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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN DARIUS LUCAS, Defendant and Appellant.	B232932 (Los Angeles County Super. Ct. No. YA076170)

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

Justin Darius Lucas, in pro. per.; and Johanna R. Perko, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Justin Darius Lucas appeals from a judgment of conviction of second degree robbery with the use of a firearm, and various prior offenses. Finding no prejudicial error, we affirm.

STATEMENT OF FACTS

On the late afternoon of September 21, 2009, 62-year-old Rene Aguero Ferrada arrived in his van at the underground parking garage of an apartment complex, to visit his son. When he opened the van's sliding side door, a man approached him from the rear of the van, pointing a large black handgun at Ferrada's chest. He later identified the man as defendant. With his finger on the gun's trigger, defendant demanded money.

When Ferrada replied that he had no money, defendant searched Ferrada's pants pockets, finding Ferrada's wallet with $25. Defendant took the money, and a black cell phone, and returned the wallet.

Defendant became angry when Ferrada said he had no more money. He punched Ferrada on the chin, and told him to face the wall. As defendant left the parking garage, Ferrada followed, running out to the garage in time to see defendant get into the passenger side of a waiting blue minivan being driven by a woman.

As Ferrada ran after the van a police car drove from the parking lot of a nearby restaurant. Ferrada pointed and told the officer that his money and cell phone had been taken, and that "he has a weapon."

The officer, Los Angeles County Sheriff Deputy Mercado, had seen defendant walk quickly from the parking garage holding his waistband, followed by Ferrada, waving his arms and yelling about having been robbed at gunpoint. When Mercado saw defendant get into the minivan, he drove his patrol car in front of the minivan and ordered its occupants to get out. Mercado gave the black cell phone defendant was holding to Ferrada.

The minivan's driver went to the patrol car's back seat at Mercado's instruction. But defendant opened the van door and ran, holding his waistband. Mercado chased defendant in his patrol car, seeing him stop briefly to remove a handgun from his

waistband and throw it into a trash can. He found defendant hiding behind a pillar, and arrested him.

After detaining defendant, Mercado recovered the gun—a loaded nine-millimeter semi-automatic pistol—from a trash can where he had seen defendant throw it. From the minivan's passenger seat Mercado recovered $25, and a wallet containing defendant's identification. Shortly afterward, Ferrada identified defendant as the man who had robbed him, and he identified photographs of his cell phone, the minivan, and the gun.

After defendant's arrest but before he had been advised of his rights under *Miranda v. Arizona* (1996) 384 U.S. 436, Detective Glynn approached defendant's jail cell, telling him that he was being charged with robbery and possession of a firearm, and asking if he wanted to speak to her. Defendant replied that he did not want to talk to her. As Detective Glynn walked away without asking anything further, defendant shouted after her, asking why the woman arrested with him was being held, and saying that the woman had "nothing to do with this," that she did not know he was "going to pitch," and to "tell her I love her." The detective testified that "pitch" is common street slang for stealing or robbing someone. In a hearing under Evidence Code section 402, defendant's counsel argued unsuccessfully that evidence of defendant's statement to the detective should be excluded, as a violation of his rights under *Miranda*.

Also over defendant's objection, the prosecution presented testimony from Patricia Jones that on June 20, 2000, she had been the victim of an attempted carjacking for which defendant had been tried and convicted. Ms. Jones testified that she and friends had encountered defendant and others at about 1:00 a.m. at a gas station near her Malibu home. Defendant and a friend had then followed Jones home, through her electric security gate. In Jones's driveway, defendant had approached Jones's car, pointed a gun and told her passenger to get out and empty his pockets, then had gotten into the car and demanded Jones's jewelry. Jones refused. Angry and nervous, defendant had pointed the gun at her forehead; however, he fled when Jones yelled "release the dogs; close the gate." The jury was instructed that Jones's testimony could not be used to show

defendant's bad character or his guilt of the charged offenses, but could be considered only on the issues of his identity as the perpetrator of the charged offense, his intent to deprive Ferrada of his property, or whether the charged offense was part of a plan. (Evid. Code, § 1101, subd. (b).)

PROCEDURAL HISTORY

A November 10, 2009 information charged defendant in count 1 with second degree robbery, a felony (Pen. Code, § 211), and charged that in committing that offense he had personally used a firearm, rendering the offense a "serious" and "violent" felony. (Pen. Code, § 12022.53.) Count 2 of the information charged defendant with possession of a firearm by a felon with prior convictions, a felony (former Pen. Code, § 12021, subd. (a)(1), now Pen. Code, § 29800, subd. (a)(1)).

