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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DEON TIMOTHY BOOTHE,

Defendant and Appellant.

B286328

(Los Angeles County
Super. Ct. No. NA106154)

THE COURT:

Deon Timothy Booth (defendant) appeals from a judgment entered following a jury trial that resulted in his conviction of second degree robbery and misdemeanor assault. We appointed counsel to represent defendant on appeal. Defendant's appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), requesting independent review of the record on appeal for any arguable issues. On July 3, 2018, we advised defendant that he had 30 days within which to personally submit any contentions or issues for us to consider. On July 18 and 19, 2018, defendant filed letter briefs raising multiple issues. We affirm.

BACKGROUND

On November 27, 2016, Marquinton Dorsey (Dorsey) and Ezequiel Cabrera (Cabrera), loss prevention officers at Vons grocery store in Long Beach, observed defendant take two bottles of alcohol off the shelf and place them in his backpack. Defendant did not attempt to pay for the bottles and walked outside of the store.

Once outside, Dorsey and Cabrera identified themselves as loss prevention officers to defendant. Dorsey requested defendant return the bottles. When defendant refused, Dorsey grabbed the strap of defendant's backpack. At that point, defendant tried to remove Dorsey's hand from his backpack by "brush[ing]" it off. Defendant also "shoved" Dorsey at least three times. Defendant then advised the loss prevention officers that he would return the bottles and began to remove his backpack when he instead took off running. The incident outside the grocery store was captured on surveillance video.

Dorsey and Cabrera immediately ran after defendant. During the chase, one of the bottles fell out of defendant's backpack and shattered. Defendant then threw the second bottle towards Cabrera, who had to move his body to avoid being hit. Long Beach police officers eventually arrested defendant in the area of the grocery store.

On September 29, 2017, a jury convicted defendant of second degree robbery (Pen. Code, § 211)¹ and misdemeanor assault (§ 240).

On October 30, 2017, at the sentencing hearing, defendant made a *Marsden*² motion, requesting that the trial court appoint

¹ All further statutory references are to the Penal Code unless otherwise indicated.

him a different attorney because his current counsel was “too busy.” Following a confidential hearing, the trial court denied defendant’s request. Defendant then made a *Faretta*³ motion, requesting that the trial court allow him to represent himself at his sentencing hearing, which it granted. The trial court relieved defendant’s current counsel of any further duties, continued the sentencing hearing, and ordered defendant to appear the next day to obtain the “paperwork” he needed to prepare for sentencing.

The following day, defendant advised the trial court that he wished to relinquish his pro. per. status. The trial court reappointed defendant’s previous counsel.

On November 13, 2017, at the sentencing hearing, defendant’s counsel requested that defendant be sentenced to probation, which the trial court denied, noting defendant “has unfortunately proven that he doesn’t do well on probation because this case itself was committed while [defendant] was on probation.” The trial court sentenced defendant to the low term

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Under *Marsden*, a defendant may move to have his appointed counsel discharged and substituted with another attorney. However, the decision is within the trial court’s discretion because a defendant has no absolute right to more than one appointed attorney. (*People v. Smith* (1993) 6 Cal.4th 684, 690.)

³ *Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*). Under *Faretta*, a defendant who makes a timely *Faretta* motion has an unconditional right to represent himself in the trial court if he voluntarily and intelligently elects to do so and is mentally competent to waive his right to counsel. (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

of two years in state prison for the robbery, and 180 days (or time served) in county jail for the assault.

Defendant filed a timely notice of appeal.

DISCUSSION

From what we can discern, defendant contends his convictions must be reversed because (1) his robbery conviction was based on insufficient evidence; (2) the prosecution violated section 1387 by improperly refileing this case after it had been dismissed; (3) the photographs of the bottles admitted into evidence show they had been tampered with at the scene; (4) his *Faretta* rights were violated; and (5) he received ineffective assistance of counsel at his sentencing hearing. We discuss each of his arguments in turn.

