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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. CURTIS PULLEY, Defendant and Appellant.	B239565 (Los Angeles County Super. Ct. No. SA078896)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rand S. Rubin, Judge. Affirmed.

James Koester, 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, Blythe J. Leszkay and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Curtis G. Pulley of receiving stolen property (Pen. Code, § 496, subd. (a)).[1] In a bifurcated proceeding, the jury found that defendant had one prior conviction within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to a total state prison term of four years, to be served in the county jail (see § 1170, subd. (h)). The sentence consisted of the high term of three years plus a one-year consecutive term for the prison prior under section 667.5, subdivision (b).

Defendant appeals on the grounds that: (1) the trial court erred in denying his two *Marsden*[2] requests, and (2) the trial court erred in denying his two *Faretta*[3] requests.

FACTS

Prosecution Evidence

On October 3, 2011, at approximately 1:00 p.m., Kestrin Pantera, an actress, kept an appointment with her agent. She parked her car on Santa Monica Boulevard near Prosser Avenue in Los Angeles. Pantera left a briefcase containing a laptop computer and an iPad in a purple case on the front passenger seat. She hid them by covering them with jackets. Pantera was not sure if the car doors were locked when she left the car. As she explained at trial, "When you push [the lock] down, sometimes it goes down but it's not actually down so it can appear to be locked but it's not."

Pantera spent approximately 15 minutes inside the agency. She then returned to her car and began driving away. She checked the items on the passenger seat and discovered that the jackets were there but the briefcase and iPad were not. Pantera felt "[t]errified, panicked . . . ." because so much personal information was on the laptop. The iPad belonged to Pantera's father, who had left it at her home the previous evening, and she had intended to mail it to him.

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1 All further references to statutes are to the Penal Code unless stated otherwise.

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

3 *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

She turned around and returned to the area where she had been parked to see if someone had the property. She asked the security person in her agent's building if they had a security camera, but there was none. She called her husband, Jonathan Grubb. Because she could not get through to the police, she drove to the West Los Angeles police station where Grubb met her. Pantera and Grubb then filed a police report.

Grubb called Pantera's father and obtained his password to log into the "Find My iPad" website. The site allowed the user to input a code from another computer and locate the iPad in case it was lost or stolen. The locate feature displayed a map with a dot showing the missing iPad's location. Grubb logged onto the website and saw an indication that the iPad was located in the area of Santa Monica Boulevard and Prosser Avenue. Grubb called the police, who met him at a motel at that spot, The Little Inn. The site showed the iPad at that location, but it did not indicate specifically which room the iPad was in. Pantera arrived, and she and Grubb waited while the police "looked around the motel and talked to people." They remained at the motel for a period of time, but nothing was found.

Grubb also used the message feature of the Find My iPad website to post a message on the stolen iPad's screen. The message read: "Return this iPad for $500 cash reward, no questions asked," followed by Grubb's cell phone number.

Pantera continued to monitor the dot on the Find My iPad application. On October 4, 2011, at approximately 10:00 a.m., she saw that the dot was moving along Santa Monica Boulevard. She called Grubb and the police, and she and a friend got in Pantera's car and began chasing the dot. At about 11:30 a.m. that same day, Grubb received a telephone call from a man identifying himself as Curtis. Curtis said he had the iPad and computer. He complained that he was "already in this" for $8,000, and would return the items in exchange for $9,500. Curtis also indicated that he would like to have Grubb's credit card information so that he could buy some cell phones to donate to The Homeless Alliance. Grubb said that he had cancelled his credit cards and would not provide any credit card information. Grubb again offered $500, but Curtis said that was not enough. They eventually settled on $8,500 in cash.

Grubb and Curtis agreed to meet at around 1:00 p.m. at the Santa Monica Pier near the chess players. Curtis said he would bring the iPad, but he would hide the computer. After he got the money, he would tell Grubb where to find it. During this telephone conversation, Grubb used the Find My iPad application to locate the iPad. He saw that it was at a location near Westwood and Santa Monica Boulevards. Grubb noted that there was a T-Mobile store at that location and telephoned the store. Grubb asked if someone had just used their phone. The T-Mobile employee answered in the affirmative and described the person as an African-American man, perhaps in his 60's. He was wearing a work uniform and carrying a bag. Grubb gave this description to Pantera.

At approximately 12:00 p.m., Pantera caught up with the dot while following a bus. She drove behind the bus to the Viceroy Hotel near the beach. She saw defendant, who matched Grubb's description, get off the bus. Pantera followed defendant in her car as he walked to the beach. He was not in a wheelchair. She saw him go into a public bathroom on the beach. Pantera parked in a parking lot located at a distance of 30 to 60 feet from the bathroom.

Detective Lynet Popper was the lead detective assigned to investigate Ms. Pantera's stolen property report. Detective Popper arrived at the beach between noon and 12:30 p.m. Pantera told her she had seen the suspect enter the bathroom on the beach.

