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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM EDWARD BENNINGER, Defendant and Appellant.	B229720 (Los Angeles County Super. Ct. No. NA082223)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles D. Sheldon, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael C. Keller and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

William Edward Benninger (defendant) appeals from his convictions of attempted premeditated murder and assault with a deadly weapon. He contends: (1) denial of his *Faretta* and *Marsden* motions was error;[1] (2) the finding that he suffered a prior strike within the meaning of the "Three Strikes" law (Pen. Code, § 667, subds. (b)-(i), § 1170.12, subds. (a)-(d)) was not supported by substantial evidence; (3) refusal to strike the Three Strikes prior was an abuse of discretion; and (4) he was denied due process and a fair trial by being handcuffed during the sentencing hearing.[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's convictions arose out of three separate physical altercations he had with Christine P., with whom he was involved in a romantic relationship at the relevant time – May and June 2009. Defendant does not challenge the sufficiency of the evidence to support conviction on the substantive charges; nor do his other contentions require a detailed recitation of the facts. It is sufficient to state that Christine testified that defendant hit her with a two-by-four on May 25; threatened her with a screwdriver, threw her down on some rocks and then hit and kicked her on May 28; and stated his intention to kill her before hitting her in the head multiple times with a wood post on June 2. After each incident, Christine was treated at a hospital for her wounds. After the last incident, she was hospitalized for several days. Defendant testified that the May 25 incident was an accident, the May 28 incident was self-defense and the June 2 incident never happened.

Defendant was charged with two counts of assault with a deadly weapon, kidnapping and attempted premeditated murder. Prior conviction, great bodily injury and

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1 *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) and *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

2 All future undesignated statutory references are to the Penal Code.

weapon use enhancements were also alleged.[3] In April 2010, defendant changed his not guilty plea to all counts to guilty by reason of insanity. He was convicted by jury of both counts of assault with a deadly weapon and attempted premeditated murder, but the jury found him not guilty of kidnapping; it found true the great bodily injury and deadly weapon enhancements as to the attempted murder and one of the assault counts, and that defendant had suffered five prior convictions. Defendant was sentenced to a total of 92 years to life in prison. He timely appealed.

DISCUSSION

A. Denial of Defendant's Faretta *Motion Was Not an Abuse of Discretion*

Defendant contends the trial court erred in denying his *Faretta* motion. He argues the motion was timely and not conditioned on a continuance of the trial. We disagree.

While the trial court was waiting for the arrival of the prospective jurors on October 28, 2010, defense counsel informed the court that defendant wanted to make a *Marsden* motion. But when the prosecutors left the courtroom, defendant stated that he wanted to represent himself. Defendant acknowledged that he was not ready to begin the trial, but understood that the court would not grant a continuance. The following colloquy ensued: "DEFENDANT: The reason I want to go pro per is because there are several witnesses -- defense witnesses that this guy is not -- he's not -- [¶] THE COURT: Okay. [¶] THE DEFENDANT: Go ahead. What are you -- [¶] THE COURT: Are you finished? [¶] THE DEFENDANT: No, I'm not finished. [¶] THE COURT: Go ahead. [¶] THE DEFENDANT: He's not -- he's not bringing them to trial, and I need them. One of them is a state-appointed investigator that has exculpatory evidence on my side. He's now saying he can't find it, and I sent it to this lawyer right here in the mail and we've already discussed it a couple of times. Now, all of a sudden, he can't find it. [¶] THE COURT: Okay. Anything else you want to say? [¶] THE

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[3] He was also charged with two counts of corporal injury to a cohabitant, but these charges were dismissed.

