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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>PEDRO RAFAEL LUNA,<br><br>Defendant and Appellant. | B229927<br><br>(Los Angeles County<br>Super. Ct. No. BA361412) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin and Alex Ricciardulli, Judges. Affirmed as modified.

William J. Capriola, 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, Linda C. Johnson and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

A jury convicted defendant Pedro Rafael Luna on three counts of assault with a firearm (Pen. Code, § 245, subd. (a)(2); counts 1-3),[1] one count of shooting at an occupied motor vehicle (§ 246; count 4), and one count of carrying a loaded firearm (§ 12031, subd. (a)(1); count 5). The jury found defendant had personally used a handgun to commit the assaults (§ 12022.5, subd. (a)), and he was carrying a loaded firearm as an active participant in a criminal street gang (§ 12031, subd. (a)(2)(C)). The trial court sentenced defendant to an aggregate state prison term of 14 years.

On appeal, defendant claims abuse of discretion in the denial of his pretrial motions for appointment of advisory counsel. He also contends he is entitled to additional presentence conduct credits. We agree he is entitled to the additional credit. In all other respects, we affirm.

## FACTUAL BACKGROUND

### *Prosecution*

At around 12:30 a.m. on August 29, 2009, Joseph Mottola (Mottola) was driving his truck to a bar in Echo Park. With him were two friends, Paul Johnson and Greg Belmudez. The truck windows were rolled down. Mottola stopped for a red light and was preparing to turn right from Echo Park Boulevard onto Sunset Boulevard. Defendant was standing on the corner to the right, about five to 12 feet away. He was wearing a white Los Angeles Dodgers jersey. Defendant threw up his arms and yelled at the trio, "Echo Park gang, homie . . . ." He then pulled out a black revolver from the front of his waistband, pointed it directly at Johnson in the front passenger seat and immediately fired two shots. The first bullet struck the passenger door, shattering the lowered window.

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

The second bullet struck the top of the passenger door, narrowly missing Johnson's chest. Defendant then fled. Mottola drove off.

Police officers were dispatched to the scene within minutes of the shooting. They found defendant as he was attempting to hide in some plants near the open security gate of a building. Defendant stood up, revealing a white Los Angeles Dodgers jersey on the ground where he had been sitting. Defendant appeared to be intoxicated. One of the officers noticed a gang tattoo on defendant's neck pertaining to the Mexican Mafia, also known as "Eme." Defendant was handcuffed and placed in a patrol car. During a search of the area, officers discovered a revolver behind a stairway, about 12 feet from where defendant was found. The revolver smelled as if it had been recently fired and contained three or four empty casings and two live rounds.

Mottola and his two friends arrived at the scene. Each of them identified defendant as the shooter in a field showup. They also identified defendant in court.

Defendant was arrested and transported to the police station, where his hands tested positive for the presence of gunshot residue. After being booked, defendant held up his hands and yelled, "Eme, fool."

***Defense***

Defendant testified in support of his defense of mistaken identification that he was not involved in the shooting on August 29, 2009. At around 12:15 a.m. that day, defendant left his home and walked up Echo Park Boulevard to get something to eat. Behind him he heard running footsteps. He turned and saw two men approaching, one of whom bumped into him, causing defendant to fall to his knees. The men ran past him into some nearby houses. Defendant never saw the shooting, heard gunshots, or yelled, "Echo Park gang, homie . . . ." Nor did he ever run into an alley, attempt to conceal himself or wear a Los Angeles Dodgers jersey that night.

According to defendant, he was walking from his house to get something to eat. He had been drinking and decided not to drive. Near an alley, defendant was approached by officers with their guns drawn. They issued various commands, before they grabbed

and searched him. Defendant was upset. When he asked why he was being detained, the officers said he matched the description of a shooting suspect and inquired about defendant's gang affiliation. The officers were sarcastic and seemed amused. Defendant told them that he did not belong to a gang. Officers discovered two outstanding traffic warrants and took him to the police station. Afterwards, police returned defendant to the area where he had been originally taken into custody. Instead of being released, defendant was detained for field showup. He was then arrested and charged with attempted murder. Defendant insisted the test revealing the presence of gunshot residue on his hands was wrong.

Dr. Michael Eisen, an expert in the field of memory and eyewitness identification, testified on defendant's behalf as to the various factors affecting human memory and the accuracy of identification.

## DISCUSSION

### A. *Defendant's Pre-Trial Motions For Advisory Counsel*

Defendant contends the court abused its discretion, thereby committing reversible error, in denying his pretrial motions for advisory counsel.

