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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LAMAR ROSE, Defendant and Appellant.	B283560 (Los Angeles County Super. Ct. No. MA069671)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Jack T. Weedin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, William Shin and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Michael Lamar Rose appeals from the judgment entered following the denial of his *Marsden*[1] motion made after his no contest plea to second degree robbery (Pen. Code, § 211)[2] and admission of a prior serious felony conviction (§ 667, subd. (a)(1)). We affirm.

FACTUAL SUMMARY[3]

On October 1, 2016, Defendant entered the residence of Lisa L. (Lisa), a woman whom he was dating, struck her with his fist, then took her phone and debit card. Sheriff's deputies arrested Defendant shortly thereafter and put him in the back of a patrol car where he broke one of the car's rear windows.

ISSUE

Defendant claims the denial of his *Marsden* motion violated his constitutional rights to assistance of counsel and due process.

DISCUSSION

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S *MARSDEN* MOTION.

1. Pertinent Facts.

a. *Background proceedings.*

On December 13, 2016, Defendant entered the above plea and admission. On December 23, 2016, the court suspended imposition of sentence on Defendant's robbery conviction and placed him on formal felony probation for five years with various probation conditions. One condition was that Defendant obey a

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

2 Subsequent section references are to the Penal Code.

3 The facts are taken from the probation officer's pre-conviction report.

protective order requiring him to stay away from, and to have no contact with, Lisa for 10 years. The court dismissed the remaining counts. The court ordered Defendant to return on February 22, 2017.

On February 22, 2017, Defendant failed to appear in court and the court summarily revoked his probation and issued a no-bail warrant for his arrest. On May 8, 2017, Defendant was present in court and remanded into custody. The court repeatedly continued the case, including on June 12, 2017, to schedule a probation violation hearing. On June 12, 2017, Defendant indicated he wanted private counsel. The court continued the case to June 29, 2017.

b. *June 29, 2017 proceedings.*

(1) *The probation violation hearing.*

On June 29, 2017, the court called the case for a probation violation hearing and counsel for the parties announced ready. However, Defendant's court-appointed counsel, Attorney Matthew Rowan, represented that Defendant was requesting additional time so he could retain counsel. The court denied the request because the court had already given Defendant time to retain counsel, but he had not done so.

Rosita Bennett then testified about a May 4, 2017 incident between Defendant and Lisa at the Rite Aid where Bennett worked. Lisa was yelling, cursing, and knocking things off shelves. Lisa also struck Defendant and Bennett. Defendant asked Bennett not to call the police. Defendant's probation officer also testified concerning multiple alleged violations of Defendant's probation. The court took judicial notice of three probation reports and the People rested.

Defendant presented no evidence and submitted the matter. After the People presented argument, the court invited Rowan to argue his side. Rowan then indicated that Defendant wanted to have a *Marsden* hearing.

(2) *The Marsden hearing.*

During the subsequent *Marsden* hearing, Defendant indicated he wanted the court to discharge Rowan as his counsel. The court asked Defendant what Rowan was doing improperly. Defendant replied, "I feel he's not in my best interest, . . . I didn't comply with things, but I feel he's not exploring my other options. There's nothing much I can do but violate. Like I told him, from the first time I seen him, I got children. [¶] I know I got [a] . . . protective order to stay away from her. But at the end of the day, that's my baby['s] mother. I have to have some kind of contact. I'm not going to sit here and fight and lie to the court. I got children . . . ."

The court indicated it did not want to discuss Defendant's probation violation but wanted "to talk about what you think Mr. Rowan has done that you think he should not be doing." Defendant replied, "[h]e's not fighting for my best interest. I got kids. I lost two children to the system. I haven't seen my mom. I got all type[s] of things going on."

The court asked, "[s]o what should [Rowan] be doing," but Defendant interrupted and, apparently referring to a drug program, began by suggesting that Rowan was not "fighting for a program" as he told him he would. The court pointed out that it was not inclined to order Defendant to participate in a drug program. The court stated, "[a]nd if I recall correctly, Mr. Rowan, on every occasion, has asked for a drug program for you." The court later asked, "[s]o you're saying he should fight harder to get

you, what, a program?" Defendant replied, "[i]t's not just a program. I feel like he's not fighting for me at all."

The court suggested Defendant's statement was too broad so the court again asked Defendant what he thought Rowan should be doing. Defendant said, "[t]he time he's not giving me is not suitable. I'm going to go to prison with 7 to 9 or 7 to 11 years. . . . I was only on . . . probation for a couple months. I would just like another chance."

