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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARQUIS JAYVON MOORE, Defendant and Appellant.	B233477 (Los Angeles County Super. Ct. No. TA114681)

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Lonergan, Jr., Judge. Reversed and remanded.

A. William Bartz, Jr., 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, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Margaret E. Maxwell, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Marquis Jayvon Moore appeals from the judgment entered following a jury trial in which he was convicted of attempted second degree robbery. Defendant contends that his conviction is not supported by sufficient evidence and that the trial court erred by failing to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and ruling that defendant's prior conviction for carrying a concealed weapon could be admitted as impeachment if he testified. We agree the trial court committed *Marsden* error, which resulted in a denial of his right to counsel. Accordingly, we reverse.

BACKGROUND

About 5:00 p.m. on October 1, 2010, Alicia Carmona stood on a street corner on 103rd Street at Grandee, waiting to cross the street. A "group of persons came" up to Carmona. When the light changed, everyone crossed the street and arrived at another corner, where they had to wait on another traffic light. Carmona felt two "instantaneous" tugs on her purse, which she carried by a shoulder strap over her left shoulder and held with her left hand. The tugs, which came from Carmona's left side, caused the purse strap to move down her arm, but she maintained her grip on her purse. She looked to her left side to see what was happening. She did not see anyone's hand on her purse, but defendant was the only person standing close to her. He was wearing a black tank top and gray shorts. When the traffic signal changed, Carmona quickly crossed the street and approached Jaime Martinez, a stranger who was getting into a parked car, and asked him for help. Martinez testified that Carmona appeared to be frightened. Martinez and Carmona got into the car, and Carmona pointed to defendant as the cause of her fear. Carmona called 911 and described defendant to the dispatcher. Carmona and Martinez followed defendant by car as he walked into a shopping center on 103rd Street.

Carmona and Martinez watched as defendant entered and exited two stores in the center, then entered a grocery store, where he remained for a longer period of time. Martinez approached the entrance to the store and saw defendant inside, near the checkout lines. Sheriff's deputies arrived while defendant was in the grocery store. They

saw a shirtless man in the parking lot and detained him because, as Deputy Scott Meredith testified, the initial broadcast included descriptions of two suspects, one in a black tank top and one who was shirtless. Deputies showed Carmona the shirtless man and she told the deputies he was not the person who tried to take her purse. The deputies went into the grocery store, saw defendant in a checkout line, searched the rest of the store but found no one else wearing a tank top, then detained defendant. Carmona, who was just outside the entrance to the grocery store, spontaneously identified defendant as the deputies led him out, saying, in Spanish, "it's him." She and Martinez identified defendant at trial.

Defendant, who was granted self-representation on the day trial commenced, did not testify or call any witnesses. He told the court he wanted to call witnesses, including the shirtless man the deputies detained, and he had the man's name, but did not know how to procure a witness's attendance. The court told defendant to subpoena his witnesses and chided him for failing to prepare for trial during the four months he had been in custody. He also attempted to call his mother as a witness and explained, in the presence of the jury, that she could "testify on behalf of me having a reason to do this."

The jury convicted defendant of attempted second degree robbery. The court sentenced defendant to two years in prison for the attempted robbery, and imposed two consecutive eight-month terms for probation violations in defendant's prior cases (Super. Ct. L.A. County, Nos. YA074752 and TA094872).

DISCUSSION

1. *Marsden* error

When this case was called for trial, appointed defense counsel informed the court, "The defense is ready. However, [defendant] has expressed a wish to represent himself." The following exchange ensued:

"The Court: Mr. Moore, my understanding from your attorney is you now want to represent yourself; is that correct?

"[Defendant]: Yes, sir.

"The Court: Okay. And, sir, when did you come to this decision? Today was your day of trial that you got sent out. Was it this morning you made that decision?

"[Defendant]: No. Well, last week when she didn't come, *I felt a little like she didn't have time to even like care about my case so how could she represent me* if she doesn't come to be on the case?

"The Court: Well, sir, first before we get into details about you representing yourself and the issues that would result from that, you are currently being represented by a very experienced attorney, Ms. Alexander, whether you know it or not. She is in a courthouse that handles a high volume as you can probably tell in Compton from having been here on different appearances. She is an experienced attorney as is opposing counsel.

"[Defendant]: *If you want to give me another public defender.*

"The Court: Wait, sir. I'm not sure who you've been talking to or what advice you've gotten while you've been in custody, but there are a lot of pitfalls regarding representing yourself, but you do have that right if you meet certain qualifications and I'm going to go over a couple of things with you first." (Italics added.)

