife from inside his jacket, and tried to stab Garcia with it. Garcia retreated from appellant, who left the store without paying for the alcohol. Two hours later, appellant returned to the store and put three bottles of liquor in a bag. When Garcia asked appellant to leave the store, he replied, "'Leave me alone,'" and put his hand inside his jacket. Believing that appellant intended to pull out his knife, Garcia did not approach appellant, who left the store with the alcohol without paying for it.

On April 13, 2016, an information was filed, charging appellant with four counts of robbery (Pen. Code, § 211).[1] Accompa-nying each count were allegations that appellant was armed with a knife in the commission of the offense (§ 12022, subd. (b)(1)). The information further alleged that appellant had suffered four prior convictions for serious felonies (§ 667, subd. (a)(1)) constituting strikes under the "Three Strikes" law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), as well as nine prior felony convictions for which he had served prison terms (§ 667.5, subd. (b)). Appellant pleaded not guilty and denied the special allegations.

In April 2016, at appellant's request, the trial court appointed attorney Jimmie Johnson to represent him. On August 10 and September 26, 2016, appellant made requests

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[1] All further statutory citations are to the Penal Code.

for a new court-appointed attorney (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)), which were denied.

On October 4, 2011, appellant entered into a plea agreement under which he was to be given a term of 21 years in state prison. In accordance with the agreement, appellant pleaded no contest to one count of robbery -- namely, the December 21, 2015 robbery of Anthony Jones (count one) -- and admitted accompanying allegations that he used a knife in the course of the offense and had suffered two prior convictions for serious felonies (a 2006 conviction for criminal threats and a 1995 conviction for robbery), one of which also constituted a strike under the Three Strikes law. The trial court sentenced appellant to a total term of 21 years, comprising the 5-year high term for robbery, doubled pursuant to the Three Strikes law (§§ 213, subd. (a)(2), 667, subd. (e)(1), 1170.12, subd. (c)(1)), plus two five-year prior conviction enhancements (§ 667, subd. (a)(1)) and a one-year knife use enhancement (§ 12022, subd. (b)(1)). The remaining charges were dismissed.

## DISCUSSION

After an examination of the record, appellant's court-appointed counsel filed an opening brief raising no issues, and requested this court to review the record independently pursuant to *Wende*. In addition, counsel advised appellant of his right to submit by supplemental brief any contentions or argument he wished the court to consider. In response, appellant submitted a supplemental brief identifying several

potential issues. As explained below, our independent review of the record discloses "no arguable errors that would result in a disposition more favorable to [appellant]."[2] (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1467.)

At the outset, we observe that appellant's plea restricts the scope of our review. Issues concerning guilt or innocence are not cognizable on appeal following a plea of no contest; defendants are generally permitted to raise only those issues "that concern the 'jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea,'" and may do so only upon obtaining a certificate of probable cause under section 1237.5.[3] (*In re Chavez* (2003) 30 Cal.4th 643, 649, 650-652, quoting *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178 (*Hoffard*).) Here, appellant obtained a certificate of probable cause, and thus may assert so-called "certificate issues."[4] (*In re Chavez*, *supra*, at

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[2] We observe that the opening brief contains inaccuracies regarding the underlying proceedings, most notably, a misstatement of the date of the plea agreement. However, we have carefully examined the record for potential issues and have found none.

[3] In the absence of a certificate of probable cause, a defendant who entered a plea of guilty or no contest may challenge only denials of motions to suppress evidence and postplea sentencing rulings. (*Hoffard*, *supra*, 10 Cal.4th at p. 1178, fn. 6.)

[4] We recognize that the trial court, in granting appellant's request for a certificate of probable cause, found that
(*Fn. continued on the next page.*)

p. 651.)

A. Marsden *Motions*

We begin with the trial court's denials of appellant's *Marsden* motions, which appellant challenged in seeking a certificate of probable cause. As the *Marsden* proceeding protects a defendant's constitutional right to representation (*People v. Martinez* (2009) 47 Cal.4th 399, 417), those rulings are subject to our review, notwithstanding appellant's plea (see *People v. Robinson* (1997) 56 Cal.App.4th 363, 369).