The information charged in connection with the count 2 offense that defendant had suffered a June 30, 2000 conviction for attempted carjacking,[1] and an October 15, 1998 conviction for violation of Health & Safety Code section 11359. And based on the attempted carjacking conviction, the information charged also that defendant had suffered a prior strike under the three strikes law; a prior serious felony conviction under section 667, subdivision (a)(1); and a prior conviction under section 667.5, subdivision (b). (Pen. Code, § 1170.12, subd. (a)-(d).)

On June 1, 2010, the trial court denied defendant's motion to strike his prior conviction (for which he had received a prison sentence of eight years and six months) under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. On June 2, 2010, the court granted the prosecution's motion to admit evidence of defendant's 2001 prior conviction, and the testimony of Ms. Jones about the attempted carjacking, pursuant to Evidence Code section 1101, subdivision (b). Defendant then stipulated to the 2001 conviction, and a 1998 conviction for violation of Health & Safety Code section 11359.

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[1] The information was later amended without objection to correct the name of the charged offense's victim, and the date of defendant's prior convictions to September 4, 2001 and September 30, 1998.

On June 4, 2010, the court denied defendant's motion to exclude the detective's testimony about his spontaneous jailhouse statement. At the conclusion of the prosecution's evidence, the court denied defendant's motion to dismiss the charges for insufficiency of the evidence. (Pen. Code, § 1118.1.) The jury was instructed, and the Friday afternoon session ended with the prosecution's opening argument to the jury.

On Monday, June 7, 2010, the court session began with a short final argument to the jury by defendant's attorney. At the close of that argument, defendant asked for permission to address the court. The court instructed defendant to wait while the jury exited into the jury room; however, defendant apparently did not wait. The transcript reflects that before the jury had left the courtroom—and while the court was telling him, "Stop. Just hold on. Stop. Okay"—Defendant said "Jurors falling asleep. This is my life. You playing me. You ain't saying nothing. You even witnessed a juror going to sleep several times."

After the jurors had left the courtroom, the court permitted defendant to talk. Defendant explained that he had been seeing jurors falling asleep, and had been telling his retained attorney, who had done nothing. "This is my life you are playing with," he explained. He also complained that the trial was unfair because he had seen a detective coercing a witness (apparently Ms. Jones), with gestures and nods. "Ain't nobody on my side. Everybody is against me. This is not a fair trial." Defendant then requested a *Marsden* hearing.

After clearing the courtroom of everyone except court personnel, the trial court heard, and denied, defendant's motion to discharge his attorney under *People v. Marsden* (1970) 2 Cal.3d 118. As the court later observed, however, that case does not apply when the defendant has a retained attorney, as defendant did. "So that hearing, it was moot, in any event."[2]

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[2] The court ordered the *Marsden* hearing transcript "stricken and destroyed" in order to prevent disclosure of any attorney-client communications.

With respect to defendant's complaint that jurors had fallen asleep during the trial, the court noted its own observation that some jurors seemed sleepy—though not asleep—before he had ordered them into the jury room. Defendant's retained attorney, and the prosecutor, also said that they had not seen a juror falling asleep or dozing. Defendant's retained attorney suggested that if the court had seen a juror dozing, he or she should be replaced by an alternate; the prosecutor suggested that first the court should ask the juror whether he had dozed off.

When asked, the juror said that his eyes were closed but he had "heard everything." Defendant told the court, however, that "I know that man right there, I seen him sleep on two occasions more than five minutes," and that the court had not seen it because "you were up there typing or doing something." The court nevertheless concluded that the juror had not been asleep, and denied the request that he be replaced.[3]

The court then admonished defendant to control himself during the remainder of the prosecution's closing argument—which defendant promised to do, while continuing to indicate that he had no confidence that his retained attorney would adequately defend him. After questioning the jury panel, the court also determined that although at least one juror had heard defendant's outburst and comment that jurors were falling asleep, that would not affect their impartiality. The prosecution then concluded its closing argument.

The jury began deliberations shortly before lunch on June 7, 2010, announcing soon afterward that they had reached a verdict. That afternoon it announced its verdict finding defendant guilty on both counts. Defendant agreed to delay the determination of his prior convictions and sentencing.