DEFENDANT: No, sir. [¶] THE COURT: It's for purposes of delay only. This case goes back to June 2nd, 2009. Actually, before that, in May of 2009. [Defendant], you have been doing nothing, in my opinion, but playing games with me, first representing yourself then not representing yourself.[4] [¶] THE DEFENDANT: No, I know. No. [¶] THE COURT: I haven't finished. [¶] DEFENDANT: Okay. [¶] THE COURT: And then having public defender, not liking the public defender. I have gone out of my way for you. I've done something I have never done in 27 years. I have appointed an attorney off the panel just to be sure you had an attorney and you would be represented by a competent person. [¶] I deny your motion. We're going to go forward. [¶] THE DEFENDANT: Okay. Could I say something? [¶] THE COURT: Go ahead. [¶] THE DEFENDANT: Your Honor, I'm not asking for a continuance. I'm asking to represent myself. I'm not asking -- [¶] THE COURT: Are you ready today? [¶] . . . [¶] You want to represent yourself right now? [¶] THE DEFENDANT: Yeah, that's what I want to do. I want to represent myself. You didn't appoint this guy, sir. [Another judge] appointed this guy, in lower courts. [¶] THE COURT: I went out of my way to get that done. [¶] THE DEFENDANT: I understand you have, Your Honor, and I appreciate it. I fully, do. [¶] THE COURT: Okay. [¶] THE DEFENDANT: But I'm not asking, if you don't want to give me a continuance and you're denying me the right to go pro per because you don't want to give me a continuance to represent myself, then I will go ahead today and represent myself -- [¶] THE COURT: Okay. [¶] THE

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4 The Honorable Judith Meyer presided over defendant's preliminary hearing in September 2009, at which defendant represented himself but was appointed standby counsel (Attorney Murray Meyer, no relation to Judge Meyer). Judge Meyer denied as untimely defendant's Code of Civil Procedure section 170.6 (§ 170.6) motion to challenge her. Defendant was held to answer and the matter was assigned to the Honorable Charles D. Sheldon for all purposes. Defendant was still in pro. per. on October 27, 2009, when Judge Sheldon denied as untimely a section 170.6 challenge to him (a challenge for bias was also denied). In April 2010, defendant changed his not guilty plea to guilty by reason of insanity (Pen. Code, § 1026); standby Attorney Meyer became trial counsel and psychiatrists were appointed to examine defendant. After a number of continuances, the matter was called for trial on October 26, and trailed to October 28, 2010, when jury selection began.

DEFENDANT: -- If you want to pick a jury." Citing *People v. Lynch* (2010) 50 Cal.4th 693 (*Lynch*), overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643, the trial court denied defendant's *Faretta* motion as untimely. It noted that defendant had demonstrated a proclivity to substitute counsel and the court did not believe defendant's representation that he could go forward without a continuance. The trial court observed that defendant's self-representation request "was made while he was yelling at me. I was talking loud, too, at one point in time; but it was made in anger, in my opinion. . . . [¶] [Defendant] has mental issues. He's pled not guilty by reason of insanity. That's a complicating factor. The case may be considered complex . . . ."

Generally, a timely, unequivocal and voluntary *Faretta* motion must be granted if the defendant is competent to represent himself and the motion is not made for purposes of delay. (*Lynch, supra,* 52 Cal.4th at pp. 721-722.) By contrast, it is within the trial court's discretion to deny an untimely *Faretta* motion. (*Id.* at p. 722.) There is no single point in time when a *Faretta* motion is considered untimely but motions made long before trial are usually considered timely and those made on "the eve of trial" untimely. Self-representation motions made moments before jury selection is to begin, made on the date trial was scheduled to begin and even ones made a few days before the scheduled trial date have been found untimely. (*Id*. at pp. 722-723, and cases cited therein.) For purposes of *Faretta,* timeliness is based "not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*Id*. at p. 724.)

The factors to be considered in assessing whether an untimely *Faretta* motion should nevertheless be granted include " '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.' [Citation.]" (*Id*. at p. 722, fn. 10.) "[W]here the sole consideration supporting granting the untimely *Faretta* motion is the defendant's willingness to forego a continuance (despite his representations that he considers one necessary) the most prudent course would be to deny the *Faretta*

motion rather than condition its grant upon denial of the continuance." (*People v. Hill* (1983) 148 Cal.App.3d 744, 760; but see *People v. Nicholson* (1994) 24 Cal.App.4th 584, 593 [abuse of discretion to deny a *Faretta* motion made for a legitimate reason where there was no request for continuance or reason to believe self-representation would cause any delay or disruption].)

