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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. XAVIER MAGALLANES, Defendant and Appellant.	B227960 (Los Angeles County Super. Ct. No. TA107818)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Cheroske and Pat Connolly, Judges. Affirmed in part, reversed in part, and remanded.

Doris M. Frizell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Daniel C. Chang and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Xavier Magallanes appeals from a judgment following convictions for attempted murder and shooting into an occupied vehicle. He contends the trial court denied him his constitutional right to counsel when the court denied him a continuance to discharge retained attorney and substitute a new attorney. In addition, both appellant and respondent contend there are sentencing errors. We will affirm the convictions, and remand for resentencing.

STATEMENT OF THE CASE

A jury found appellant guilty of attempted premeditated murder (counts 1 & 2; Pen. Code, §§ 664/187, subd. (a))[1] and shooting at an occupied motor vehicle (count 3; § 246). The jury also found true that appellant personally used and intentionally discharged a firearm (§ 12022.53, subd. (c)), and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The trial court sentenced appellant to a term of life in state prison, plus a firearm use enhancement of 20 years on count 1, and a consecutive term of the same length on count 2. The court stayed the sentence on count 3, pursuant to section 654. Appellant was given 324 days of presentence custody credit based on 282 actual days in custody and 42 days of local conduct credit. In addition, the court imposed a $1,000 restitution fine (§ 1202.4, subd. (b)) and a $1,000 parole revocation fine, which was suspended pending completion of parole (§ 1202.45). The court waived all remaining "mandatory fees." Appellant timely appealed from the judgment.

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

STATEMENT OF THE FACTS

A. *Prosecution Case*

Eric Silva testified that on June 7, 2009, at about 11:30 p.m., he was driving his Oldsmobile Cutlass in Lynwood. His friend, Jose Velasquez, was a passenger in the vehicle. After stopping at an intersection, Velasquez noticed another Oldsmobile approaching the intersection and told Silva, "'Check it out, it is a car like yours.'" Silva continued to his destination, and the other vehicle began following. After a while, Silva noticed the other vehicle was still following. As he turned left onto a school road, the other vehicle sped up and pulled alongside Silva's vehicle. Both vehicles were in an area illuminated by a street light.

Silva testified that appellant was driving the other vehicle -- a silver-gray Oldsmobile Cutlass. There was also a passenger in appellant's car. Silva further testified that after appellant had pulled alongside him, appellant asked, "Where you guys from?" Silva responded, "What do you mean? . . . I don't bang." Appellant then stated, "You guys tuna fish. You guys tuna fish." Silva repeated that he did not bang. Appellant then stated, "This is my block. This is my block." Silva responded, "Cool. You know what? I don't bang. So keep on banging the block. I don't do bang." Appellant again said, "Tuna fish." Silva understood "tuna fish" to be a derogatory term for members of the Tortilla Flats gang.

Silva testified that appellant continued saying "Tuna fish," and Silva continued to reply, "No." Appellant then pulled out a revolver with his left hand, and pointed it at Velazquez. In response, Silva immediately stepped on his accelerator and drove away. As Silva did so, appellant fired four shots. Silva testified he drove without stopping until he reached a friend's house.

Silva's friend called the police. Silva noticed there were several bullet holes in his car, including one in the windshield and another in the rear quarter panel.

Silva testified he was present when a deputy sheriff recovered a bullet from the trunk of his car.

Silva also testified that a few days after the shooting, he identified appellant from a photographic six-pack. Silva further testified that he was shown some photographs of a car, and that he identified that car as the one appellant was driving. Silva noted that appellant drove a rare type of car. Silva knew that it was a rare car because "I know those type[s] of cars. I am a car person, that is what I do."

Silva's passenger, Velasquez, also testified at trial, providing testimony consistent with Silva's. Velasquez testified that appellant pulled out a chrome .38 revolver and pointed it at his face. Velasquez identified appellant as the shooter in court, and testified that he had previously identified appellant from a photographic six-pack.

Deputy Sheriff Marc Antrim testified that he made a traffic stop of appellant on June 10, 2009. Appellant was driving a silver Oldsmobile Cutlass; the deputy took some photographs of the vehicle. Deputy Antrim also testified that he conducted a field interview of appellant during the encounter. Appellant "self-admitted" he was an El Segundo gang member with the moniker "X-Man." Appellant also had a tattoo on his back consistent with membership in the El Segundo gang.