Beginning with the next hearing a few days later, and continuing at subsequent hearings, defendant's retained counsel sought to be relieved as counsel because "[t]he attorney client relationship has been destroyed by Mr. Lucas."

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[3] Upon the court's refusal to replace the juror, appellant said ". . . [T]his is not a fair trial. Why is everything getting denied towards me? Everything is getting denied. You know that man was asleep. You know he was asleep."

After considering whether defendant should represent himself in pro. per. for the purpose of moving for a new trial and to handle sentencing, or should be represented by new retained counsel or by the public defender, defendant affirmed that he did not want to be represented at that point by the public defender. The court relieved his retained attorney as counsel, and defendant was appointed to represent himself in pro. per.[4] Upon the court's denial of his request for a trial transcript in order to prepare his new trial motion, however, defendant sought the public defender's assistance. The court then appointed the public defender to represent defendant, and ordered preparation of a trial transcript.[5]

On April 19, 2011, the public defender filed a written motion for new trial. The motion argued that defendant's representation by his retained trial counsel was constitutionally deficient, because counsel failed to present the testimony of an

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[4] In considering counsel's request to be relieved—joined by defendant—the court considered a number of factors, including that the only remaining issues to be handled in the trial court were a possible new trial motion, and sentencing. Defendant began to explain the grounds on which he intended to base his new trial motion, and on the court's inquiry, he affirmed that he would be able to be ready "with these motions and ready for the sentencing" few weeks hence. Based on that representation, the court said "I don't see any reason not to grant this."

[5] A defendant in a criminal case has a constitutionally guaranteed right of self-representation. (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]; *People v. Jones* (1991) 53 Cal.3d 1115, 1141.) But before self-representation is granted, the record must show that the defendant "'understood the disadvantages of self-representation, including the risks and complexities of the particular case'"—that "'"he knows what he is doing and his choice is made with eyes open."'" (*People v. Jones*, *supra*, 53 Cal.3d at pp. 1141-1142; *Faretta v. California*, *supra*, 422 U.S. at p. 835.)

We have obtained from the trial court and reviewed the transcript of the earlier *Marsden* hearing (which it had earlier ordered destroyed) on the unfulfilled hope that it might reveal the extent of defendant's understanding. However, the record is nevertheless sufficient to reflect statements by defendant indicating his awareness and understanding of the procedural requirements ahead of him, and it reflects the court's inquiry about his ability to meet them. Moreover, although defendant refused the services of the public defender at that point, as it turned out, the public defender was appointed to represent defendant before any further action was required on his behalf. Neither defendant nor his appellate counsel have suggested any error or prejudice with respect to these rulings, and we have found none.

eyewitness identification expert, counsel failed to file a *Pitchess* motion, and counsel failed to make a meaningful closing argument on defendant's behalf. And the motion argued that a new trial should be granted due to juror misconduct in sleeping during the trial, due to the erroneous admission of Ms. Jones's testimony concerning the attempted carjacking in 2000, under Evidence Code section 1101, subdivision (b), and because the verdict is against the weight of the evidence. On May 5, 2011, the court denied the new trial motion.

The court sentenced defendant to 25 years in state prison. As to the count 1 conviction, it ordered the upper term of five years in state prison doubled because of the prior strike conviction. The court enhanced this sentence by an additional 10 years, based on the jury's finding that defendant had personally used a firearm in the robbery, and by another five years based on his prior "serious" felony conviction. (Pen. Code, § 667, subd. (a)(1).) The court stayed the count 2 conviction pursuant to section 654; it credited defendant with 581 actual days and 87 days of good time/work time credits;[6] and it ordered him to pay various fines and fees.

On May 11, 2011, defendant filed his timely appeal from the June 7, 2010 verdict and the May 5, 2011 sentencing order. (Pen. Code, § 1237.)

DISCUSSION

Counsel appointed to represent defendant in this appeal filed a brief raising no issues. (*People v. Wende* (1979) 25 Cal.3d 436, 441-442.) On March 1, 2012, we advised defendant that he could submit by brief or letter any grounds of appeal, contentions, or argument he wished this court to consider, within 30 days. On March 12, 2012 we received defendant's three-page response, asking the court to consider three topics: (1) that the trial court did not permit the defense to impeach a prosecution witness with evidence of her prior conviction; (2) that the prosecution gave the defense only a

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[6] The good time/work time credit was computed as 15 percent of the actual days. (Pen. Code, § 2933.1.)

few days notice that the witness would be testifying; and (3) that his attorney was incompetent.