Here, defendant represented himself at his preliminary hearing in September 2009, and continued to do so until April 2010 when he changed his not guilty plea to guilty by reason of insanity. At that time, standby counsel was appointed as defense counsel. When defendant made his self-representation motion on October 28, 2010, the trial had already been continued a number of times and jury selection was about to begin. Although defendant expressed dissatisfaction with appointed counsel's representation, there is no objective evidence that the quality of that representation was in any way inadequate. And although defendant offered to proceed without a continuance, he made clear that he was agreeing to do so only in order to obtain self-representation and not because he was actually ready. Under these circumstances, we find no abuse of discretion in the trial court's denial of defendant's *Faretta* motion as untimely.

B. Denial of Defendant's Marsden *Motion Was Not an Abuse of Discretion*

Defendant contends it was error to deny his *Marsden* motion. He argues that the trial court did not adequately evaluate defendant's reasons for wanting new counsel. We disagree.

When the defendant makes a *Marsden* motion, the trial court must permit him to explain the basis of his contention that counsel is providing inadequate representation, and to relate specific instances of inadequate performance. (*People v. Smith* (2003) 30 Cal.4th 581, 604.) 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." (*Ibid.*) We review the denial of a *Marsden* motion for abuse of discretion. (*Ibid.*)

Here, defendant made his *Marsden* motion after the jury was sworn. Reading from something he had written, defendant explained that appointed counsel was not adequately representing him because (1) the trial court had denied defendant's request to reduce the number of armed guards in the courtroom; (2) counsel did not have copies of the victim's medical records; (3) counsel did not have copies of photographs of defendant taken by the police; (4) the investigator had not interviewed the victim or certain named prosecution witnesses; (5) the investigator had not located or interviewed certain defense witnesses; (6) counsel had not filed a motion to exclude photographs of the victim's injuries; (7) counsel did not know defendant's theory of defense; (8) counsel had not interviewed any of the police officers involved in the case; (9) counsel had not interviewed the fireman involved with an arson that occurred at the garage where defendant had been living with Christine until the first assault; (10) counsel would not talk to defendant about his theory of the case; (11) counsel had not prepared defendant to testify; and (12) counsel had lost exculpatory evidence that defendant received while he was representing himself, from his court-appointed investigator. Defendant asked for either a continuance so that counsel could rectify these matters, new counsel, or that he be allowed to represent himself.

Defense counsel was given a copy of what defendant had read into the record and it was agreed that he would respond the next day. The next day, defense counsel stated that he had the medical records and photographs to which defendant referred, he saw no purpose in interviewing the officer who testified at the preliminary hearing, other officers were interviewed, the victim was difficult to locate and it was finally decided not to interview her, other witnesses could not be located, counsel intended to make an Evidence Code section 352 motion to exclude some of the photographs, counsel understood defendant's theory of defense, the fire investigator was not relevant to the charged offenses, the defense investigator's report defendant claims was lost had never existed, and counsel intended to discuss with defendant his testifying. Defendant responded that counsel could not possibly be prepared for trial since he asked defendant during voir dire what had happened on June 2, the date of the charged attempted murder.

The trial court stated that, like the *Faretta* motion it had previously denied, defendant was making his *Marsden* motion out of anger. Insofar as defendant was making another *Faretta* motion, the trial court reiterated its reasons for denying the prior motion, including expressing a doubt whether defendant was mentally competent to represent himself which is a different standard than competence to stand trial. Regarding the *Marsden* motion, the trial court observed that defense counsel was "a very competent attorney who's been in my court any number of times and I can say that on the record. I know he's competent and in my opinion, [defendant] is lucky to have him." The trial court denied the *Marsden* motion, observing that counsel was "doing an excellent job for you. And you wouldn't be satisfied with anything that happens in this case, in my opinion."

We find no abuse of discretion in the trial court's conclusion that defendant failed to make the requisite *Marsden* showing. The trial court allowed defendant ample opportunity to specify his complaints. Defense counsel responded to each of those complaints. That defendant suggested a continuance to give counsel an opportunity to correct what defendant believed was lacking in his representation demonstrates that there were no irreconcilable differences between counsel and defendant. Under these circumstances, the trial court did not abuse its discretion in denying defendant's *Marsden* motion.