Detectives Popper, Curtis, and Smith waited approximately one minute before the suspect came out of the bathroom. When defendant emerged, he was carrying a backpack in his hand. An iPad with a purple cover was protruding from the backpack. Pantera identified the iPad as the one stolen from her car. Defendant was arrested.

Detective Popper later went to The Little Inn, where Martiza Chavarria, the motel manager, took her to the room that had been rented by defendant. On the bed there was a briefcase matching the description of the one taken from Pantera's car. The briefcase contained some papers and a handicapped placard with defendant's name on it. It did not contain a computer. Chavarria testified that on October 2 and 3, defendant rented several rooms at the motel. Motel records showed that he rented one room on October 2, 2011, and then three rooms on October 3.

Pantera recovered the iPad and her briefcase, but her laptop was never returned to her.

Defense Evidence

Defendant testified on his own behalf. He admitted that he had a 2006 felony conviction for unlawful driving or taking of a vehicle; a 1993 felony conviction for writing checks with insufficient funds; a 1987 felony conviction for bank larceny, a federal offense; and a 1987 felony conviction for theft by forged check or credit card.

On October 3, 2011, defendant was staying at The Little Inn. He had rented several rooms because he was expecting to have a press conference, and people were coming from different parts of the country.

Across the street from The Little Inn on Santa Monica Boulevard was a café where defendant had discussed holding his press conference with the café manager on October 3, 2011. When defendant left the café, he saw a yellow Mercedes 450SL parked outside it. Defendant, a Lakers fan, had been trying to purchase a car like that because it was yellow. He took some photographs of the car with his iPhone.

A young woman who was speaking on a cell phone approached the Mercedes, put a bag down on the curb, and opened the car door. She got in the car and drove off while defendant was "photographing this whole situation." Defendant waved at her in an attempt to tell her she had left her bag on the curb. At that point, defendant saw a homeless man named John pick up the woman's bag and a briefcase. John showed defendant the bag and a computer he had found inside. Defendant saw that it was an iPad. The briefcase was empty except for some pieces of paper. Defendant gave John $100 for the iPad and the briefcase. Defendant had the woman's license plate number and he intended to locate her through DMV records and return her property.

Because he was late for a meeting in Beverly Hills, defendant put the iPad and briefcase in his motel room. After the meeting, defendant went to Newport Beach to stay the night with a friend.

When defendant returned to The Little Inn on the following morning, he saw that the iPad had been activated, and it showed a message on the screen offering a reward.

Later that morning, defendant went to a T-Mobile store in Beverly Hills to purchase cell phones for his children. He asked an employee if he could make a call from one of the cell phones to check its sound quality. He gave the employee the number of the person offering the reward, and the clerk dialed the number for him. He had "close to" $3,800 in his pocket at the time.

An older-sounding man answered the phone. The man said he was on a breathing machine and could not talk very well. He identified himself as Gary or Harry "or some 'G' name." Defendant said he had seen the reward about the iPad and was willing to mail the iPad to him. The man suggested they meet in person. Defendant said it was not necessary to give him a reward, but the man could make a donation to a nonprofit organization defendant had founded called Homeless Coalition. Defendant denied telling the person that he wanted $9,500. Defendant and the man agreed to meet at 12:30 p.m. at "Muscle Beach where the chess setup is," and defendant caught a bus to Santa Monica.

Defendant arranged for a friend named Johnny to videotape defendant returning the iPad to the man on the phone. Defendant believed he could use the video as a goodwill exhibit in aid of his fund-raising. Defendant went into the restroom to change his clothes and take his medicine. When he came out, there were 15 to 20 police officers outside with their guns drawn, and he was arrested. One officer pulled defendant's backpack off his shoulder. An officer also took "a lot of . . . money and stuff" out of defendant's pocket.

DISCUSSION

I. *Marsden* Motions

A. Defendant's Arguments

Defendant contends that at the time of his *Marsden* requests, it was readily apparent there had been a complete breakdown of the attorney/client relationship between him and his public defender. It was also readily apparent that defendant's trial counsel and his preliminary hearing counsel had not conducted reasonable investigation into his case and were not providing effective assistance of counsel. The trial court therefore erred in denying his *Marsden* motions.

B. Relevant Authority

A defendant's Sixth Amendment right to the assistance of counsel entitles him to substitute appointed counsel "'''''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.'''''" (*People v. Welch* (1999) 20 Cal.4th 701, 728.)

We apply the "deferential abuse of discretion standard" when reviewing the denial of a motion to substitute counsel. (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) "'Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel.' [Citations.]" (*People v. Hart* (1999) 20 Cal.4th 546, 603.)

C. First **Marsden** *Motion (January 25, 2012)*

1. Proceedings

At a pretrial conference on December 5, 2011, deputy public defender Alba Marrero took over defendant's case. At the next two pretrial conferences (December 19, 2011, and January 4, 2012, deputy public defender Florentina Demuth appeared for Ms. Marrero. On January 4 and January 6, 2012, defendant refused to appear in court. On January 11, 2012, defendant appeared, represented by Ms. Marrero. He refused to waive time, but the trial court granted the defense a continuance over defendant's objection.