The following then occurred: "The Court: Now you're arguing your sentencing with me. I'm not doing this. [¶] The Defendant: I'm not arguing. [¶] The Court: What do you want him to do that he has not done? Do you want him to argue more? What else should he be doing? [¶] The Defendant: I feel that's not . . . right. I've only been on probation for two or three months. . . . [¶] The Court: Now we're talking about sentencing. [¶] What do you want him to do? [¶] The Defendant: I don't want him to be my attorney no more." Defendant then, apparently referring to prison time, stated, "I'm not taking no time today." Defendant later said, "every right that I have, I'm going to exercise."

The court repeated, "I'm asking you to share with me what you feel he should do that he hasn't done. You're saying he needs to fight harder; correct? [¶] Is that what you're saying? [¶] The Defendant: If that's how you want to put it. [¶] The Court: Well, I'm asking you to use your own words, but you start talking to me about sentencing and what you don't want to do and what you're not going to do. That's not what I'm asking you. That's not the appropriate discussion we're having now. [¶] You want him to fight harder for you; is that correct?"

Defendant replied, "I feel like he's not fighting for me at all. I feel suicidal. I feel like having a mental breakdown. He was supposed to order that two or three days ago, order for the court to have a psyche [*sic*] come down and evaluate me . . . ." The court stated it would take care of that and sign a medical order if Defendant needed one. Defendant claimed he had been diagnosed with "bipolar, depression, and post traumatic stress disorder," "[h]e said this three court dates ago," (*sic*) and he took medication.

The following later occurred: "[The Court]: Okay. What has [Rowan] done that he should not have done? [¶] The Defendant: . . . I feel like he's not fighting for my life. I got a lot to lose. If I go to prison, I'm going to lose everything. I [feel] like if I go to prison, I might never come home. Seven years, eight years. It can turn into a whole lot. I might have a mental breakdown. That's what I'm scared [of] the most."

The court asked Rowan to summarize his criminal experience and how long he had represented Defendant. Rowan represented he had been a public defender for almost 12 years, he had represented Defendants in felony, misdemeanor, and juvenile delinquency cases, he had handled about 50 jury trials, and he had handled many different matters. Rowan said he had been representing Defendant since May 8, 2017.

The court asked Rowan to discuss his representation of Defendant and Defendant's claim of deficient representation. The following later occurred: "[Rowan]: . . . I believe I fought as hard as I could . . . to persuade the court to show some clemency and give him the opportunity to do a drug program. [¶] I believe the court has made it clear that it would not entertain that possibility, but I've continued to do what I can to advocate for it.

[¶] I don't know if the court would like me to comment on anything else. [¶] The Court: All right. Very well. [¶] No. I think that's sufficient."

The court then asked Defendant if there was anything else he wanted the court to consider. Defendant replied, "Yes. [¶] . . . the last court date, I told him I don't feel mentally stable being in the courtroom. I told him this two, three days ago. [¶] He lied to me on multiple occasions." Defendant suggested that on at least one occasion, Rowan had met with him prior to court proceedings, and then had lied, telling him that Rowan was "going to go in there and talk to the judge." Defendant said, "[n]ext thing I know, you calling me in the courtroom when he promised me to come back and talk to me. . . . I feel like killing myself right now."

The court indicated it would take care of that and sign a medical order. The following then occurred: "[The Court:] With respect to the statements, I find that defense counsel has properly represented the Defendant and will continue to do so. [¶] With respect to the allegations that are made, they're not well-taken. The Defendant . . . , in my observations of him, since the very beginning, has never accepted responsibility. He just stated in court here that, one, he's not going to stop seeing his baby's mother because it's his baby's mother, so he has no intentions [of] complying. But more importantly -- [¶] The Defendant: I never said that. [¶] The Court: Be quiet. [¶] -- that he will do everything he can not to make this happen. So he first wanted to get a private lawyer so we gave him time to do that." The court then stated, "[t]hen had the hearing and he had to stall out here after counsel had spent a lot of time this morning with him back in the lockup speaking with him. I

confirmed that." The court commented Rowan was the court's regular calendar deputy and Rowan was very patient.