Detective Ben Torres testified that on August 5, 2009, appellant was arrested, and his home was searched after appellant and his mother consented. During the search, officers recovered a speedloader for a revolver handgun and some ammunition, including a .380-caliber bullet.

Senior criminalist Tracey Peck, a firearms examiner, testified she examined the bullet recovered from Silva's car. She determined that the fired bullet was

consistent with the type of bullet commonly loaded into .380 auto caliber cartridges. Peck also stated that that it was possible to load and use automatic bullets in a revolver.

Detective Patrick Escamilla testified as a gang expert regarding the Lynwood El Segundo 13 and Tortilla Flats gangs. Detective Escamilla testified that the two gangs were rivals and had members living in parts of Lynwood. Detective Escamilla opined that Silva and Velasquez were not members of the Tortilla Flats gang.

Detective Hugo Reynaga also testified as a gang expert. Detective Reynaga opined that appellant was a Lynwood El Segundo 13 gang member based upon appellant's admissions, and other indicia of gang membership, such as associating with two admitted gang members. After being presented with a hypothetical situation that mirrored the evidence in the instant case, Detective Reynaga opined that the shootings were committed for the benefit of a criminal street gang.

B. *Defense Case*

Marina Elbadry, appellant's mother, testified that appellant was right-handed. She also testified that at the time of the incident, appellant was on a school vacation. She stated that appellant was not a gang member.

DISCUSSION

A. *Denial of Motion for a Continuance*

Appellant contends he was denied his constitutional right to the assistance of counsel when the trial court refused to allow him a continuance in order to discharge his retained attorney and substitute another private attorney. We disagree.

1. *Relevant Background*

Appellant was represented by private counsel, John Goalwin, at the preliminary hearing and at subsequent hearings in 2009. On February 25, 2010, appellant appeared with Mr. Goalwin. The minute order for the hearing stated: "Per stipulation of all parties, the matter is set for jury trial for . . . 03/09/10." Nothing in the appellate record suggests appellant raised any objection to Mr. Goalwin's representation.

On March 8, 2010, the day before trial, attorney Brian Michaels filed a notice of motion and motion for continuance and a motion to substitute as attorney of record. In the declaration filed in support of the motion, Mr. Michaels stated that "[d]uring the week of February 19, 2010," appellant asked him to represent appellant in the instant matter. Michaels further stated that he tried to get the case files and an accounting of fees from Mr. Goalwin, but was unsuccessful. The declaration then stated: "[Appellant]'s family signed a contract to retain my office to represent [appellant] at the last appearance in this matter. I received a call that they decided to stay with their current lawyer at the 11th hour. I assumed my contact with [appellant] and his family [was] now done. It was not. I received a call on [Thursday] 3/4/10 from [appellant]'s family once again indicating they no longer wanted to go on with Mr. Goalwin and would I take the case. They indicated Mr. Goalwin's failure to return unearned fees is what caused the delay and the timing of the call." The declaration further stated: "As of March 5, 2010 I was not retained but may be retained on Monday[, March 8, 2010]." Later, the declaration stated: "Today, March 8, . . . [appellant] confirmed his personal desire to have our firm [s]ubstitute in as attorney of record. On information and belief the long delay was brought about by current counsel's failure to account for and return all unearned fees."

The motion for a continuance and substitution of new attorney of record was noticed for the first day of trial, March 9, 2010, at 8:30 a.m., before Judge John J. Cheroske. On March 9, appellant and Mr. Goalwin appeared before Judge Cheroske. Mr. Goalwin informed the court that when he visited appellant in county jail yesterday, "I was informed by [appellant] that he did not want me to represent him anymore. He retained another attorney." Mr. Goalwin also stated that when he arrived at his office that morning, "there was an email that was sent to me Sunday night [March 7, 2010] from attorney Brian Michaels saying he was going to take the case. Apparently he filed a [motion for a continuance under Penal Code section] 1050."[2]

The trial court asked if Mr. Michaels was present, but there was no response. The court then asked the prosecution if it was ready, and the prosecutor responded in the affirmative. The court stated the matter had been pending for eight months, and that the trial had been continued six times.[3] The court further stated, "I received a request in writing from Brian Michaels to 1: substitute in to the case and 2: to continue the case and most importantly, he's not even here. So his request is denied. It's untimely anyway. And in my opinion, it will just be another unnecessary delay." The court transferred the matter for trial before the Honorable Patrick Connolly.

When the parties appeared before Judge Connolly, Mr. Michaels was present, and asked that the previously denied motion for substitution be "reviewed." Judge Connolly stated: "Mr. Goalwin announced ready. . . . This

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[2] The motion was not filed until Monday, March 8.