The court then asked defendant about his education, whether he understood the charges and his maximum sentencing exposure, whether he was aware of the prosecution's plea offer, and other matters pertinent to self-representation. The court then asked defendant, "[I]s it still your wish to represent yourself in a pro per status and relieve your attorney, Ms. Alexander?" Defendant replied, "Yes, sir." The court provided defendant with its Advisement and Waiver of Right to Counsel form to complete, directed him to consult with counsel in lockup regarding the form, and recessed for lunch.

When the court reconvened after lunch, defense counsel was not present. The court noted that she had been called to appear in another courtroom. The court nonetheless asked defendant if he had completed the Advisement and Waiver of Right to Counsel form. Defendant said he had read portions of the form, but did not understand

all of it. The court asked if he had discussed it with defense counsel. Defendant responded as follows:

"[Defendant]: Is it necessary to have her be here?

"The Court: No.

"[Defendant]: I can tell she no longer cares. Do you understand me?

"The Court: Mr. Moore, *we are not going to get into any kind of Marsden motion here. You've already indicated you don't feel your attorney is doing an appropriate job.* However, when I inquired this morning, the question is not whether or not you like your attorney or think she is doing a good job. The question is whether or not you want to represent yourself. That's different from if you want or are asking for another attorney. Right now are you prepared and do you wish to relieve your attorney of record, Ms. Alexander, and represent yourself in this case?

"[Defendant]: Yes." (Italics added.)

The court then went through the Advisement and Waiver of Right to Counsel form with defendant. During this discussion, defendant expressed confusion about whether he could choose to be represented by counsel: "But on the paper it says that at a certain time no matter during the time I can choose to have somebody represent me." He twice remarked that, if defense counsel or some other defense attorney had been present at an unspecified time, the trial could have started or even concluded already. Defendant finished his second of such remarks by asking if the court understood him. The court responded:

"The Court: No. I don't understand what you're saying. You're not happy with the time you've been given by your attorney?

"[Defendant]: What time? It's not for sure I'm getting time.

"The Court: No, your time with your attorney.

"[Defendant]: There's not a time I call her. She give me her business card.

"The Court: So you're basically saying that she really hasn't been your attorney.

"[Defendant]: No."

The court stated its expectation that defense counsel would return to the courtroom soon, then continued:

"The Court: "[W]e need to proceed one way or another so she'll come back when she is finished with that proceeding. She is your attorney of record and she'll remain so unless you decide to go pro per. Do you want to talk to her for a few moments and make a decision on which route you want to go?

"[Defendant]: Talk on the basis of that paper, her reading the rights being waived or talk to her about representing me?

"The Court: Talk to her about whatever you want.

"[Defendant]: What has been the purpose of representing me—representation the whole time I've been incarcerated?

"The Court: Sir, I don't know what your relationship has been nor am I at this point going to get into it.

"[Defendant]: That's why I feel I have to represent myself. That's self-explanatory right there.

"[The prosecutor]: Your Honor, can I make a suggestion?

"The Court: Absolutely.

"[The prosecutor]: Sounds like we are getting into the grounds of a *Marsden* motion.

"The Court: *Absolutely*. *That's why we are cutting it off right now.* [¶] *Your relationship with your attorney is yours.* I need a decision from you." (Italics added.)

The court recessed, then resumed proceedings after defense counsel returned. At that time, the court noted that defendant had initialed and signed the Advisement and Waiver of Right to Counsel form. Upon inquiry by the court, defendant acknowledged that he had had an opportunity to go over the form with his attorney and was still requesting to represent himself. He also told the court he was ready to start trial.

While the court and the parties awaited the arrival of civilian clothing for defendant to wear, the court again explained the prosecutor's plea offer to defendant.

The court characterized the offer as "very reasonable," stated a belief that defense counsel had also considered it a reasonable offer, and noted defendant was encountering one of the problems with self-representation. The following exchange ensued:

"[Defendant]: What I understand is it never was subject to me going pro per. *By me asking to remove her from the case, it automatically means that I want to go pro per?*

"The Court: Yes, sir. You can't—

"[Defendant]: Pick and choose?

"The Court: No. You can't pick and choose an attorney.

"[Defendant]: So at the time I felt like representing myself was the best decision for me.

"The Court: Sir, we're beyond that now. I granted that. You filled out the waiver.

"[Defendant]: So at the same time how am I supposed to get ready for a trial in 'x' number of hours?

