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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ROBBINS, JR.,

Defendant and Appellant.

B281576

(Los Angeles County
Super. Ct. No. TA133510)

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

Alan S. Yockelson, 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, Colleen M. Tiedemann and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Robert Robbins, Jr., (Robbins) of possessing a controlled substance for sale and selling, transporting, or offering to sell a controlled substance (Health & Saf. Code, §§ 11351, 11352, subd. (a)). The trial court sentenced him to 16 years in state prison. Roberts appealed, arguing, inter alia, that the trial court erred by denying his *Marsden*¹ motion to substitute appointed counsel without a hearing prior to imposing his sentence. We agreed that the trial court erred in denying the motion without a hearing and remanded the matter to the trial court with directions to conduct a *Marsden* hearing. (See *People v. Robert Robbins, Jr.* (July 28, 2016, B261609) [nonpub. opn.].) On remand, the trial court duly conducted a *Marsden* hearing and then denied Robbins’s motion to replace his court-appointed attorney.

On appeal, Robbins argues that the trial court abused its discretion in denying his motion, because, with respect to one of his complaints against his attorney, the trial court purportedly failed to conduct a “meaningful inquiry” into the merits of his claim. We disagree and affirm the judgment.

BACKGROUND

I. Robbins’s arrest

On May 24, 2014, the Los Angeles Police Department (LAPD) conducted a “buy-bust” narcotics operation in a housing project. As part of the operation, the LAPD used a nonconfidential informant (NCI) equipped with audio and video recording equipment and marked currency. After another drug purchaser directed the NCI to Robbins, the NCI approached

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

Robbins as he sat outdoors in a chair counting a large pile of money. Robbins did not take the money offered to him by the NCI, but, instead, directed the NCI to two other individuals, L.C., who took a marked \$10 bill from the NCI, and R.S., who gave the NCI a rock of crack cocaine. After completing the transaction with the NCI, L.C. took the NCI's money over to Robbins and handed him the marked bill; Robbins then disappeared into a nearby residential building. Due to safety concerns, the LAPD did not follow Robbins into the building. On June 3, 2014, less than a week later, the LAPD arrested Robbins in the same area with \$1,300 in small denominations.

II. Robbins's *Marsden* motion

On July 23, 2014, the People filed a two count information charging Robbins with the possession and sale of a controlled substance. The information also alleged a gang enhancement for both counts. After the gang allegations were dismissed, a jury found Robbins guilty of both counts.

On January 14, 2015, the trial court held a sentencing hearing. At the beginning of that hearing, Robbins's counsel advised the court that, while speaking with his client earlier that day, he learned that his client wanted a *Marsden* hearing held before being sentenced. The trial court denied the request, explaining to Robbins as follows: "I think it's too late. . . . And you have had your opportunities and your counsel has represented you, in my opinion, properly." After denying the *Marsden* motion, the trial court granted Robbins's *Romero* motion,² striking a juvenile strike, and then sentenced him to 16 years in prison.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

III. Robbins's appeal

Robbins timely appealed from his conviction, arguing, *inter alia*, that the trial court erred by denying his request for a *Marsden* hearing. The People agreed with Robbins that the trial court had erred with respect to the *Marsden* hearing. Although we rejected Robbins's other arguments on appeal, we remanded the matter to the trial court "with directions to conduct a *Marsden* hearing. If the *Marsden* motion is granted, the court shall hold a new sentencing hearing. If the *Marsden* motion is not granted, the judgment is otherwise affirmed."

IV. The *Marsden* hearing

On March 3, 2017, the trial court conducted an *in camera* *Marsden* hearing. At the hearing, Robbins did not argue that there was an irreconcilable conflict between himself and his court-appointed counsel; instead, he based his request for a new attorney solely on his counsel's alleged failure to provide him with adequate representation: "He just didn't do a good job."

At the hearing, Robbins identified a number of alleged failings by his defense counsel during his criminal case. For example, Robbins maintained that his counsel failed to have a purportedly exculpatory police video shown at trial. After hearing and clarifying Robbins's claim about the video, the trial court asked defense counsel to respond. Robbins's attorney stated that the video from the NCI's body camera was not only shown at trial but also that he had used the video to argue "strenuously" to the jury that the video did not show Robbins directing the NCI to L.C. and R.S., the individuals who sold the NCI the crack cocaine. Using his notes from the trial, Robbins's counsel directed the trial court to a minute order which indicated that the video was admitted as "People's Exhibit Number 4."

In addition, Robbins asserted that during the trial his attorney improperly allowed the People and the police to photograph his tattoos. Under the trial court's questioning, Robbins's defense counsel explained that the photographs of Robbins's tattoos were not used at trial, because he succeeded in getting the gang enhancement allegations dismissed. The trial court then explained to Robbins that "tattoos of defendants that the People believe are gang-related or have some relevancy for any other reason are routinely admitted in trials. And you have no expectation of privacy when you put a tattoo on your body. And so trying to object to that would have been futile on the part of [defense counsel] at that time."