In order to obtain new court-appointed counsel, a defendant must show that "the . . . appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*People v. Smith* (1993) 6 Cal.4th 684, 696.) To carry this burden, the defendant must identify specific instances of inadequate performance. (*People v. Welch* (1999) 20 Cal.4th 701, 772.) In this regard, tactical disagreement, by itself, "is insufficient to compel discharge of appointed counsel" (*People v. Cole* (2004) 33 Cal.4th 1158,

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probable cause existed only with respect to one potential issue identified by appellant, namely, the denial of appellant's *Marsden* motions. However, as section 1237.5 does not permit the trial court to limit the scope of an appeal in issuing a certificate of probable cause (*Hoffard*, *supra*, 10 Cal.4th at pp. 1176-1180), we have examined the record for any arguable issues cognizable following a no contest plea.

1192), as is the mere fact that the defendant dislikes or distrusts appointed counsel (*People v. Clark* (2011) 52 Cal.4th 856, 918). The decision to appoint new counsel is consigned to the trial court's discretion. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.) As explained below, the record discloses no abuse of that discretion.

On August 10, 2016, the parties described their plea agreement negotiations to the trial court. When defense counsel Johnson stated that he had proposed an agreement under which an 11-year term would be imposed on appellant, the trial court noted that appellant's maximum sentence on a single count of robbery appeared to be 22 years, even if the court were to strike four of appellant's prior "strikes." Johnson maintained that there were mitigating factors, including that the robberies involved property of nominal value and that appellant suffered from drug addiction. The court continued the matter to permit further negotiations, and permitted appellant to provide his mental health records to the prosecution.

At appellant's request, the trial court then conducted a *Marsden* hearing. Appellant sought a new court-appointed attorney, arguing that Johnson had been sarcastic and disrespectful to him and his family. Appellant stated that Johnson had mischaracterized the charges as "equal to a murder case," had advised appellant that revealing his drug problem to the police was "the dumbest thing [he] could have done," and had paid appellant only one visit, during which Johnson fell asleep. Appellant also stated that Johnson had

improperly contacted appellant's family members and upset them by saying that appellant "could get forever."

Johnson denied any misconduct, stating that he had informed appellant that his case was similar to a murder case, as he potentially faced life in prison due to the multiplicity of robbery charges and his lengthy criminal record. According to Johnson, despite his efforts to convey those facts, appellant believed that his age and drug problem would enable him to avoid a long sentence. Johnson denied telling appellant that revealing his drug problem was "dumb"; rather, he advised appellant that attributing "what he did" to a drug problem was to acknowledge that "he did it," and that the gravity of the charges foreclosed the resolution of the case through a drug program. Johnson further stated that he had no improper contacts with appellant's family, and that during his visit with appellant, he fully reviewed the grocery store video recordings with appellant without falling asleep. When Johnson asked appellant to suggest a plea offer, he initially proposed a three-year term, but eventually agreed to the 11-year term offer that Johnson presented to the prosecution.

In denying the *Marsden* request, the trial court stated to appellant: "Your case -- and I think your attorney recognizes it -- is very serious. Standing alone, your conduct would not be that big a deal. . . . But the problem is, because of your record and those strikes, that conduct becomes blown up way out of proportion. [¶] So your attorney has an obligation to give you his best assessment of the underlying

case and your chances of succeeding or not succeeding at trial . . . . [¶] Maybe Mr. Johnson's bedside manner leaves a bit to be desired . . . , but the news he's giving you is accurate. [¶] So there's nothing about what he's done or said that would fall out of the realm of not competently represent[ing] you."

At the next hearing, on September 26, 2016, the prosecutor proposed a 21-year plea agreement requiring appellant to admit to one count of robbery and certain accompanying allegations. After informing appellant that he faced a potential aggregate sentence of one hundred years to life plus 21 years, the trial court ordered the matter continued to permit appellant to consider the proposed agreement.