We have conducted an independent review of the record, as required by *People v. Wende, supra,* 25 Cal.3d at p. 441. As explained below, we have determined that neither the supplemental issues raised by defendant's filing in this court nor anything else in the record indicates that any issue constitutes an arguably meritorious ground for reversal of the judgment or modification of the sentence in this case. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110 [when court of appeal affirms a judgment in a *Wende* appeal in which the defendant has filed supplemental contentions, the appellate court's opinion must reflect those contentions and the reasons that they fail].) We therefore affirm the judgment.

A. The Record Does Not Show An Erroneous Refusal To Permit Impeachment Of A Prosecution Witness.

Defendant's supplemental filing in this court asks that we review the trial court's refusal to permit Ms. Jones to be impeached with evidence that she had a prior criminal conviction. The record shows that after the trial court had granted the prosecution's request to present Ms. Jones's testimony under Evidence Code section 1101, subdivision (b), and shortly before presenting her testimony, the prosecution disclosed that Ms. Jones's rap sheet indicated a February 1973 conviction for felony criminal conspiracy (apparently resulting from a plea agreement involving narcotics charges), which had later been expunged. After finding that in 1973 Ms. Jones would have been 20 or 21 years old, the court granted the prosecution's request to exclude evidence of the conviction under Evidence Code section 352.

The law affords the trial court broad discretion to determine the admission or exclusion of such evidence, based on a conclusion that its probative value is outweighed by the danger of undue prejudice, confusion, or misleading of the jury, or the risk of undue consumption of time. (Evid. Code, § 352.) We cannot say that the trial court's ruling excluding evidence of Ms. Jones's 36-year-old conviction constituted a clear abuse of its discretion in this case. (*Pannu v. Land Rover North America, Inc.* (2011) 191

Cal.App.4th 1298, 1317.) Moreover, Mr. Ferrada and Deputy Mercado both provided credible eyewitness testimony of defendant's identity as the perpetrator of the robbery, and the person who had fled while discarding the money, the wallet, and the weapon that had been used in the robbery. This record does not indicate that Ms. Jones's credibility was critical to the identification of defendant as the perpetrator of the crime, or to the determination of the intent with which he had acted. In light of this, we cannot say that a different result would have been probable if the defense had been permitted to confront Ms. Jones with evidence of her prior felony conviction. (*Ibid*.)

B. The Record Does Not Show Error Or Prejudice In The Notice To The Defense That Ms. Jones Would Testify.

Defendant's supplemental filing in this court suggests that he was prejudiced by the fact that the defense had only a few days notice that Ms. Jones would be testifying. However, this contention, even if true, is undermined by the absence of anything in the record showing how the defense would have benefitted if it had learned earlier that Ms. Jones would testify, or how it was prejudiced by its ignorance of that fact. Without that, even if there was error there is nothing to show that appellant was prejudiced by it. (Cal. Const., art. VI, § 13 [no reversal of judgment or new trial unless error has resulted in miscarriage of justice]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [no miscarriage of justice or reversal where it appears the outcome would be the same even in the absence of the error].)

C. The Record Does Not Show That Defendant's Retained Counsel Was Incompetent, Or (Even If He Was) That Defendant Was Prejudiced.

We have reviewed the record in this case with a careful eye toward defendant's contentions that his retained attorney "lied to me about a lot of things and was very incompetent in handling my case"; that a thorough review of the transcript of his trial proceedings would show "all types of errors and inconsistencies"; and that his conviction rests entirely on the testimony of "a lying witness that they coerced and some lying law enforcement." We find, to the contrary, that defendant's conviction is strongly supported by the eyewitness testimony of his robbery victim, and by Deputy Mercado's fortuitous

observation of defendant fleeing the scene, abandoning the stolen phone and money, and discarding the gun as he ran. Even without the corroboration provided by Ms. Jones's testimony and the testimony about defendant's spontaneous jailhouse statement that his girlfriend did not know of his intent to "pitch," we cannot conclude that the jury would have reached a different result.

These determinations, and our conclusion that neither error nor prejudice resulted from the circumstances discussed above, lead us to conclude that the record does not support defendant's contention that he was prejudiced by any failure of his retained attorney to present a competent defense on his behalf. Having undertaken an independent review of the record in this case, we conclude that it reflects no arguably meritorious ground for reversal of the judgment or modification of the sentence in this case. (*People v. Wende, supra,* 25 Cal.3d at pp. 441-442.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.