For his final complaint, Robbins asserted that his counsel failed to act when the attorney representing R.S. conferred with his client near the jury box while the jury was present and stated that Robbins was a "three striker." According to Robbins, "everybody in the courtroom heard" the statement about his prior criminal history, but "nobody said nothing."

When questioned by the trial court about the alleged "three striker" incident, Robbins's counsel responded as follows: "I have no recollection of a conference between [R.S.] . . . and [his court-appointed attorney] prior to [R.S.] testifying. I don't have any recollection that it was behind the jury deliberation room door while the jurors were in the jury box. I don't have any recollection of that happening. [¶] However, assuming that it did, . . . I don't see how that is something that I had anything to do with or any control over. So I don't think that's an appropriate basis for complaining about my performance. It sounds like Mr. Robbins is dissatisfied with some statements that he believes the jury may have overheard that were made by the attorney that was

appointed to represent [R.S.] prior to him testifying.” The trial court, after listening to defense counsel’s remarks did not ask any follow-up questions of either Robbins or his attorney regarding the “three striker” complaint.

During the *Marsden* hearing, in addition to eliciting and exploring all of Robbins’s complaints, the trial court questioned both Robbins and his attorney on their working relationship. Among other things, the trial court discovered that Robbins’s counsel had represented him from arraignment through trial and that in all that time Robbins had never requested a *Marsden* hearing until just before the sentencing hearing.

At the conclusion of the *Marsden* hearing, the trial court denied Robbins’s request as follows: “So the Court has listened and considered Mr. Robbins’s complaint[s] and also considered [defense counsel’s] response[s], and I’ve reviewed the contents of the court file. And it’s the Court’s position . . . that [defense counsel] properly represented [Mr. Robbins] during [his] trial and that there’s no basis to support [Robbins’s] *Marsden* claim, and therefore [the] motion is going to be denied.”

DISCUSSION

On appeal, Robbins contends that the trial court erred with respect to only one of his complaints at the *Marsden* hearing, namely his counsel’s purported failure to object or otherwise respond to the “three striker” comment by the attorney for R.S. Specifically, Robbins argues that “[a]lthough the trial court questioned counsel on some of the issues [he] raised, it failed to conduct any meaningful inquiry into this particular claim.” According to Robbins, this alleged failure by trial court “constituted a procedural error and an abuse of discretion

requiring reversal.” As discussed below, we are not persuaded by Robbins’s argument.

A. Guiding principles and standard of review

“The governing legal principles [derived from *Marsden*, *supra*, 2 Cal.3d 118] are well settled. ‘Under the Sixth Amendment right to assistance of counsel, “ ‘[a] defendant is entitled to [substitute another appointed attorney] if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’ ” ’ ” (*People v. Valdez* (2004) 32 Cal.4th 73, 95.)

Marsden, *supra*, 2 Cal.3d 118, imposes a number of specific requirements on a trial court. First, if a “defendant complains about the adequacy of appointed counsel,” the trial court has the duty to “permit [him or her] to articulate his [or her] causes of dissatisfaction.” (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695 (*Eastman*).) Second, the trial court has the duty to “make a record sufficient to show the nature of [a defendant]’s grievances and the court’s response to them.” (*Id.* at p. 696, italics omitted.) Third, if any of defendant’s complaints “suggest ineffective assistance,” the trial court must “conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance.” (*Id.* at p. 695.) In other words, if a “defendant states facts sufficient to raise a question about counsel’s effectiveness,” the trial court has a duty to “question counsel as necessary to ascertain their veracity.” (*Ibid.*) In sum, the trial court must “ ‘allow the defendant to express any specific complaints about the attorney and the attorney to respond accordingly.’ ” (*Id.* at p. 696.)

A defendant faces a “very heavy,” even “extreme” burden to prevail on a *Marsden* motion. (*People v. Bills* (1995) 38 Cal.App.4th 953, 961, 962.) “The defendant must show that appointed counsel is not adequately representing him, and that the deficiency in representation is so great as to substantially impair the defendant’s right to the effective assistance of counsel. [Citation.] The defendant must give specific examples of counsel’s inadequacies, and cannot rest upon mere failure to get along with or have confidence in counsel.” (*Id.* at p. 961.)

Once a defendant has been afforded an opportunity to explain and provide specific instances of inadequate performance, “‘[t]hereafter substitution is a matter of judicial discretion.’” (*People v. Horton* (1995) 11 Cal.4th 1069, 1102.) “Denial is not an abuse of discretion ‘unless the defendant has shown that a failure to replace counsel would substantially impair the defendant’s right to assistance of counsel.’” (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

B. No abuse of discretion

Here, the trial court met all of the *Marsden* requirements.