I. Sufficiency of the Evidence

Defendant argues his robbery conviction should be reversed because there was insufficient evidence to support the jury's finding that he used force to take the bottles from the loss prevention officers. Specifically, he writes, "[b]oth loss prevention [officers] got on the stand and testified under oath that I the defendant never pushed Mr. Dorsey at all." We disagree.

"To determine whether sufficient evidence supports a jury verdict, a reviewing court reviews the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable jury could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 617.)

Robbery is the "felonious taking of personal property in the possession of another, from his person or immediate presence,

and against his will, accomplished by means of force or fear.” (§ 211.) The trial court here defined “force” to the jury as “more than the incidental touching necessary to take the property.”

There was evidence of the element of “force” in this case. Cabrera and Dorsey testified that while defendant was still in possession of the bottles, he “shoved” Dorsey at least three times. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [“testimony of a single witness is sufficient to support a conviction”].) The surveillance video also captured a physical interaction between Dorsey and defendant. This evidence, taken as a whole and viewed in the light most favorable to the judgment, was more than sufficient to conclude defendant committed second degree robbery.

II. Section 1387

Defendant contends the prosecution improperly brought the same charges against him twice on two different occasions in violation of section 1387. However, there is nothing in the record indicating this case was refiled. Without any documentation, we do not know whether or in what manner the trial court ruled on this issue. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 [“Failure to provide an adequate record on an issue requires that the issue be resolved against plaintiff”].) Given the sparse record, we must presume the trial court’s ruling, if any, was correct.

III. Admission of the Photographs

Defendant writes, the photographs depict “them bottles were placed there. Evidence tampered with.” Although not entirely clear, it appears defendant is contending his convictions must be reversed because the photographs of the bottles should not have been admitted at trial due to evidence tampering. The

problem with this argument is that defendant failed to make a motion to exclude such evidence at trial and therefore has forfeited any challenge to the admission of the photographs on appeal. (Evid. Code, § 353, subd. (a) [codifies the well-settled California rule that a failure to make a timely objection to, or motion to exclude or to strike, inadmissible evidence waives the right to complain of the erroneous admission of evidence]; see also *People v. Seaton* (2001) 26 Cal.4th 598, 655.)

IV. *Faretta*

Despite the fact that the trial court granted defendant's *Faretta* motion, defendant now challenges the trial court's ruling, contending "[t]hey didn't allow me to go [pro. per.] right away. They waited a month later then finally allowed me to go [pro. per.] They violated my *Faretta* rights." It appears defendant is arguing the trial court violated his *Faretta* rights by delaying its decision on his motion. The record on appeal shows no delay. We find no error concerning defendant's *Faretta* motion.

V. Ineffective Assistance of Counsel

Defendant contends his counsel "fail[ed] to protect [his] rights to be sentenced appropriately." We disagree.

"To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; *Strickland v. Washington* (1984) 466 U.S. 668, 687–696.)

"Counsel's duty at sentencing is to be familiar with the sentencing alternatives available to the court, to make sure that

the court is aware of such alternatives, to explain to his or her client the consequences of the various dispositions available and to be certain that the sentence imposed is based on complete and accurate information. [Citations.]” (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085–1086.)

Here, it is unclear what more defendant’s counsel could have done for defendant at the sentencing hearing. As noted above, defendant’s counsel argued for a lesser sentence, mainly probation, which the trial court denied due to defendant’s criminal history. Defendant was then sentenced to the low term for the robbery and time served for the assault. Because defendant has failed to show that but for his counsel’s error, the trial court would have sentenced him differently in this case, his ineffective assistance of counsel claim fails.

CONCLUSION

In addition to the arguments set forth by defendant in his letter briefs, we have examined the entire record and we are satisfied that defendant’s appellate counsel has fully complied with his responsibilities and that no arguable issues exist. (*Wende, supra*, 25 Cal.3d at p. 441.)

We conclude defendant received adequate and effective appellate review of the judgment entered against him by virtue of counsel’s compliance with the *Wende* procedure as well as our review of the record. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123–124.)

The judgment is affirmed.

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ASHMANN-GERST, Acting P. J. CHAVEZ, J. HOFFSTADT, J.