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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PRINCE AYREE,

Defendant and Appellant.

B229103

(Los Angeles County
Super. Ct. No. BA366597)

APPEAL from a judgment of the Superior Court of Los Angeles County,
William C. Ryan, Judge. Affirmed.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for
Plaintiff and Respondent.

Defendant and appellant, Prince Ayree, appeals the judgment entered following his conviction for 11 counts of commercial burglary, with prior prison term and prior serious felony conviction findings (Pen. Code, §§ 459, 667.5, 667, subd. (b)-(i)).

He was sentenced to state prison for a term of 14 years, 8 months.

The judgment is affirmed.

BACKGROUND

Ayree was convicted for having burglarized a series of grocery stores and pharmacies. Given the nature of his appeal, it is not necessary to discuss the particular facts of each crime.

CONTENTIONS

1. The trial court erred by denying Ayree's *Faretta* motion to represent himself at trial.

2. The trial court erred by failing to conduct an adequate *Marsden* hearing after Ayree complained about defense counsel.

DISCUSSION

1. *Procedural background for both contentions.*

On the day set for trial, and just before prospective jurors were brought into the courtroom for voir dire, Ayree asked to address the court:

"The Defendant: I was trying to hire another counsel. The one that I have at present just told me to 'F' off to my face in the back. So I was trying to retain a different counsel. That's what I was trying to do.

"The Court: Well, you're here for trial. Unless that lawyer walks in right now and says, 'I'm ready to go,' we're going forward with the trial.

"The Defendant: Well, would there be any chance that I would be able to exercise my *Faretta* rights?

"The Court: Are you ready to go?

"The Defendant: No, I'm not.

"The Court: No. It's untimely. The answer is no."

The trial court asked defense counsel if she was ready for trial, and counsel said she was. The court again told Ayree his *Faretta* request was untimely and then said, “Clear the court room. I’ll treat this as a *Marsden* motion.”

With the courtroom cleared, the trial court asked: “What are you unhappy about, Mr. Ayree, other than you didn’t like the way defense counsel talked to you?” Ayree complained counsel had not shown him the security camera videotapes which had been recorded during the burglaries. Asked if there was anything else, Ayree said only: “And the fact that the way she just spoke to me is blatant disrespect, and I’ve never disrespected her since I’ve been dealing with her.”

Defense counsel explained there were 13 hours of surveillance camera videotapes, that she had given Ayree copies of the relevant still photographs which had been extracted from the videotapes,¹ and that “to sit at Wayside with Mr. Ayree while he watches 13 hours of videotape, to make those special[] arrangements and to spend those 13 hours is simply unfeasible and unproductive.”

The trial court then ruled: “I think that’s a tactical call by the attorney. She showed the relevant parts. She doesn’t have to sit through 13 hours and show you everything, especially since she showed you the relevant parts. [¶] I don’t find any basis to remove [her].”

2. *Ayree’s Faretta motion was properly denied as untimely.*

Ayree contends the trial court improperly denied his motion to represent himself at trial pursuant to *Faretta v. California* (1975) 422 U.S. 806 (45 L.Ed.2d 562). This claim is meritless.

¹ Defense counsel explained: “[T]hose stills have been printed out, and they have been done in color, and [the prosecutor] was kind enough to make color copies for me to share with Mr. Ayree, and it’s the other 12.7 hours of the videotapes that he wants to see and that he’s upset that I have not . . . brought to Wayside.” Presumably the color stills were the key shots identifying Ayree as the burglar.

a. *Legal principles.*

“A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [Citation.] ¶ . . . ¶ . . . ‘[U]nlike the right to be represented by counsel, the right of self-representation is not self-executing. In *Faretta*, . . . the court held that a knowing, voluntary, and unequivocal assertion of the right of self-representation, made weeks before trial by a competent, literate defendant, should have been recognized [citation]; subsequent decisions of lower courts have required expressly that the defendant make a timely and unequivocal assertion of the right of self-representation. [Citations.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21.)

Ayree’s motion was properly denied because it was neither timely nor unequivocal.