On January 20, 2012, the case was called for a readiness hearing. Ms. Marrero informed the court that defendant wanted her to do a *Pitchess*[4] motion, but defendant refused to waive time. The trial court did not find good cause for a continuance, and the last day for trial remained January 31, 2012. Ms. Marrero also informed the court that defendant wished her to file a motion under Code of Civil Procedure section 170.6. The trial court stated it did not have the motion before it and would not rule. Both sides announced ready, and trial was set for January 25, 2012.

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4 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

At the beginning of the proceedings on January 25, 2012, defendant addressed the court. Defendant stated, "I conferred with the attorney, and one of the first things I told her was that I was not guilty of anything other than trying to return a computer to—that was lost to some person that I called on the phone and the consequence that I got arrested. There was evidence in my pack when I came out of the restaurant and seen the computer stuff sitting on the street side. I took a picture of the car that left it there— . . . to prove my innocence. This attorney here will not file any kind of motion in my behalf to get this information. The trial court asked if defendant was making a *Marsden* motion, and defendant replied, "I'm trying to fire this attorney."

A *Marsden* hearing was then held, and the trial court asked defendant to state his complaints about his attorney. Defendant first complained that Ms. Marrero had not filed the motion under Code of Civil Procedure section 170.6, which was to be based on the fact that the trial judge looked just like the man who had molested defendant when he was 12. The trial court informed defendant that his attorney had not filed that motion because the court had indicated to her that it would be untimely.

Defendant next complained that he had asked Ms. Marrero to file a *Pitchess* motion, and she had not. The trial court pointed out that the witnesses against defendant were civilians, and this was perhaps why Ms. Marrero had not filed such a motion.

Defendant told the court that Ms. Marrero would not go to check on his backpack that had contained his credentials, credit cards, and perhaps the $3,700 he had in his possession when he was arrested. He also implied that the backpack contained the license number of the car driven by the person who left the property. He had written down the license number, and he wished to go to the DMV and get information to enable him to contact that person. Counsel had refused to contact a judge, Judge Filer, who knew about defendant's homeless program in which millionaires such as Bill Gates and Warren Buffett had placed $365 million. Counsel had also refused to call defendant's witness to court or even ask him the name of his witness.

In response to defendant's allegations, Ms. Marrero stated: "I met Mr. Pulley for the first time on the 5th of December in this court. . . . As soon as I met him he wanted a

Pitchess motion. . . . And at that time I asked [*sic*] him that we would be able to file all these motions but he would have to waive time. He was adamant that he was not guilty and that he wasn't going to waive any time. I explained to him what my trial schedule was. He refused to talk to me. . . . In order for me to file a *Pitchess* motion I have to be clear on the facts that I am filing. He would never discuss what the facts were with me. Counsel then told the court about two successive visits to defendant on her lunch hour during the time he refused to come to court. Defendant never did give her any facts for a *Pitchess* motion. Nevertheless, she prepared it, but because she had no facts, she could not file it. The trial court then informed her that a *Pitchess* motion was not relevant because of the civilian witnesses.

Ms. Marrero stated she had then filed a section 995 motion as a means of challenging whether defendant was held without any probable cause. The motion was denied. Counsel was not able to talk to defendant because he was angry, and he would not allow her "to get to the bottom of what he [was] trying to say." She had a long telephone conversation with defendant in which she explained that she knew Judge Filer, but it would not be relevant to follow up on the information defendant had given her as the reason to contact Judge Filer.

Ms. Marrero stated that defendant had told her for the first time (no date was specified, although she implied it occurred recently) that he had had $3,700 in his pocket. She had a prepared a declaration and was willing to ask the court to sign an order for her to inspect defendant's property, but defendant would not waive time, and a certain amount of time was necessary to coordinate with the property person and for that person to act. Defendant would not waive time for her to prepare any of the motions that he believed were legitimate.

The trial court suggested that defense counsel subpoena the property person to come to trial with the evidence, and defense counsel agreed. Counsel concluded, "So I've tried all along to work with Mr. Pulley, but without him waiving time, I'm not able to file the necessary motions that he has, and now I'm stuck in this trial without doing all of the investigation that I needed to do because he won't waive time.

When the trial court asked if defendant wanted "the last word," defendant stated, "She talk a lot, but she never told you that I asked her from the very beginning that I didn't want to be in this courtroom." The trial court reiterated that an affidavit for that purpose had to be filed on December 5, 2011, when the case was sent to the court for all purposes. This issue was discussed for four more pages of transcript, with defendant insisting that the sequence of events was not as the trial court had gleaned from reviewing the transcripts. Finally, the trial court stated, "I've heard the *Marsden* motion. I believe that this attorney is doing her best within the time constraints. She's familiar with this case. She's willing to do more, but Mr. Pulley doesn't want to waive time. I find that any deterioration in this relationship is occasioned by Mr. Pulley's recalcitrant and defiant attitude. There's no reason why this attorney cannot adequately represent this defendant for trial if he allows her to.