#### 1. Procedural Background

Following his felony arraignment, defendant elected to represent himself throughout the proceedings in his case. (*Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562].) Prior to trial, defendant filed a "Notice to Appoint Advisory Counsel," in which he stated his reasons for seeking advisory counsel: "The motion will be made on the grounds that advisory counse[l] can help guide [*sic*] through the legal due process of trial and will be able to expedite the pretrial process by helping 'Pro Per' in the proper procedure to challenge evidence presented at trial. Advisory counsel will be able to interview witnesses that Pro Per does not have access to. 'Pro per' has limited time at law library and cannot properly prepare all motions afforded him in

[a] timely fashion [*sic*] an advisory counsel will be able to aid in this area. 'Pro Per' needs advise [*sic*] on whether to proceed as 'Pro Per' is prudent and what his options are."

At a pretrial conference on May 27, 2010, Judge Rand S. Rubin denied defendant's motion, stating: "There's no advisory counsel appointed in this court, so the request is denied. You can either be pro per or you can have counsel."[2]

At the conclusion of a *Pitchess*[3] hearing on June 18, 2010, the court announced it would arrange for standby counsel to be present for defendant at the next court date. On August 4, 2010, with standby counsel present, the court heard and denied defendant's motions to suppress evidence and to set aside the information. Defendant then had a discussion with the court as to how he was to be provided certain discovery he had requested from the People while he was in jail.

"The Court: Standby counsel maybe could take it.

"[Defendant]: That's the reason I wanted advisory counsel was —

"The Court: No. There's no advisory counsel. You're the attorney. I don't have to appoint advisory counsel to pick up the discovery from the People.

"[Defendant]: I wanted advisory counsel so she could — when I was cross-examining my own self or direct examining my own self, for confusion of that nature, and for some kind of a — a — a guidance on the issues of — out of — how to build foundation on evidence. I'm learning, and I'll learn by the time I go to trial, because I'm going to go to trial . . . ."

Later, during an ex parte hearing, defendant renewed his request for advisory counsel so he could benefit from "actual guidance" during trial.

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**2** Although the May 27, 2010 minute order indicates that defendant's "request for co-counsel is heard and denied," defendant only requested that advisory counsel be appointed.

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

"The Court: You don't get to have an attorney give you guidance. You're the attorney.

"[Defendant]: Yes. I understand I'm the attorney, but I believe that you still have the discretion. You have the discretion of determining if I should have an advisory counsel.

"The Court: My discretion is that you don't. Okay."

Jury trial commenced on November 10, 2010, and standby counsel was present for defendant throughout the trial.

**2. Application of Relevant Legal Principles**

California courts have discretion to appoint advisory counsel to assist an indigent defendant who elects to represent himself. (*People v. Crandell* (1988) 46 Cal.3d 833, 861, disapproved on other grounds by *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.) However, "[a] criminal defendant does not have a right to simultaneous self-representation and representation by counsel. [Citations.] 'None of the "hybrid" forms of representation, whether labeled "cocounsel," "advisory counsel," or "standby counsel," is in any sense constitutionally guaranteed.' [Citation.]"[4] (*People v. Bradford*

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[4] "[T]he role and duties of advisory and/or standby counsel are not clearly established or defined." (*Brookner v. Superior Court* (1998) 64 Cal.App.4th 1390, 1395.) Various terms have been "loosely used," with no consistent meaning, to refer to multiple situations in which an accused and counsel are involved in the defense, such as "'advisory counsel,'" "'standby counsel,'" "'cocounsel'" and "'hybrid representation.'" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1164, fn. 14; see also *Brookner, supra,* at p. 1393.) Some courts have attempted to define these terms, but there is no uniformity in their use; "'advisory counsel'" is counsel who is present in the courtroom at the defendant's side, does not speak for the defendant or participate in the conduct of the trial, but only gives legal advice to the defendant (*Chaleff v. Superior Court* (1977) 69 Cal.App.3d 721, 731, fn. 6 (conc. opn. of Hanson, J.); accord, *People v. Blair* (2005) 36 Cal.4th 686, 725); "'standby counsel'" is counsel who is present in court to follow the evidence but does not give legal advice. Standby counsel is appointed for the benefit of the court to step in and represent the defendant in the event it becomes necessary to revoke the defendant's pro se status or to remove the defendant from the court (*Chaleff v. Superior Court, supra,* at p. 731, fn. 7; *Blair, supra,* at p. 725); and "cocounsel" is where

(1997) 15 Cal.4th 1229, 1368; accord, *McKaskle v. Wiggins* (1984) 465 U.S. 168, 183 [104 S.Ct. 944, 79 L.Ed.2d 122]; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1430.) When ruling on a request for advisory counsel, the court may consider the defendant's intelligence and verbal skills (*People v. Clark* (1992) 3 Cal.4th 41, 111), demonstrated legal abilities and reasons for seeking advisory counsel, and whether the motion represented an effort to manipulate the legal proceedings. (*Crandell, supra*, at p. 863.) As with other matters left to the trial court's discretion, "'as long as there exists "a reasonable or even fairly debatable justification, under the law, for the action taken, such action will not be here set aside . . . ."' [Citations.]" (*Id.* at p. 863.)