Defendant attempted to interrupt but the court asked him to be quiet. Defendant replied no and interrupted the court. The following later occurred: "[The Court:] I do find that the Defendant has represented that he's going to do everything he can. So now he is saying that he's suicidal and wants to talk about a psyche [*sic*] report and saying it's not safe for him to go forward. And he's saying he will not be sentenced today, which I beg to differ. He will be. I think that he is making up things in an effort to avoid being -- [¶] The Defendant: I'm not making up nothing. I -- [¶] The Court: The motion is, therefore, denied."

c. *Subsequent probation violation hearing proceedings.*

After the prosecutor reentered the courtroom, the court found Defendant violated probation by failing to report to probation as ordered; giving a false residence address to probation; failing to enroll in and complete domestic violence and community labor programs as ordered; failing to complete drug testing; and violating a protective order by being in Lisa's presence. The court revoked Defendant's probation and sentenced him to prison for the upper term of five years for second degree robbery plus five years for the prior serious felony conviction enhancement for a total of 10 years.

2. Analysis.

Defendant claims the denial of his *Marsden* motion violated his constitutional rights to due process and assistance of counsel. He argues the trial court failed to allow him to articulate the cause of his dissatisfaction and failed to make an adequate record at the hearing. He also argues the trial court failed to question Rowan appropriately and failed to thoughtfully exercise its discretion when considering Defendant's *Marsden* motion. We reject these claims.

"When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation—i.e., makes what is commonly called a *Marsden* motion [citation]—the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. 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. Substitution of counsel lies within the court's discretion. The court does not abuse its discretion in denying the motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel." (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

People v. Lewis and Oliver (2006) 39 Cal.4th 970 (*Lewis*), is illuminating. In that case, Oliver made a *Marsden* motion, complaining of his trial counsel's alleged inattentiveness, lack of loyalty, and inadequate trial preparation. (*Lewis*, at pp. 978, 1004.) At the *Marsden* hearing, the court allowed Oliver to express his complaints. (*Id.* at p. 1004.) *Lewis* found, "Oliver

had a full and fair opportunity to voice his objections about counsel's performance. Oliver offered no specific information to which either Turner or the trial court could meaningfully respond. Indeed, given the timing and nature of the motion, it appears to have been made primarily to delay the trial. In any event, since Oliver declined to elaborate on his complaints about counsel, the court had no duty to inquire still further. (See, e.g., *People v. Lucky* (1988) 45 Cal.3d 259, 280–283 . . . [no *Marsden* violation where, among other things, defendant declined to criticize counsel].)" (*Lewis*, at p. 1004.)

During the *Marsden* hearing in the present case, the court repeatedly asked Defendant to articulate his objections about Rowan's performance in its attempt to identify Defendant's complaints. Defendant responded with vague claims to the effect Rowan did not have Defendant's best interests at heart, Rowan was not fighting for him, and Rowan was supposed to be fighting to get Defendant into a drug program. Defendant suggested Rowan had lied to him concerning Rowan's willingness to consult with him before and after his appearances in court, but the court concluded that Rowan had spent substantial time talking with Defendant on those occasions.

Instead, it is clear on this record that what Defendant was really concerned about was not any alleged deficiency in Rowan's performance but the prospect of the court sentencing him to prison. The court repeatedly made efforts to keep Defendant on track, reminding him the *Marsden* hearing was not a sentencing proceeding but an opportunity for Defendant to express his dissatisfaction with Rowan's performance.

Moreover, we note that "Whenever [a *Marsden*] motion is made, the inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the *future*." (*People v. Smith* (1993) 6 Cal.4th 684, 695.) Here, Defendant made his *Marsden* motion after the presentation of evidence at the probation violation hearing but before Rowan presented argument concerning whether the court should find Defendant violated probation. At that stage in the proceedings, the court had little more to do than to determine whether Defendant violated his probation.

Defendant provided no specific information during the *Marsden* hearing as to how Rowan could have represented him better or what he could have done to dissuade the court from finding Defendant in violation of probation and sentencing Defendant to prison.[4] Defendant presented no specific information indicating Rowan's questioning the People's witnesses at the probation violation hearing constituted deficient performance. In fact, it was Rowan's cross-examination of Bennett that elicited evidence that Lisa did quite a bit of damage in the store and struck both Defendant and Bennett. These were mitigating facts relevant to the issues of whether the court should revoke probation and sentence Defendant to the extent he violated the protective order.

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[4] There is no dispute that if the trial court properly denied Defendant's *Marsden* motion, the trial court's finding that Defendant violated probation, the court's order revoking probation, and Defendant's later sentence were valid.