2. First Marsden *Motion Properly Denied*

We conclude that the trial court did not abuse its discretion and that defendant's right to assistance of counsel was not substantially impaired by the trial court's refusal to replace Ms. Marrero. (See *People v. Hart, supra*, 20 Cal.4th at p. 603.) "It is the very nature of a *Marsden* motion, at *whatever* stage it is made, that the trial court must determine whether counsel has been providing competent representation." (*People v. Smith* (1993) 6 Cal.4th 684, 694-695.) We agree with the trial court that Ms. Marrero was competently representing defendant.

It is true that Ms. Marrero did not file an affidavit of prejudice under Code of Civil Procedure section 170.6 on the first day Judge Rubin called defendant's case for a pretrial conference. The record shows that defendant was represented by Matthew Huey in the prior proceeding when the matter was assigned to Judge Rubin. At the first hearing in Judge Rubin's court on December 5, 2011, the minute order shows only that defendant moved for release on his own recognizance or a bail reduction. Defendant himself said that he first told Ms. Marrero of his desire to disqualify Judge Rubin on January 18, 2012. Assuming he did so, his request was untimely. Moreover, defendant did not claim that

Judge Rubin was prejudiced against him, but rather, that defendant disliked Judge Rubin because he purportedly looked like the person who had molested him when he was 12.

As for the *Pitchess* motion, the trial court was entitled to credit Ms. Marrero's assertions that defendant never gave her any grounds for filing a *Pitchess* motion. (*People v. Clark* (2011) 52 Cal.4th 856, 912.) The facts of the case bear out the trial court's assessment that there was no basis for filing a *Pitchess* motion for personnel records of any of the arresting officers, since the principal witnesses against defendant were civilians. Counsel is not required to make idle or frivolous motions. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 726.) Ms. Marrero filed a section 995 motion in any event, to ascertain whether defendant was arrested with sufficient probable cause.

With respect to defendant's backpack, it appears defendant was not very clear or consistent in relating to his attorney what he claimed was in that backpack and its alleged relevance to his case. Defendant was angry and unable to clearly communicate what he wanted to say to Ms. Marrero. According to Ms. Marrero, defendant did not at first tell her that there was a sum of $3,700 in his pocket, which, if true, was a fact she believed would be useful at trial. Although defendant told the court just prior to the *Marsden* hearing on January 25, 2012, that there was evidence in his pack to prove his innocence, it is not clear that he ever told his counsel that there was exculpatory evidence in his pack. Defendant's refusal to waive time before trial was an obstacle to obtaining the property by means of a motion. Ms. Marrero's long experience told her that it would take more time than was available to her before trial to obtain the order, coordinate with the property person, and obtain the property. Furthermore, the last time they had appeared in court before January 20, 2012, which would have been on January 11, 2012, defendant told Ms. Marrero that he was willing to take a time-served plea bargain that had apparently been offered him. Ms. Marrero had tried to set a date for accepting the bargain but had found that the prosecution was offering only a two-year deal at that juncture. On the next court date, January 20, 2012, defendant refused the two-year offer.

We believe the record shows that Ms. Marrero was, as she expressed it, trying "all along to work with [defendant]." The court was entitled to believe Ms. Marrero's

assertion was credible. (*People v. Clark*, *supra*, 52 Cal.4th at p. 912.) The record of the *Marsden* hearing shows that she had spoken to defendant several times by telephone and in person. She had listened to defendant and made an effort to ascertain there was sufficient evidence to support the charges by filing the section 995 motion, since defendant refused to discuss the facts with her. She also filed a motion to suppress under section 1538.5.

As for the deterioration in their relationship, we agree with the trial court that, "any deterioration in [the attorney-client] relationship [had been] occasioned by [defendant's] recalcitrant and defiant attitude," and there was "no reason why [Marrero could not] adequately represent [defendant] for trial if he allow[ed] her to" do so. The record establishes that defendant was a very difficult client, and a conflict between defendant and counsel does not constitute an irreconcilable conflict when the defendant has failed to make a good faith effort to work out any disagreements. (See *People v. Smith*, *supra*, 6 Cal.4th at p. 696; *People v. Barnett* (1998) 17 Cal.4th 1044, 1086.) Unless there is a complete breakdown in the attorney-client relationship, disputes over tactics and a defendant's lack of trust in or disregard for his attorney are not sufficient grounds for relieving counsel. (*People v. Memro* (1995) 11 Cal.4th 786, 857, disapproved on another point in *People v. McKinnon* (2011) 52 Cal.4th 610, 639; *People v. Silva* (1988) 45 Cal.3d 604, 622.) The court also will not relieve defense counsel if the defendant manufactures a conflict to force substitution of counsel. (*People v. Smith*, *supra*, 6 Cal.4th at pp. 696-697.)