Following that order, appellant asserted another *Marsden* motion, contending that Johnson had said that "he was going to lose in trial." Appellant stated that he did not trust Johnson because he disparaged appellant and was working with the prosecutor. Johnson responded that he had told appellant only that because the prosecution had a very strong case with "no problems of proof," it was highly likely that he would be convicted. The trial court denied the motion, stating: "The impression that I'm getting here and that I had before is that the situation is this. Mr. Johnson is giving you his assessment of the case. His bedside manner leaves a lot to be desired . . . , but it doesn't change the fact that he's fought for you . . . to get you this offer . . . If they can prove these charges, that offer is gold. . . . [¶] . . . [¶] . . . I

don't think changing attorneys is going to change anything. . . . I know that if you go to trial, you [have] as good a chance with Mr. Johnson as you do with anybody else."

On this record, the trial court did not err in denying the *Marsden* motions, as appellant identified no specific instances of inadequate performance by his attorney. The evidence before the court showed that Johnson advised appellant accurately regarding his circumstances and negotiated a favorable proposed plea agreement with the prosecution. Accordingly, there are no arguable issues relating to the *Marsden* motions.

B. *Other Contentions*

We next examine the contentions asserted in appellant's supplemental brief.[5] Appellant maintains that in entering the no contest plea, he was inadequately advised regarding the consequences of his plea and the related admissions. "When a criminal defendant chooses to plead . . . , no contest[], both the United States Supreme Court and [the California Supreme Court] have required that the

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[5] In addition to the restrictions described above, our review of these contentions is subject to another limitation. To the extent appellant challenges the prior convictions to which he admitted in entering the no contest plea, his contentions could have been presented in an appeal from the pertinent judgments of conviction, and thus may not be raised in this appeal. (*People v. Howerton* (1953) 40 Cal.2d 217, 220.) We therefore disregard all such contentions.

defendant be advised on the record that, by pleading, the defendant forfeits the constitutional rights to a jury trial, to confront and cross-examine the People's witnesses, and to be free from compelled self-incrimination. [Citations.]"[6] (*People v. Gurule* (2002) 28 Cal.4th 557, 633-634.) The California Supreme Court has also required that the defendant be advised of the direct consequences of his plea (*ibid.*), as well as any additional punishment due to prior convictions he admits in connection with the plea, provided such punishment flows directly from the prior convictions and a conviction on the underlying current charge (*People v. Cross* (2015) 61 Cal.4th 164, 171). However, no advisement is required regarding the consequences of the plea for future convictions. (*People v. Gurule*, *supra*, at pp. 633-634.)

The record shows that the trial court fully complied with these requirements when appellant entered his plea. The court informed appellant that he was waiving his right to a jury trial, his right against self-incrimination, and his

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6 In *Boykin v. Alabama* (1969) 395 U.S. 238, 242-244, the United States Supreme Court held that when a defendant voluntarily enters a guilty plea, the trial court must affirmatively establish that the defendant is aware of the constitutional rights that he or she is waiving. In *In re Tahl* (1969) 1 Cal.3d 122, 131-132, our Supreme Court extended the *Boykin* ruling, requiring that the record must expressly show the defendant entered a guilty plea and waived his or her constitutional rights following the trial court's enumeration of those rights.

right to confront his accusers. Additionally, the court detailed the consequences of appellant's plea and admissions for his current sentence and future criminal actions, including the potential use of his current robbery conviction as "a prior felony conviction, prior strike, and a prior prison commitment." The record thus discloses no defect in the court's advisements.[7]

Appellant contends his sentence was erroneously determined, arguing that the robbery to which he entered the no contest plea was incorrectly regarded as a first-degree robbery, and that there was an improper "du[a]l use" of facts. However, the record establishes that the trial court imposed the five-year high term applicable to second degree robbery, rather than the six-year or nine-year high terms applicable to first degree robbery (§ 213, subd. (a)).[8] Furthermore, there was no improper "dual use" of appellant's admitted knife use and prior convictions. The court was permitted to impose the high term on the robbery to which appellant pled no contest -- namely, the December

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[7] In a related contention, appellant asserts that Johnson rendered ineffective assistance by failing to challenge the advisements. That contention fails, as defense counsel is not obliged to raise meritless objections. (*People v. Price* (1991) 1 Cal.4th 324, 387.)