Indeed, during the *Marsden* hearing, Defendant conceded, "I didn't comply with things." He did not, during that hearing, provide specific information as to what, if any, evidence Rowan could have introduced to dispute the People's evidence. Defendant said, "there's nothing much I can do but violate" and he provided no specific information as to what Rowan could have done to avoid a finding Defendant had violated probation.

Defendant further acknowledged intentionally violating the protective order precluding him from having contact with Lisa. He provided no specific information as to how Rowan could have challenged the evidence Defendant had violated the probation condition and protective order that went to the heart of this case.

Despite Rowan's diligent efforts to have the court place Defendant in a drug program, the court was disinclined to do so. Defendant suggested he was having mental health problems and the court indicated it would issue a medical order but Defendant provided no specific information as to what more Rowan could have done on that issue.

The court diligently asked Rowan to summarize his criminal experience and how long he had represented Defendant. The court then inquired into the specifics of Rowan's representation of Defendant relating to Defendant's claim of deficient representation. Given the conclusory nature of Defendant's assertions, the court's satisfaction with Rowan's explanations was reasonable.

The trial court found that Defendant's *Marsden* motion lacked merit, finding the motion to be a dilatory tactic intended either to delay sentencing or to avoid it altogether, in part because it was made after the court's denial of Defendant's request for additional time to retain private counsel.

Because Defendant did not show that a failure to replace counsel would substantially impair his right to assistance of counsel, the trial court did not abuse its discretion by denying Defendant's *Marsden* motion and did not violate his right to due process.[5]

None of the cases cited by Defendant, and none of his arguments, compel a contrary conclusion. This includes *U.S. v. Adelzo-Gonzalez* (9th Cir., 2001) 268 F.3d 772 (*Adelzo-Gonzalez*). In that case, involving a more profound conflict between attorney and client, the Ninth Circuit concluded that a district court failed to make an adequate inquiry into the possible breakdown of their relationship, given the client's allegations that his attorney swore at him and threatened to "sink [him] for 105 years" if he did not accept the prosecution's offer to settle the case. (*Id.* at p. 774.) *Adelzo-Gonzalez* found that the district court failed to ask probing questions of the defendant despite "striking signs of a serious conflict." (*Id.* at p. 778.)

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[5] Defendant's argument on appeal is the trial court's denial of his *Marsden* motion violated his rights to the effective assistance of counsel and due process. However, in a footnote, Defendant asserts a "claim of denial of effective assistance of counsel may lie at both probation violation and sentencing proceedings," and he cites cases referring to ineffective assistance issues but not *Marsden* motions. To the extent Defendant suggests he was denied effective assistance of counsel independent of his *Marsden* claim, we reject the suggestion. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

In contrast, the trial court here asked appropriate open-ended questions in an attempt to have Defendant clarify his vague assertions of discontent with counsel, following up with more probing questions related to counsel's performance at the probation violation hearing. To the extent the trial court's inquiry in the present case was at odds with *Adelzo-Gonzalez,* we respectfully disagree and note that we are not obligated to follow federal appellate court authority. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

In *U.S. v. Reyes-Bosque* (9th Cir. 2010) 596 F.3d 1017 (*Reyes-Bosque*), the Ninth Circuit itself later distinguished *Adelzo-Gonzalez*, observing, "specific questions were necessary in *Adelzo-Gonzalez* because there were *obvious* signs of discord between the defendant and his counsel: the defendant told the court that he and appointed counsel were not getting along and that he did not pay attention to him; appointed counsel also *openly called the defendant a liar* before the court and even *threatened '"to sink [him] for 105 years so that [he] wouldn't be able to see [his] wife and children."'"* (*Reyes-Bosque*, at p. 1034, italics added.) This was "evidence of a *serious* conflict." (*Ibid.,* italics added.) Nothing similar happened here.

Defendant asserts, "When responding to a defendant's complaints counsel should clearly describe for the record the work that has been done on the case by counsel, by other attorneys in the office, and by others such as paralegals and investigators. (*People* v. *Hovey* (1988) 44 Cal.3d 543, 573 [*Hovey*].)" The assertion is frivolous. Nothing in *Hovey*, at page 573 of that decision or anywhere else, had anything to do with a *Marsden* motion. At page 573 of the *Hovey* decision, our Supreme Court simply concluded a trial court properly excluded the

Defendant from a hearing the trial court conducted on *its initiative* to determine the competency of the Defendant's counsel. And notwithstanding Defendant's assertion to the contrary, *Hovey* says nothing about what counsel should "describe for the record."

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.