In addition, defendant had a record of being dissatisfied with appointed counsel. He was represented by deputy public defender Matthew Huey at his preliminary hearing on October 31, 2011, and his arraignment on November 15, 2011. Prior to his preliminary hearing, defendant filed a *Marsden* motion, which was denied, and he then asked permission to represent himself, which was denied. "'"[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, supra,* 11 Cal.4th at p. 857; *People v. Smith* (2003) 30 Cal.4th 581, 606 ["A defendant may not effectively veto an appointment of counsel by claiming a lack of trust in, or inability to get along with, the appointed attorney."].) To the extent that defendant's version of his communications with counsel differ from Ms. Marrero's, the trial court in its discretion may accept Ms. Marrero's version. If an assessment of credibility is the determining factor, the court has discretion to believe counsel's version of events proffered in a *Marsden* hearing. (See, e.g., *People v. Jones, supra,* 29 Cal.4th at p. 1245.)

We conclude there was no abuse of discretion in denying defendant's first *Marsden* motion.

D. Second* Marsden *Motion (January 31, 2012)

1. Proceedings

On the fourth day of trial, prior to the testimony of the prosecution's last witness, Pantera, defendant asked to address the court. He stated, "Once again, your Honor, I would just like to put in a *Marsden* motion, dismiss my attorney at this particular stage." He said that the "work have been done, so we say, and it's just my testimony left and closing arguments basically, you know. I just like to represent myself at this point on." The trial court asked if defendant was making a *Marsden* motion or a request to represent himself. Defendant replied, "Well, relieve my attorney from her duties. I don't feel like she is working in my best interests." The trial court again asked for clarification as to whether defendant wanted another attorney appointed. Defendant replied, "I want to represent yourself." The trial court stated, "That motion is going to be respectfully denied. Number 1, we are in the middle of trial. Number 2, I see the way you've acted throughout this trial, and I don't want to turn this into a circus. I've seen your attorney representing you and I think she's doing the representation to the best of her ability, so your motion to take over the case—last time I asked you about pro. per. you said you would need time to prepare." Defendant said, "I don't need no time now." The court stated that the request was untimely and was denied.

At that point, defendant said, "Well, what about having another attorney to represent me? She couldn't even get a question asked to either one of the witnesses on the witness stand yesterday. She had 25 denials to ask the question." Defendant also stated that his attorney refused to even ask the question he wanted to ask. The trial court asked the prosecutor to step out of the courtroom.

At the ensuing *Marsden* hearing, the trial court asked defendant what was new and different since the last *Marsden* motion. Defendant replied, "As to the newness of time about witness testimony, she's telling me, don't say anything in front of the jury, don't talk to me in front of the jury. I can't ask her no questions about what I want to ask this person here." He also complained that, "nobody sent . . . a motion out to subpoena my property to be in this courtroom." He also believed that the jury could see his attorney was inexperienced. He added that Ms. Marrero refused to have the investigator go out and look at his evidence proving his innocence.

Ms. Marrero responded that she had a problem with defendant's lack of respect in that he screamed everything at her and was always "very, very angry." She had never had a clear conversation with defendant about the facts of the case. Defendant was not forthcoming and was very selective as to what facts he related to her. He also heard what he chose to hear and then accused the court or herself of saying things they did not say. She explained that, as defense counsel, there were things she chose not to ask because these things would help the prosecutor's case with respect to the element of knowledge. For example, defendant wanted to testify about his conversation with the owner of the iPad even though counsel believed it had not been proved that defendant had that conversation. She believed that defendant would make the case for the People if he testified. She did not believe the People had done a good job and that there was room for reasonable doubt. With respect to defendant's opinion that she was inexperienced, she pointed out that she had been a public defender for 21 years. Finally, she had no evidence that a video existed of the lady driving away and leaving her computer on the sidewalk as defendant claimed, and defendant had never told her where the video was

located. She believed that the fact that there was no evidence of the location of his backpack helped to create reasonable doubt with the jury.

The trial court found that there was no breakdown in the relationship between defendant and Ms. Marrero that would make it impossible for her to represent defendant. The court told defendant that Ms. Marrero "can properly represent you if you allow her." The trial court stated that Ms. Marrero was "doing the best she can, being rushed to trial without a time waiver."

2. Second Marsden *Motion Properly Denied*

We agree with the trial court. Ms. Marrero's relationship with defendant had not changed since the first *Marsden* motion. Defendant's complaints about Ms. Marrero advising him not to testify and her failure to ask certain questions he wished her to ask constituted mere differences of opinion as to tactics. Disagreements over strategy are insufficient to warrant a substitution of counsel under *Marsden*. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 728–729 ["A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.'"]; *People v. Lucky* (1988) 45 Cal.3d 259, 281–282 ["There is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney."].)