Defendant argues the record shows the lower court failed to exercise its discretion on his motion for advisory counsel. The failure to exercise discretion in refusing to grant a request for advisory counsel is error. (*People v. Crandell, supra,* 46 Cal.3d at p. 864 [after a summary denial].) If there is any absence of an exercise of discretion, we determine whether the denial of a request for advisory counsel would have been an abuse of discretion. (*Id.* at pp. 862-863.) If the denial would not have been an abuse of discretion, no constitutional right is implicated, and we review the trial court's error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Crandall, supra*, at pp. 864-865.)

In this case, it appears the court failed to exercise its discretion in denying defendant's pretrial motions for advisory counsel. The record reveals defendant's motions were summarily denied; there is no evidence the court evaluated the facts that may have justified the appointment of advisory counsel. (See *People v. Crandell, supra,* 46 Cal.3d at p. 862.) Rather, it appears the court had a blanket rule that a defendant either act in pro. per. or be represented by counsel. The court's failure to exercise discretion was error.

Nonetheless, the record supports the inference that had the court exercised its discretion in denying defendant's request for advisory counsel, such exercise would not

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the defendant and counsel share representation in some respect (*People v. Moore* (2011) 51 Cal.4th 1104, 1119, 1120, fn. 7).

have been an abuse of discretion. (*People v. Clark, supra,* 3 Cal.4th at p. 112.) In representing himself, defendant consistently demonstrated that he was a thorough and able advocate: He filed numerous pretrial motions, which he drafted and argued with considerable skill, including motions for informal discovery, *Pitchess* and *Brady*[5] material, to suppress evidence, to set aside the information, to compel discovery, for sanctions for failure to comply with discovery, and for appointment of an eyewitness identification expert. At trial, defendant made motions in limine, engaged in jury voir dire; he cross-examined the People's witnesses and presented witnesses (including expert testimony) supporting his defense and surrebuttal; requested jury instructions and raised objections to the People's proposed instructions; and he presented both opening and closing statements. (See *People v. Crandall, supra,* 46 Cal.3d at p. 865.) Additionally, this case did not present highly complex legal issues, but instead turned on factual disputes recognized and addressed by defendant's self-prepared defense. (See *Clark, supra,* at p. 111.) Finally, the evidence in support of the verdicts was overwhelming. On this record, it is not reasonably probable that had advisory counsel been appointed, defendant would have obtained a more favorable result. (*People v. Watson, supra,* 46 Cal.2d at p. 826.)

**B. *Miscalculation of Custody Credits***

The trial court awarded defendant 446 days credit for time actually served in presentence custody, but only 49 days of presentence conduct credit. As defendant argues, he is entitled to 17 additional days of conduct credit—15 percent of his actual custody time—pursuant to section 2933.1, subdivision (c) (presentence conduct credit limited to 15 percent of actual custody days for defendant by reason of a firearm enhancement under § 667.5, subd. (c)). (See generally *People v. Florez* (2005) 132 Cal.App.4th 314, 322.)

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**5** *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215].

The People concede the miscalculation but argue it can only be raised in the trial court. (§ 1237.1 ["No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court . . . ."].) However, "section 1237.1 only applies when the sole issue raised on appeal involves a criminal defendant's contention that there was a miscalculation of presentence credits. In other words, section 1237.1 does not require a motion be filed in the trial court as a precondition to litigating the amount of presentence credits when there are other issues raised on direct appeal." (*People v. Acosta* (1996) 48 Cal.App.4th 411, 420; see also *People v. Florez, supra,* 132 Cal.App.4th at p. 318, fn. 12; *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Duran* (1998) 67 Cal.App.4th 267, 269-270.) Such is the situation in this case. Accordingly, the judgment must be modified to reflect the additional 17 days of presentence conduct credits.

**DISPOSITION**

The judgment is modified to reflect a total of 512 days of presentence custody credits. As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J. ZELON, J.