"The Court: Sir, we've been through all that.

"[Defendant]: Who is 'we'?

"The Court: Again, you're talking over me. You can't talk when I talk. We are beyond that. We've spent now hours on this case with me explaining to you and trying to talk to you about why this is a bad decision. Yes, we're at the hour now. It's the moment now where the jury is coming in and we are starting your jury trial. You've been saying all along that you wanted to be pro per and you're ready for trial.

"[Defendant]: *I asked if I could have her removed from the case and that makes me go pro per?*

"The Court: No. You didn't ask that. It was explained to you that you can't pick and choose. You can't not like this attorney.

"[Defendant]: It's not that I don't like her. *She can't represent me if she's not doing nothing for me*." (Italics added.)

Defendant contends that his statements informed the court that he was dissatisfied with his appointed attorney's representation and wanted to substitute a different attorney, thus triggering the trial court's duty to conduct a *Marsden* hearing. We agree.

When a defendant asserts that appointed counsel is inadequately representing him and asks the court to appoint another attorney, the court must allow the defendant to explain the basis of his request and state specific instances of allegedly poor representation. (*Marsden*, *supra*, 2 Cal.3d at p. 124.) To impose a duty of inquiry on the trial court, "there must be 'at least some clear indication by defendant that he wants a substitute attorney.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 157.) A clear request for self-representation does not trigger a duty to conduct a *Marsden* inquiry. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1372–1373.)

After providing the required hearing, the trial court then has discretion in deciding whether to replace counsel. "'A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

Although defendant, through counsel, initially asked to represent himself, defendant's ensuing statements clearly revealed that he believed his current attorney was not providing adequate representation and wanted another attorney. Very early on in the lengthy discussion between the court and defendant regarding his representation, defendant stated his concern that his attorney did not care about his case and immediately stated, "If you want to give me another public defender." At that point, the trial court should have conducted a *Marsden* hearing or, at a minimum, asked defendant to clarify whether he wanted a substitution of attorneys or self-representation. The trial court failed to do either, and ignored the clear implication of defendant's statement, that is, he wanted the court to appoint a different attorney to represent him. The trial court instead carried on with its explanation and inquiry regarding self-representation. When defendant later restated his belief that defense counsel "no longer cares," the trial court

expressly refused to consider "any kind of *Marsden* motion here," and twice incorrectly informed defendant that his sole choices were self-representation or representation by the existing defense counsel. When defendant later again raised his dissatisfaction with defense counsel, the prosecutor informed the court that defendant appeared to be stating grounds of a *Marsden* motion. The court agreed, but again refused to conduct the required hearing.

The trial court erred by failing to either conduct the hearing required by *Marsden* or conduct an inquiry sufficient to establish that defendant wanted to represent himself. In light of defendant's obvious confusion and the court's multiple misadvisements that his only choices were to represent himself or proceed with the attorney whose representation he believed was unsatisfactory, defendant's ultimate completion of the Advisement and Waiver of Right to Counsel form and his express agreement that he was seeking self-representation were insufficient to establish that he did not want a substitution of counsel. Defendant's confusion regarding the choices available to him was illustrated by his remarks to the court after being granted self-representation: "By me asking to remove her from the case, it automatically means that I want to go pro per?" and "I asked if I could have her removed from the case and that makes me go pro per?"

Viewed from a different perspective, the court's misadvisements regarding defendant's options, coupled with its failure or refusal to conduct the hearing required by *Marsden*, negates a voluntary, knowing, and intelligent waiver by defendant of his constitutionally guaranteed right to counsel. (*People v. Cruz* (1978) 83 Cal.App.3d 308, 318 (*Cruz*).) "[T]he federal Constitution requires assiduous protection of the right to counsel," which persists unless the defendant knowingly, voluntarily, and intelligently waives that right. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.) "Courts must indulge every reasonable inference against waiver of the right to counsel." (*Ibid.*) "[I]n order to protect the fundamental constitutional right to counsel, one of the trial court's tasks when confronted with a motion for self-representation is to determine whether the defendant truly desires to represent himself or herself." (*Id.* at p. 23.)