[3] Appellant disputes the court's figures, but acknowledges that the case had been pending for more than six months and that multiple continuances had been granted.

was sent here for trial. This motion regardless of whether or not Mr. Michaels was present was heard by [Judge Cheroske]. There is nothing that I have heard that would . . . lead me to believe that there is anything different except for this, Mr. Michaels, are you ready to go to trial today?" Mr. Michaels stated, "Absolutely not." The court denied the motion to substitute counsel, and stated that trial would commence that day with Mr. Goalwin. The court declined to hear from appellant at that time, but later, the court heard from appellant "in the framework of a *Marsden*[4] [hearing]."[5]

2. *Analysis*

Under the Sixth Amendment of the federal constitution, a criminal defendant has the right to be represented by counsel at all critical stages of the prosecution. (*Faretta v. California* (1975) 422 U.S. 806, 818-819.) The right to effective assistance of counsel includes the right to appear with retained counsel of one's choice. (*People v. Gzikowski* (1982) 32 Cal.3d 580, 586.) A court, however, may deny a motion for a continuance to obtain new counsel if the motion was made for the purpose of delaying trial, was untimely, or would impair efficient judicial administration. (*Ibid*.)

After reviewing the record, we find no abuse of discretion in the denial of appellant's motion for a continuance and to substitute a new attorney of record. (*People v. Courts* (1985) 37 Cal.3d 784, 790, citing *Ungar v. Sarafite* (1964)

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

[5] Appellant contends the trial court erred in holding a *Marsden* hearing because a criminal defendant wishing to discharge retained counsel need not satisfy the requirements of *Marsden*. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) Any error in holding a *Marsden* hearing, however, is irrelevant to the issue on appeal, as the denial of the motion for continuance and substitution occurred prior to and independent of such hearing.

376 U.S. 575, 589 [granting of a continuance is within discretion of the trial court].) First, the motion was untimely, as it was noticed for the first day of trial. (See, e.g., *People v. Lau* (1986) 177 Cal.App.3d 473, 479 [trial court did not abuse its discretion in denying defendant's request to replace attorney made right before jury selection]; see also *People v. Courts*, *supra*, 37 Cal.3d at p. 792, fn. 4 [citing cases where the lateness of continuance requests made on "the eve-of-trial, day-of-trial, and second-day-of-trial" was a significant factor justifying denial of motion].) In addition, Judge Cheroske acted within his discretion to deny appellant's motion because Mr. Michaels was not even present when the motion was to be heard and, according to his declaration, was seeking not only a substitution, but a continuance. Similarly, Judge Connolly did not abuse his discretion in denying the renewed motion for a substitution because there was no change in the factual circumstances, except an affirmation from Mr. Michaels that he was not ready to try the case. There can be no dispute that the granting of the motion would have delayed the trial yet again and thus impaired the efficient administration of justice. (See *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428 [fair opportunity to secure counsel of choice is necessarily limited by the countervailing state interest in proceeding with prosecutions on an orderly and expeditious basis, "'"taking into account the practical difficulties of 'assembling the witnesses, lawyers, and jurors at the same place at the same time'"'"].)

Appellant contends on appeal that the untimeliness of his request was due to attorney Goalwin's failure to bring to the court's attention appellant's desire to retain new counsel. He suggests Mr. Goalwin should have notified the court about appellant's desire to retain new counsel at the February 25 hearing. The record indicates, however, that as of that date appellant had decided to continue with Mr. Goalwin. In Mr. Michaels' declaration, he stated he had initially been retained by

appellant's family to represent appellant at the February 25, 2010 hearing, but at the "11th hour," had received a call from the family that they were staying with their current attorney. In addition, the record shows that appellant was present at the February 25, 2010 hearing, but nothing in the record suggests he raised the issue of obtaining new counsel. In short, appellant has failed to show he could not have retained new counsel in a timely fashion or was prevented from bringing to the court's attention his desire to do so. (Compare *People v. Blake* (1980) 105 Cal.App.3d 619, 623-625 [where defendant had reasonable opportunity to obtain counsel of his choice but failed to do so until on or after commencement of trial, trial court did not abuse its discretion in denying continuance] with *People v. Courts*, *supra*, 37 Cal.3d at pp. 791-796 [where defendant, more than a week before trial, requested a continuance to retain private counsel, retained counsel five days before trial, and sought to have matter heard several days prior to trial, court erred in denying continuance].) Accordingly, we find no error in the denial of his motion for a continuance.