Faretta motions made on the eve of trial are routinely held to be untimely. (See *People v. Valdez* (2004) 32 Cal.4th 73, 102 [motion for self-representation made “moments before jury selection was set to begin” was untimely]; *People v. Clark* (1992) 3 Cal.4th 41, 99 [*Faretta* request made during 10-day trailing period was, in effect, made on eve of trial and, therefore, was untimely]; *People v. Burton* (1989) 48 Cal.3d 843, 853 [*Faretta* motion made “after the case had been called for trial, both counsel had answered ready, and the case had been transferred to a trial department for pretrial motions and jury trial” was untimely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 626 [“motions for self-representation made on the day preceding or on the trial date have been considered untimely”].)

“ ‘When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court’s discretion.’ [Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) “In exercising that discretion, a trial court is required to consider (1) the quality of counsel’s representation, (2) the defendant’s prior proclivity to substitute counsel, (3) the reasons for the request, (4) the length and stage of the proceedings, and (5) the disruption or delay which might reasonably be expected to follow the granting of such a motion. (*People v. Windham* (1977) 19 Cal.3d 121, 128)” (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1204.) A trial court need not, however, explicitly consider the *Windham* factors on the record. (See *id.* at p. 1206 [although “the trial court may not have explicitly considered each of the *Windham* factors, there were sufficient reasons on the record to constitute an implicit consideration of these factors”]; *People v. Perez* (1992) 4 Cal.App.4th 893, 904 [“While the court did not specifically make [a *Windham*] inquiry, we conclude there were sufficient reasons on the record for the court to exercise its discretion to deny the request.”].)

“When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give ‘considerable weight’ to the court’s exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]” (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

b. *Discussion.*

Ayree sought to represent himself on the morning jury selection was set to begin; he was not ready to go to trial and would have needed a continuance. Under these circumstances, Ayree’s *Faretta* motion was certainly untimely. In addition, it was not unequivocal because Ayree only made the motion *after* announcing he was trying to retain new counsel and the trial court indicated it would not grant a continuance for that purpose. “Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant’s conduct or words reflecting ambivalence about self-representation may support the court’s decision to deny the defendant’s motion.”

(*People v. Marshall*, *supra*, 15 Cal.4th at p. 23 [motion for self-representation made in frustration may be denied].)

The trial court did not abuse its discretion by denying Ayree's motion for self-representation.

3. Ayree's *Marsden* motion was properly denied.

Ayree contends the trial court violated *People v. Marsden* (1970) 2 Cal.3d 118, by denying his request to substitute appointed counsel. This claim is meritless.

a. *Legal principles.*

“ ‘ “When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to 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.” ’ [Citation.] The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would ‘substantially impair’ the defendant's right to effective assistance of counsel.” ’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 878.)

“ ‘As we have stated, “a *Marsden* hearing is not a full-blown adversarial proceeding, but an informal hearing in which the court ascertains the nature of the defendant's allegations regarding the defects in counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement.” [Citation.]’ [Citation.]” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

A bare assertion of inadequate representation is insufficient to require appointment of new counsel; the defendant must make a substantial showing. (*People v. Crandell* (1988) 46 Cal.3d 833, 859, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364.) “[I]f a defendant's claimed lack of trust in, or inability to get along

with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.”’ [Citation.]” (*People v. Memro* (1995) 11 Cal.4th 786, 857.) “We do not find *Marsden* error where complaints of counsel’s inadequacy involve tactical disagreements.” (*People v. Dickey* (2005) 35 Cal.4th 884, 922.)

“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.)

b. *Discussion.*

Ayree argues the trial court erred by failing to adequately inquire into the alleged swearing incident. But the record shows the court listened to Ayree’s complaints and twice asked if there was anything else he wanted to say. Ayree explained he was unhappy with defense counsel’s comment because it showed disrespect. There is nothing in the record to suggest Ayree had any more to say about the matter. Even if counsel did swear at Ayree, that would not, by itself, have demonstrated an irreconcilable conflict necessitating substitute counsel. (See *People v. Taylor, supra*, 48 Cal.4th at p. 600 [holding that, although defendant cursed and lunged at defense counsel, “heated words alone do not require substitution of counsel without a showing of an irreconcilable conflict”]; *People v. Smith* (1993) 6 Cal.4th 684, 688, 696 [where defendant accused defense counsel of using “ ‘foul language,’ ” court held: “Although clearly some heated words were spoken between client and attorney . . . that alone does not require a substitution of counsel absent an irreconcilable conflict.”].)

We conclude the trial court did not err by denying Ayree’s *Marsden* motion.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.