C. Substantial Evidence Supports the Finding That Defendant Had a Prior Three Strikes Law Conviction

Defendant contends the trial court erred in finding his prior federal conviction for bank robbery in violation of title 18 of the Unites States Code section 2113(a) (§ 2113(a)) qualified as a strike under the Three Strikes law. He argues that section 2113(a) can be violated in a manner that would not qualify the crime as a strike under California law, and there was no evidence as to the manner in which defendant had violated the federal statute. We disagree.

Upon a claim of insufficient evidence to support an enhancement, the appellate court examines "the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found . . . the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt." (*People v. Miles* (2008) 43 Cal.4th 1074, 1083 (*Miles*).) Where the fact of conviction pursuant to a specific statute is inadequate to prove qualification as a serious felony, the court may look to the record of conviction in the prior proceeding. (*Id*. at p. 1082.) Certified records from the Federal Bureau of Prisons constitute admissible evidence to prove a strike allegation. (§ 969b.)

Among the prior felony convictions that qualify as a strike under the Three Strikes law are those serious felonies defined in section 1192.7, subdivision (c). (§ 667, subd. (d)(1).) "Bank robbery" is one such crime. (§ 1192.7, subd. (c)(19).) "Bank robbery" is defined in subdivision (d) of section 1192.7 as "to take or attempt to take, by force or violence, or by intimidation from the person or presence of another any property or money or other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association."

In January 1984 (the date of defendant's alleged prior conviction), section 2113(a) read as follows: "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or [¶] Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny" shall be fined or imprisoned or both.

Violation of the first paragraph of section 2113(a) qualifies as a strike; violation of the second paragraph does not. (*Miles, supra*, 43 Cal.4th at pp. 1077, 1082-1083.) *Miles* is instructive. In that case, to prove that a prior conviction for violation of section 2113(a) qualified as a strike, the People introduced the form "Judgment and Probation/Commitment Order," signed by the federal judge. The form recited that the defendant pled guilty to a "violation of 18 U.S.C. 2113(a)(d)(e), armed bank robbery and . . . kidnapping, as charged in the First Count of the Indictment . . . ." (*Miles,* at p. 1079.) The defendant challenged the sufficiency of the evidence that the federal conviction qualified as a strike. (*Id*. at p. 1078.) Our Supreme Court affirmed, reasoning that "the trier of fact may draw *reasonable inferences* from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document, standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction." (*Id*. at p. 1083.) "Where, as here, the statutory provision includes more than one form of offense, one may reasonably infer, absent contrary indicia, that the additional prose [in the judgment] is not mere surplusage, but an attempt to delineate which form was violated." (*Id*. at p. 1085.) Moreover, the court explained, the term "robbery" in both legal and common parlance corresponded only to the first paragraph of section 2113(a), not the second which described the crime commonly known as "burglary." (*Miles,* at p. 1085.) The court in *Miles* found this to be "a strong background for concluding that [the federal judge's] notation describing the offense committed under section 2113(a) as "bank *robbery*" most likely [citation] refers to the forcible taking of the offense . . . ." (*Miles,* at p. 1087.) Providing further support to this conclusion was the fact that the judgment form stated that the conviction was also for "armed robbery" and "kidnapping." (*Id*. at p. 1088.)

Here, the information alleged that defendant was convicted on January 9, 1984, of "Robbery of a Credit Union," in case No. CR83-791 PAR, a strike under the Three Strikes law. To prove this allegation, the People introduced defendant's "Penitentiary

Packet from the Federal Bureau of Prisons." The packet included the "Judgment And Probation/Commitment Order" in case No. CR83-791 PAR, signed by the federal judge, which showed defendant was convicted of "robbery of a credit union in violation of 18 USC 2113(a)" and sentenced to four years in prison. Defendant testified during the priors trial, but only to dispute that he suffered a prison term on some of the alleged priors; he did not dispute that the prior conviction for violation of section 2113(a) qualified as a prior serious felony conviction. Defense counsel did not argue to the jury that the People had failed to prove the federal conviction was for a serious felony.