There was no breakdown between Ms. Marrero and defendant such that it was impossible to defend him, and she was even optimistic about creating reasonable doubt with the jury if defendant did not testify. Ms. Marrero was an experienced defense attorney and the record shows that she continued to represent defendant in a professional manner despite the abuse to which he subjected her. Far from making a good faith effort to work out his disagreements with counsel, he screamed his requests (or demands) at her, thus creating unnecessary conflict. (*People v. Smith*, *supra*, 6 Cal.4th at pp. 696-697.) Defendant has not shown that Ms. Marrero's performance detrimentally affected

his trial. Therefore, his right to counsel was not substantially impaired. (*People v. Barnett*, *supra*, 17 Cal.4th at p. 1085.)

Moreover, defendant's courtroom behavior and his attitude and manner of speaking to the trial court are evidence that, as we have noted, defendant was a difficult client. After he was found guilty, and during jury deliberations on the prior prison term allegation, defendant claimed he became ill in the lockup. The trial court stated for the record, "He was back there by himself, he was on the floor, and of course when someone tells the sheriffs they're ill, they have no choice but to call the ambulance. The ambulance has come and they have taken Mr. Pulley away. I do want to make a record, because I think this is just getting to be a joke. There were other court days that Mr. Pulley refused to come to court, claiming he was ill. In the courtroom he did, I believe, purposely fall out of his wheelchair to avoid going forward on the first day of trial. A few days ago he claimed he was sick from an odor in the van that transported nine people. The other eight people did not claim to be ill. But at some point after they brought another van and were ready to take Mr. Pulley away, he realized he didn't want to go to the doctor and refused, made them bring another van for him and refused. This morning, according to counsel, his own counsel, he was very abusive and used some terminology that is not appropriate to use with counsel, and even in the court he had a couple of outbursts . . . . My impression from what I have seen and his record is he's some kind of a con man or like a child that just wants to get his way, and this is his manipulation of not being here for the verdict, and that is the verdict on whether there is a one-year prior or not." Later the court added, "I watched him put his hands in his mouth trying to make himself throw up through the entire session. So if he did vomit back there—and I don't know if he did or he didn't—I think he forced himself just like he was trying to do the first day of jury selection."

Finally, Ms. Marrero had made her best efforts to locate defendant's backpack, as she related to the trial court on January 26, 2012. She had submitted an order to the trial court the previous day, which the trial court had signed, that directed the sheriff's department to "bring all personal property of the defendant . . . to court for his next court

date of January 30, 2012." On January 26, 2012, Ms. Marrero advised the trial court that she had spoken to the property person who usually comes into court, a Mr. Hernandez, and he said that that defendant's clothes were not in his custody. He had only some medical scrubs, since defendant went to booking from the hospital. Mr. Hernandez told Ms. Marrero to contact Detective Popper to find the location of defendant's property. Ms. Marrero also found out that the West Los Angeles police station did not have a "holding cell," and everything that is deemed excess property is sent to Van Nuys. A person in Van Nuys told her that the property had been destroyed. The supervisor told her that she would need an order and would have to talk to the detective to see where the clothes were. They did not know. Ms. Marrero then enlisted the aid of the prosecutor, who told the trial court that he contacted Detective Popper, who informed him that the police department did not have defendant's personal property. She contacted the medical ward at county hospital, and it was not there either. The last person who had the property to her knowledge was Detective Curtis, who was on vacation. The trial court stated that he was "ordering [Detective Popper] to get in touch with [Detective Curtis]," and the prosecutor said he would "tell her that, and I will relay the response to defense as soon as I get it."

On Monday, January 30, 2012, the prosecutor told the court that Detective Popper said she had been unable to reach Detective Curtis and was going to contact the hospital, presumably for the second time. On January 31, 2012, Ms. Marrero told the court that she believed defendant's property was "nowhere to be found." The trial court stated, "We don't know what happened to it after his arrest. It's not in the police possession." Thus, Ms. Marrero appears to have done all that she could in order to find defendant's backpack.

As noted, defendant was not content with the attorney who preceded Ms. Marrero. He filed a *Marsden* motion against the attorney and followed it with a *Faretta* motion. It is likely that defendant would have been unhappy with any attorney. As the trial court later indicated, defendant seemed bent on delaying the proceedings in any manner possible once trial became imminent. We conclude there was no abuse of discretion or

violation of defendant's Sixth Amendment right to effective representation in the denial of defendant's second *Marsden* motion.

E. Any Error Harmless

Finally, we conclude that any error in denying defendant's *Marsden* motions was harmless beyond a reasonable doubt. (See *People v. Reed* (2010) 183 Cal.App.4th 1137, 1148.) Defendant's insistence on testifying and the concomitant necessity of revealing his history of theft offenses lead to the conclusion that any error in denying the *Marsden* motions was not prejudicial. Defendant suggests that an analysis of the prejudice he may have suffered because of the failure to find the backpack is precluded because he is not able to show the evidence it contained. He states that this court should conditionally reverse his judgment to enable the trial court to conduct an evidentiary hearing to either examine the backpack or, "if the evidence was either legitimately unavailable or did not have the exculpatory value that appellant represented, he would not receive an undeserved windfall." We agree with respondent that the existing record is sufficient to make this determination. The record shows that Ms. Marrero, the prosecutor, and the police made their best efforts to locate the backpack, but their efforts were unsuccessful. Therefore, defendant's suggested remedy is unnecessary.