[8] First degree robbery encompasses only those robberies conducted at or within statutorily specified locations, including ATM machines, transit vehicles, and inhabited structures. (§ 212.5.)

21, 2015 robbery of Anthony Jones (count one) -- because it was transactionally related to a dismissed charge of robbery (count 2) involving a different victim, viz., the manager of the store at which Jones worked.[9] (*People v. Guevara* (1979) 88 Cal.App.3d 86, 92-94; see *People v. Calhoun* (2007) 40 Cal.4th 398, 405-408.) The court also properly employed one of the prior convictions appellant admitted -- namely, a 2006 conviction for criminal threats (§ 422) -- as a strike under the Three Strikes law (for purposes of doubling the high term on the admitted robbery) and the basis for a five-year enhancement (§ 667, subd. (a)(1)). (*People v. Ramirez* (1995) 33 Cal.App.4th 559, 566).[10]

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[9] In a related contention, appellant suggests that the five-year high term was incorrectly applied to what he describes as an "*Estes* [r]obber[y]." That term refers to a robbery in which property was acquired peacefully, but force or fear was used to prevent its owner from regaining it. (*People v. Pham* (1993) 15 Cal.App.4th 61, 67; see *People v. Estes* (1983) 147 Cal.App.3d 23, 27-28.) Because the *Estes* robbery which appellant admitted was a second degree robbery (*People v. Gomez* (2008) 43 Cal.4th 249, 254-266 [affirming second degree robbery conviction of defendant who first used force or fear when property owner tried to regain property]), it was properly subject to a five-year high term.

[10] Appellant suggests that the 2006 conviction was too old to serve as a strike. However, the age of a conviction, by itself, does not preclude it from serving as a strike. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813 [trial court
(*Fn. continued on the next page.*)

Appellant's remaining contentions fail on the record before us. He asserts that he did not understand his no contest plea because he had not taken his medication, even though the record discloses that he repeatedly affirmed that he understood the plea agreement and its consequences when he entered the plea. As the record is silent regarding whether appellant was, in fact, taking medication necessary for his ability to comprehend the plea, his contention is not cognizable in this appeal. (*People v. Sanders* (1990) 221 Cal.App.3d 350, 362.)

Appellant's other contentions fail for similar reasons. He suggests that the trial court did not order a mental health evaluation or otherwise respond appropriately to letters he submitted regarding his mental health. Generally, the trial court is obliged to investigate a defendant's competency to stand trial only when there is "[s]ubstantial evidence of incompetence" (*People v. Mai* (2013) 57 Cal.4th 986, 1032), that is, "'evidence from which a reasonable jurist would entertain a bona fide doubt concerning competency'" (*People v. Mendoza* (2016) 62 Cal.4th 856, 884). No such evidence appears in the record. Although appellant referred to his addiction problem and mental health records during the first *Marsden* hearing, he conducted himself appropriately throughout the proceedings; furthermore, the record lacks appellant's mental health records and the letters to

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erred in striking a strike merely because it was 20 years old].)

which he refers in his brief.[11]

C. *Conclusion*

In addition to examining appellant's contentions, we have reviewed the record and found no potential error. We therefore conclude that appellant's counsel has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende*, *supra*, 25 Cal.3d at p. 441.)

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[11] For the same reasons, the record supports no contention that Johnson rendered ineffective assistance by failing to raise an issue regarding appellant's competency to stand trial. (*People v. Sanders*, *supra*, 221 Cal.App.3d at p. 362.)

## DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.