Under the reasoning of *Miles*, we find the notation "robbery of a credit union" on the judgment form, in the absence of any rebuttal evidence, constitutes substantial evidence that the conviction in case No. CR83-791 PAR qualified as a strike under the Three Strikes law.

D. Refusal to Strike the Three Strikes Priors Was Not an Abuse of Discretion

Defendant contends it was an abuse of discretion for the trial court to deny his motion to strike the Three Strikes priors. He argues the trial court improperly based its decision exclusively on defendant's past criminal record. We disagree.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531 (*Romero*), our Supreme Court held that trial courts have discretion under section 1385 to dismiss Three Strikes allegations in the furtherance of justice. We review the trial court's decision under the abuse of discretion standard. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 992-993.)

Here, the trial court denied defendant's *Romero* motion, commenting, "You have a long history of criminal behavior and incarcerations . . . ." Defendant has not established that the trial court abused its discretion by deciding based on personal antipathy or any other improper factor, or that he falls outside of the scope of the Three Strikes law because of his background, character, and prospects. On the contrary, defendant's probation report shows an extensive history of criminality beginning with a sustained juvenile petition in 1981. There followed adult convictions for taking a vehicle without

the owner's consent (1982), unauthorized entry into a dwelling (1982), receiving stolen property (1982), engaging in a lewd act in public (1983), burglary (1983), robbery (1984), taking a vehicle without the owner's consent (1987), being under the influence of a controlled substance (1989), possession of a firearm by a convicted felon (1992), under the influence of a controlled substance (1998), violation of promise to appear in court (1998), possession of paraphernalia (1999), arson of an inhabited structure (1999) and disorderly conduct (2008). The gap in criminality between 1999 and 2008 can be explained by the fact that defendant was sentenced to 10 years in prison on the 1999 arson conviction. Defendant's criminal history demonstrates that he is just the kind of recidivist to whom the Three Strikes law was intended to apply.

E. Defendant Was Not Denied Due Process or a Fair Trial as a Result of Being Restrained During the Sentencing Hearing

Defendant contends he was denied due process and a fair trial as a result of being handcuffed during the sentencing hearing, at which he represented himself. We disagree.

The trial court has discretion to order the defendant physically restrained and its exercise of that discretion will not be disturbed on appeal absent a showing of manifest abuse. (*People v. Ayala* (2000) 23 Cal.4th 225, 252.) A formal hearing is not required, so long as the court makes its own determination about the need for restraints based on facts shown to it, and does not simply defer to the recommendation of law enforcement. (*People v. Lomax* (2010) 49 Cal.4th 530, 561.) A greater showing of need is required to restrain a defendant during trial than during other proceedings. (*Tiffany A. v. Superior Court* (2007) 150 Cal.App.4th 1344, 1356; *In re Deschaun M.* (2007) 148 Cal.App.4th 1384, 1387.) The need for restraints may be demonstrated by a showing of unruliness. (*DeShaun M., supra*, at p. 1386; *Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1016.) It is the prosecution's burden to demonstrate need. (*Tiffany,* at p. 1357.)

Here, defendant represented himself at a postverdict hearing on November 16, 2010. After the trial court refused defendant's request for additional funds and defendant was being removed from the courtroom, defendant exclaimed, "Stupid ass mother. Shit."

Defendant was handcuffed at the next hearing, which was the sentencing hearing on November 24. When he complained that he could not turn his papers with the handcuffs on, the trial court suggested that one of defendant's hands be freed. In response to the bailiff's reluctance to do so, the sergeant was summoned. The trial court stated, "For the record, I've talked to the sergeant in charge of security in the building, and in that he was a sergeant in charge of pro pers for a long time, he said the way he handles sentencing – and it makes sense to me - is that somebody has papers, the bailiff will give the papers to the clerk or the court, and I will read them. So the handcuffs stay on."

We find no abuse of discretion in the trial court's decision to have defendant remain handcuffed. The sergeant's experience with other pro. per.'s was not the only fact before the court at the time it made its decision. Defendant's outburst at the previous hearing supported keeping the defendant in handcuffs at the sentencing hearing.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.