II. *Faretta* Motions

A. Defendant's Arguments

Defendant contends the trial court abused its discretion by denying his requests to represent himself on the day of trial, but prior to voir dire, and when he renewed his request following the first day of testimony.

B. Relevant Authority

A defendant has the right to represent himself if he voluntarily and intelligently chooses to do so. (*Faretta*, *supra*, 422 U.S. at p. 835.) He or she must opt to do so, however, "within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127-128.) "The 'reasonable time' requirement is intended to prevent the defendant from misusing the motion to unjustifiably delay trial or

obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852.)

"'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.] In exercising this discretion, the trial court should consider factors such as '"the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion."' [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959, citing factors set forth in *People v. Windham*, *supra*, 19 Cal.3d at p. 128; see also *People v. Lynch* (2010) 50 Cal.4th 693, 722, fn. 10.) A trial court need not expressly cite these factors in making its ruling. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1206.) A trial court "rarely should grant such a motion on the day set for trial." (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1277.)

A defendant may not seek "to unnecessarily delay trial under the pretense of a *Faretta* motion." (*People v. Moore* (1988) 47 Cal.3d 63, 79.) "'Trial courts are not required to engage in game playing with cunning defendants who would present Hobson's choices.' [*Faretta*] held generally that a defendant may represent himself. It did not establish a game in which defendant can engage in a series of machinations, with one misstep by the court resulting in reversal of an otherwise fair trial." (*People v. Clark* (1992) 3 Cal.4th 41, 115.)

C. First Faretta *Motion (January 25, 2012)*

1. Proceedings Below

After the trial court denied defendant's *Marsden* motion on January 25, 2012, defendant asked to be released on his own recognizance, and the trial court told him that the issue had been dealt with and he had a $30,000 bond. Just prior to the prospective jurors entering the courtroom, defendant said to the trial court, "Being that I don't want her to represent me and I don't feel comfortable with her representing me and she and I not go—seem like I being rushed to judgment here, I don't have the evidence to prove

my innocence, I don't have the name of my witnesses that can prove my innocence and there have been no investigation done on that and I still haven't seen my property where I can get telephone numbers and names and try to make bail. I haven't did anything since I been down so I'm asking to go pro. per. on this matter."

The trial court asked defendant if he was ready to proceed. Defendant said he would not be ready that day. He would have to waive time to get some things done. The trial court stated, "Well, the problem is that this is not a game and you wouldn't waive time and I have a jury outside and we're ready to go, and I actually had to make a good cause finding for counsel to get ready, to get this to go, so we're going forward." Defendant said that counsel was not ready. At that point, Ms. Marrero interjected to put on the record that defendant had fallen out of his wheelchair, but he got back in. Counsel then stated, " . . . I think that it's true what he's saying. I mean, because he didn't waive time, I was not able to check out his property, I think that if he wants to go pro. per., that is his choice, and I think that what we can do is bring his property here, let him inspect his property, let him go pro. per." Counsel said that she and defendant had not really bonded because he would not waive time to do the motions he requested. She stated, "And I think that he has enough reasons to be insecure about going forward today because of the fact that . . . ." The trial court interrupted to say that if this were the case, defendant would not have been in such a hurry and would have waived time. There were 50 jurors outside and they were ready to start the trial. The court told Ms. Marrero to subpoena the property in for trial. Defendant interrupted to say, "What about my evidence, your Honor? The videotape that I made of the car leaving the bag on the sidewalk?" The trial court stated, "Okay. Your request for pro. per. at this point in time, when the jury's outside, you refused to waive time, is untimely. The request to be pro. per. is denied." Defendant began to argue with the court and to complain about being in jail and his lack of proper medical treatment. Ms. Marrero said to the trial court, "I just think that the court should consider his pro. per. status. He's right, we have not had . . . ." The court told counsel that it had already dealt with the *Marsden* motion and stated, "I know you want to relitigate it, try and create some more issues, but I dealt with the

Marsden. You talked about what you've done, talked about being ready based on the time frame you have. I have a jury outside. The case is going to go."

2. First Faretta *Motion Properly Denied*

Defendant's request for self-representation, which he made at the very instant his trial was set to begin, was properly denied as untimely. (*People v. Marshall* (1996) 13 Cal.4th 799, 827.) The California Supreme Court has held that, in the face of an untimely request, the grant of propria persona status may be conditioned on the defendant's ability to proceed with the trial without a continuance. (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1039.) The court has also "held on numerous occasions that *Faretta* motions made on the eve of trial are untimely." (*People v. Lynch*, *supra*, 50 Cal.4th at p. 722, disapproved on another point in *People v. McKinnon*, *supra*, 52 Cal.4th at p. 637.) In this case especially, where defendant was adamant for weeks that he would not waive time, there was no abuse of discretion in denying his request as untimely while the jurors were waiting in the corridor.