B. *Sentencing*

Both parties contend there were sentencing errors. Appellant contends the trial court was unaware it had discretion to impose a concurrent sentence on the second count of attempted premeditated murder. Respondent contends the trial court erred in failing to include certain mandatory fees and assessments. We address each contention in turn.

1. *Concurrent or Consecutive Sentences*

Where a defendant has been convicted of a number of serious felonies, each of which separately qualifies the defendant for a life sentence, the trial court has discretion to order that the life terms be served either concurrently or consecutively. (*People v. Jenkins* (1995) 10 Cal.4th 234, 254-256.) The court may

impose consecutive terms of imprisonment where the criminal act is an act of violence against separate individuals. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 459.) If the court is unaware of its sentencing discretion, the matter must be remanded. (*People v. Deloza* (1998) 18 Cal.4th 585, 599-600.) However, remand is not necessary "where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

In this case, appellant had asked the court to impose a concurrent sentence on count 2, based on several mitigating circumstances, such as the fact that his mother depended upon him for assistance. The prosecutor disagreed, stating:

"I think the court is somewhat limited by the Penal Code in what it can and cannot impose as far as the 20 year gun allegation that's mandatory, and I believe consecutive on each count, since they were separate victims.

"I believe count 3, 654's.

"So [appellant] should be sentenced on counts 1 and 2. I don't believe that there is a determinate sentence for count 1 as the base term; I believe that it's a life sentence. And, in addition, the gang allegation and the charge itself [e]nsure that [appellant] is eligible for parole on that life sentence after 15 years, after he has served the 20 year allegation on the gun enhancement pursuant to Penal Code section 12022.53(c).

"And I would just ask the court to impose the maximum that is allowed under this case, based on the facts."

The trial court told appellant, "this is, I think, truly a sad case for a couple of reasons. First of all, the simple fact of the matter is that you have a family that needs you. You have a younger brother that needs you, and you have a mother that, obviously, needs you. And because of your actions, no matter how reckless,

careless, or stupid they were, [they] are going to take you away from the people who need you. . . . I think that you[] and the victims in this case are extremely lucky that this was not a murder -- or perhaps even two murders. As to the sentencing itself, the court is limited. There is really no high [term], and there is no low term. As to count 1, the court chooses the only term appropriate, which is life. The court is also going to impose the 12022.53(b) and (c), which adds 20 years. . . . As to count 2, the court is also imposing life, as well as the 12022.53(b) and (c). And so you will serve a consecutive life plus 20 years." On count 3, the court imposed the middle term of five years, plus 20 years for the firearm enhancement, but stayed the sentence pursuant to section 654.

On this record, we cannot be confident the trial court recognized its discretion to impose a concurrent sentence on count 2. The prosecutor's comments can reasonably be read to suggest that consecutive sentences were mandatory. The court's own observation that appellant was lucky the shootings did not result in one or two murders appears to be little more than a comment on the evidence, rather than a statement of its reasoning for imposing a consecutive sentence. Moreover, the record does not show that there is no reasonable probability that the trial court would have imposed a different sentence. (Cf. *People v. Coehlo, supra*, 89 Cal.App.4th at p. 889 [no remand because "trial court has twice imposed 10 consecutive sentences and indicated that it would impose them even if some were not mandatory"].) Accordingly, we will remand to the court to exercise its discretion in imposing either a consecutive or concurrent sentence on count 2.

2. *Mandatory Fees and Assessments*

At sentencing, the trial court imposed a "parole fine of $1,000." The court made no comment about imposing or waiving any other fines or fees. However, the minute order indicated the trial court imposed a restitution fine of $1,000

pursuant to section 1202.4, subdivision (b), and stayed a parole revocation fine of $1,000 pursuant to section 1202.45. In addition, a "[n]unc pro tunc minute order prepared by S.A. Rucker, Clerk" added the notation: "The court waives remaining mandatory fees."

Respondent contends -- and appellant concedes -- that the trial court was required by section 1465.8, subdivision (a)(1) to impose a $30 court security fee for each of the three criminal convictions for a total of $90. Respondent further contends the court was required by Government Code section 70373, subdivision (a)(1) to impose a $30 court facilities assessment for each conviction, for a total of $90. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327 [court security fee]; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1414 [court facilities assessment].) We agree. On remand, the trial court shall impose the correct fees and assessments.

DISPOSITION

The convictions are affirmed. The matter is remanded for resentencing consistent with this opinion.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.