The court made sure that Robbins had the opportunity to fully present his grievance regarding the purported comments by R.S.’s attorney. (*Eastman, supra*, 146 Cal.App.4th at p. 695.) After Robbins raised that particular grievance, the trial court asked Robbins a number of follow-up questions to clarify the nature of that particular complaint. After Robbins answered the trial court’s specific questions, the court asked Robbins if he had “anything else” to add and he replied, “No. That’s it.” On appeal, Robbins does not contend that the trial court failed to allow him to either fully explain the “three striker” issue or to present all of his evidence regarding that particular issue. (See *People v.*

Horton, *supra*, 11 Cal.4th at pp. 1068, 1101–1103 [*Marsden* motion properly denied after trial court provided defendant “ample opportunity” to explain basis for complaints].)

In addition, through its questioning of both Robbins and his counsel, the trial court made a record sufficient to show the nature of Robbins’s grievance with respect to the “three striker” comments. (*Eastman*, *supra*, 146 Cal.App.4th at p. 696.) On appeal, Robbins does not contend that the trial court failed to create a sufficient record. (Cf. *People v. Mendez* (2008) 161 Cal.App.4th 1362, 1368 [reversing denial of *Marsden* motion because, *inter alia*, trial court made “no record”].)

Finally, the trial court allowed defense counsel to “respond accordingly” to Robbins’s “three striker” grievance. (*Eastman*, *supra*, 146 Cal.App.4th at p. 696; cf. *People v. Cruz* (1978) 83 Cal.App.3d 308, 317 [*Marsden* error because trial court failed to ask counsel to address defendant’s complaints]; *People v. Groce* (1971) 18 Cal.App.3d 292, 297 [*Marsden* error because trial court failed to inquire “into counsel’s reason for not producing the physician or his hospital records”].)

On appeal, Robbins does not deny that the trial court sought and received defense counsel’s response to the “three striker” grievance. Instead, he argues that defense counsel’s statements “should have triggered further questioning” on the issue. Without identifying any specific questions that the trial court “could have and should have” asked defense counsel, Robbins nonetheless maintains that the trial court’s failure to conduct any follow-up questioning was a prejudicial error. Robbins is mistaken—the trial court’s decision not to ask any further questions about the “three striker” grievance was not an abuse of discretion for two principal reasons.

First, Robbins’s counsel did not recall the event and, in his response, suggested that it might never have occurred. Any further questioning of defense counsel about why he did not respond to an event he did not recall and believed might not have occurred would have been futile and a waste of time for the parties and the trial court. In other words, no amount of follow-up questioning of defense counsel by the trial court would have “ascertain[ed] the[] veracity” of Robbins’s allegation. (*Eastman, supra*, 146 Cal.App.4th at p. 696.)

Second, Robbins failed to meet his threshold burden of stating “facts sufficient to raise a question about counsel’s effectiveness” with respect to that particular grievance. (*Eastman, supra*, 146 Cal.App.4th at p. 695.) Although Robbins regarded the comments by R.S.’s attorney as prejudicial at the time, he did not state at the *Marsden* hearing that as soon as he heard those comments he immediately brought the issue to the attention of his defense counsel or ever raised the issue with his counsel at any time prior to the *Marsden* hearing. Moreover, although Robbins asserted that “everyone” in the courtroom heard the comments, he offered no facts to support that assertion. His counsel, who had brought his trial notes to the hearing, had no recollection of the incident. And, despite having seven months³ to prepare for the *Marsden* hearing by contacting others who were present in the courtroom at the time of the alleged “three striker” comments (e.g., R.S., R.S.’s attorney, bailiffs, court staff, court reporters, and/or spectators) and obtaining their sworn testimony that such comments were in fact made in the

³ We issued our decision directing the trial court to hold a *Marsden* hearing on July 28, 2016. The *Marsden* hearing was held on March 3, 2017.

jury's presence, Robbins failed to provide the trial court with any supporting declarations. It is well established that "mere allegation[s] . . . without more" are insufficient to compel a trial court to grant a *Marsden* motion. (*People v. Abilez* (2007) 41 Cal.4th 472, 489.) In addition, where, as seemingly occurred here, there is " 'a credibility question between defendant and counsel at the hearing, the court was "entitled to accept counsel's explanation." ' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.)

In sum, where, as here, the "record demonstrates the court allowed defendant to explain the reasons for his dissatisfaction with counsel and permitted counsel to [adequately] respond," no abuse of discretion will be found in denying defendant's motion. (*People v. Abilez, supra*, 41 Cal.4th at p. 488; *People v. Smith* (2003) 30 Cal.4th 581, 606–608 [no abuse of discretion denying *Marsden* motion where defendant was given "full opportunity to air all of his complaints, and counsel to respond to them"].)

Accordingly, we hold that the trial court conducted a proper *Marsden* hearing as to the "three striker" grievance and did not abuse its discretion in denying Robbins's motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.