Moreover, defendant did not ask to represent himself until after his *Marsden* motion was denied and the parties began discussing preliminary matters prior to the entrance of the jury. Faced with the inevitability that his trial was about to begin, defendant, who had refused to waive time for his attorney to investigate, suddenly wished to delay the beginning of trial and represent himself. "[B]y juggling his *Faretta* rights with his right to counsel interspersed with *Marsden* motions," the trial court could have reasonably concluded that he was "playing 'the *Faretta* game'" in an effort to delay the trial. (*People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.) The trial court presumably was aware of the *Faretta* motion that defendant had made at the preliminary hearing, since it had ruled on defendant's section 995 motion. The fact that Ms. Marrero seemed to be in favor of allowing defendant to represent himself is testament to his difficulty as a client. The record contains no evidence that she represented defendant less than vigorously despite defendant's conduct.

In addition, granting the *Faretta* on the day trial was to begin would have resulted in disruption and delay, since defendant acknowledged he was not ready to proceed.

Moreover, a defendant who begins to use delaying tactics, or is otherwise offensive, may forfeit his right of self-representation. (*Faretta*, *supra*, 422 U.S. at pp. 834-835, fn. 46; *People v. Powers*, *supra*, 256 Cal.App.2d 904, 914-915.) Defendant had already shown himself to be disrespectful to the court, telling the trial judge: "I still hate this court. . . . I hate you."

A trial court need not explicitly state on the record that it has considered the various *Windham* factors if substantial evidence in the record otherwise supports the inference that the trial court had those factors in mind when it ruled. (*People v. Scott*, *supra*, 91 Cal.App.4th at p. 1206.) The trial court's remarks here provide substantial evidence that it had the appropriate factors in mind. (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354-1355.) We conclude the trial court did not err or abuse its discretion in denying defendant's first *Faretta* motion.

D. Second* Faretta *Motion (January 31, 2012)

The second *Faretta* motion, like the first, was intertwined with defendant's second *Marsden* motion, but even more so.[5] A defendant's *Faretta* request may be found equivocal when it is made immediately after the court had rejected the defendant's *Marsden* motion. (See, e.g., *People v. Scott*, *supra*, 91 Cal.App.4th at pp. 1205-1206.) Defendant contends, however, that this *Faretta* motion should have been granted because he told the court unequivocally that he would not need any additional time. The mere fact that defendant asserted he would not need a continuance did not grant him "an absolute right to represent himself without regard to the *Windham* factors." (*People v. Bradford*, *supra*, 187 Cal.App.4th at p. 1355.) The same standard applies to this motion as to any *Faretta* motion brought after the commencement of trial. (*Bradford*, at p. 1355.)

Defendant further contends it was readily apparent that counsel was not diligently trying to secure the evidence he believed was crucial to his defense, despite her

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5 The proceedings surrounding defendant's second *Marsden* motion are related *ante*.

assurances that she would, and the antagonism between defendant and counsel was escalating, which constituted good cause.

We disagree. As we have discussed, Ms. Marrero made several efforts to obtain defendant's backpack. It was determined that it had been lost. Although defendant stated he would not need a continuance, his taking over his defense would have caused a disruption in the proceedings in any event. Defendant had demonstrated a penchant for showing disrespect for the court and for staging events he believed would elicit sympathy for him. The trial court was not unreasonable in its concern that defendant would turn the trial into a circus. "The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 23.) A *Faretta* motion made for the purpose of delay or to frustrate the orderly administration of justice may be denied. (*Ibid*.) The trial court did not err or abuse its discretion in denying defendant's *Faretta* motion toward the end of the prosecution case.

Moreover, any error in denying defendant's *Faretta* motions was harmless. Although a trial court's error in denying a timely motion to represent oneself is automatically reversible (*People v. Joseph* (1983) 34 Cal.3d 936, 945-948), when the motion is untimely, we apply the harmless error standard, i.e., whether it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058; *People v. Nicholson (*1994) 24 Cal.App.4th 584, 594-595; *People v. Watson* (1956) 46 Cal.2d 818, 835-836.)

We conclude there would not have been a result more favorable to defendant had he represented himself. "[A] defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051-1052, citing *Faretta*, 422 U.S. at p. 834.) The record shows that defendant was represented by competent counsel. During the *Marsden* hearings, before the *Faretta* motions, defendant's attorney established that she had been diligent in representing defendant within the time limits imposed and had considered and

responded to those requests made by defendant that she could understand and that she believed had a reasonable basis. Defendant, against counsel's advice was determined to testify and tell his convoluted story, which the jury clearly found incredible. Had he represented himself, his delaying tactics and transparent histrionics would only have increased. It is inconceivable that he, representing himself, would have achieved a more favorable result. Any interference with defendant's right of self-representation was not substantial and not prejudicial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.