In assessing whether a defendant validly waived his right to counsel, we review the entire record, including proceedings after the purported invocation of the right to self-representation, and determine de novo whether there was a knowing, intelligent, and voluntary waiver of the right to counsel and invocation of the right of self-representation. (*People v. Doolin* (2009) 45 Cal.4th 390, 453; *Marshall*, *supra*, 15 Cal.4th at p. 24.) In this case, we conclude defendant's purported waiver of the right to counsel and exercise of the right to represent himself was not knowing, intelligent, and voluntary because the trial court misadvised him regarding his right to counsel and refused to conduct the hearing *Marsden* requires when defendant complained about his court-appointed attorney and informed the court that he wanted to be represented by a different attorney, rather than proceed *in propria persona*. "Under the circumstances, defendant cannot be said to have been fully apprised of his right to counsel and therefore did not effectively waive that right." (*Cruz*, *supra*, 83 Cal.App.3d at p. 318.) "Both the defective *Marsden* inquiry and the ineffective *Faretta* waiver induced by that error constitute deprivations of [defendant's] constitutional right to effective assistance of counsel." (*People v. Hill* (1983) 148 Cal.App.3d 744, 756.) Because the trial court's errors violated defendant's constitutional rights, and it is impossible to determine with any degree of confidence whether defendant was prejudiced by this deprivation of his rights, we must reverse his convictions. (*Hill*, at p. 763.)

We note that although a conditional reversal is often an appropriate remedy for *Marsden* error that potentially failed to expose ineffective assistance by appointed counsel who continued to represent a defendant (*People v. Minor* (1980) 104 Cal.App.3d 194, 200; *People v. Lopez* (2008) 168 Cal.App.4th 801, 815; *People v. Sanchez* (2011) 53 Cal.4th 80, 92–93 [remedy for post-trial motion]), conditional reversal is inappropriate here, where the trial court's errors forced defendant to represent himself. The conditional reversal remedy was designed to resolve the issue of whether a trial court's erroneous failure to conduct the hearing required by *Marsden* resulted in any prejudice to the defendant where the trial record was "free of error and there is no indication in the record

of inadequacy on the part of trial counsel." (*Minor*, at p. 200.) A conditional reversal in this case would amount to an idle act that would provide neither an adequate remedy for the complete deprivation of counsel nor any level of assurance that the trial court's errors resulted in no prejudice to defendant.

In light of our disposition, we need not address the issues of allegedly improper impeachment and error in the calculation of defendant's presentence custody credits, but we must address defendant's sufficiency of evidence claim.

2. Sufficiency of evidence

Defendant contends that the evidence was insufficient to support his conviction, specifically with respect to identity. He argues, as he did at trial, that he was merely one of several people standing near Carmona, and her conclusion that he was the person who tugged on her purse was based solely on speculation. He argues that the speculative nature of Carmona's identification is further shown by her conduct in describing two suspects to the police.

To resolve this issue, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.) We presume the existence of every fact supporting the judgment that the jury could reasonably deduce from the evidence and make all reasonable inferences that support the judgment. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Catlin* (2001) 26 Cal.4th 81, 139.) A reasonable inference may not be based solely upon suspicion, imagination, speculation, supposition, surmise, conjecture, or guesswork. (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

Although Carmona did not see defendant tugging on her purse, she testified that the tugs came from her left side, and when she felt them, she looked to her left and saw defendant standing to her left. Although other people were standing on the corner with Carmona and defendant, defendant was the only person standing close to Carmona.

Carmona's testimony provided substantial evidence from which the jury could reasonably infer that defendant was the person who tugged on her purse.

Defendant's argument about a second suspect does not cast doubt upon Carmona's identification of defendant, much less detract from the sufficiency of the evidence to support the conviction. Martinez testified that when Carmona asked him for help, she identified defendant as the cause of her fear. Both Martinez and Carmona testified that defendant was wearing a black tank top and they followed him by car to the shopping center and watched as he entered and exited the stores. Although Deputy Meredith testified that the initial broadcast included descriptions of two suspects, one in a black tank top and one who was shirtless, Deputy Villegas clarified: "The description was changed during the call. As soon as we arrived to the location, we had an updated description saying that the description was of a male with a black tank top and dark clothing, pants and that he was in the shopping center close by." Meredith detained a shirtless man, and Carmona informed the deputies the shirtless man was not the culprit. Carmona spontaneously identified defendant when the deputies escorted him from the grocery store. It is thus clear that Carmona never wavered in her description of the culprit or in her identification of defendant. The "second suspect" description may have come from a source other than Carmona or it may have been intended to describe someone who appeared to be accompanying defendant. Whatever its origin, it is a collateral matter and does not diminish or negate the substantial evidence supporting defendant's conviction.

DISPOSITION

The judgment is reversed and the cause is remanded.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.