Filed 5/30/17 P. v. Warsaw CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER DEWAYNE WARSAW, Defendant and Appellant.	B275887 (Los Angeles County Super. Ct. No. YA088998)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Vanessa Place, 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, Shawn McGahey Webb and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Defendant Christopher Dewayne Warsaw appeals from the judgment following a trial at which the jury convicted him of nine counts of attempted murder of a peace officer (Pen. Code, §§ 187, subd. (a), 664; counts 1-8, 10);[1] nine counts of assault on a peace officer with a semiautomatic weapon (§ 245, subd. (d)(2); counts 11-18, 20); two counts of false imprisonment of hostage (§ 210.5; counts 23-24); and one count each of kidnapping (§ 207, subd. (a); count 21); possession of a firearm by a felon (§ 29800, subd. (a)(1); count 25); and forcible rape of a child 14 years or older (§ 261, subd. (a)(2); count 27). The jury also found true the attendant sentencing allegations.

This is a second strike case (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Defendant was sentenced to prison for a total determinate term of 32 years, consisting of 26 years, or double the eight-year upper term, plus a 10-year firearm enhancement (§ 12022.5, subd. (a)) on count 23; four years eight months, or three years four months, i.e., double one-third the five-year midterm, plus one year four months, i.e., one-third the four-year midterm for the firearm enhancement (§ 12022.5, subd. (a)), on count 24; and one year four months, or double one-third the two-year midterm, on count 25. He also was sentenced, on counts 1 through 8, and 10, to nine consecutive indeterminate life terms of 30 years to life, or double the 15-year minimum term, plus 20 years for the firearm enhancement (§ 12022.53, subd. (c)), and, on count 27, to a consecutive term of life without possibility of parole, plus a 10-year firearm enhancement (§ 12022.53, subd. (b)). The trial court imposed and stayed (§ 654) the

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1 All further section references are to the Penal Code.

sentence of 58 years on each of counts 11 through 18 and 20 and the sentence of 36 years on count 21.

Defendant contends the trial court committed prejudicial error in denying his February 29, 2016 motion and subsequent motions to substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Further, he claims he was denied effective assistance of counsel and, at sentencing, he was denied his right to self-representation under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). He also contends the judgment must be reversed for denial of his new trial motion based on ineffective assistance of counsel and because of cumulative error.

We affirm the judgment. The trial court did not abuse its discretion in denying his *Faretta* or his challenged *Marsden* motions. Denial of his new trial motion was proper. There is no cumulative error.

BACKGROUND

1. Factual Background

We recount the evidence pursuant to the usual standard of review. (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) The events leading up to the charges in this matter occurred on November 27, 2013.

a. Mother and daughter as hostages

About 10:30 a.m., November 27, 2013, defendant phoned Myisha G., his girlfriend until about a month before, to use her backyard Jacuzzi. She refused. He still showed up and went into the Jacuzzi. When Myisha, who was already there, said she did not feel like talking, he became very angry and threatened to drown her. Shortly, M.G., Myisha's 14-year-old daughter, came outside with the family dog. While the dog distracted defendant, the two retreated into the house. Defendant drove off.

Less than 30 minutes later, defendant returned. M.G. screamed and tried to escape through the front door but he dragged her back with gun in hand. When Myisha confronted him, he ordered them to "sit the fuck down and shut the hell up." He added "nosey neighbors . . . probably called the police." One of two witness neighbors did call Inglewood police. The door knocks of the responding officers went unanswered. Defendant ordered his hostages into Myisha's bedroom.

b. Initial exchange of gunfire

About 12:30 p.m., eight SWAT team officers responded to a backup request. Sergeant Brett Birkbeck, accompanied by other officers, knocked and ordered the front door opened. Defendant said "don't fucking come in here" before firing multiple shots through the door. An officer suffered severe chest bruising despite body armor. The police returned fire.

At 12:40 p.m., defendant called 911 and said: "I've got hostages in a house and they shootin' inside the house. Tell 'em to stop shootin' " and that "[w]e got two women in the house."

c. Defendant's rape of 14-year-old M.G.

Following the initial gunfire exchange, defendant moved his hostages from Myisha's bedroom to a bedroom farther from the police. He ordered them to lie under the bed.

At some point, defendant handcuffed Myisha and had her stay seated in the bathroom shower. He told M.G. to undress and lie on the bed. After he removed his pants, M.G. saw a "shoestring," which defendant tied around his penis. She was "scared and nervous" but tried not to make a sound, because defendant told her to be quiet or "I'll shoot you." He placed his penis into her vagina and ejaculated on her stomach. Afterward,

he released Myisha, and she stayed under the bed with M.G. until his surrender.

d. Defendant's surrender

About nine hours after negotiations, defendant told his hostages he had wrapped the gun in a plastic bag and hid it in the fireplace and ordered them not to tell. He allowed them to leave, and after 9:00 p.m., he surrendered.

e. Recovered gun and bullet evidence

At least 10 gunshots came from inside the house, including six fired through the front door. The .45-caliber semiautomatic gun in a plastic bag in the chimney matched three cartridge cases, several fired bullets, and bullet fragments found outside. A bloodstain on the gun contained defendant's DNA.

f. Physical evidence corroborating M.G.'s rape account

On December 8, 2013, M.G. told Patrice, her stepmother, defendant had raped her. The police were called. During a taped treatment interview, M.G. told Misty Molina, a certified sexual assault examiner, defendant "got on top of me"; put his penis "inside me"; and told her "to shut up . . . or he'd kill her."

During the examination, Ms. Molina noted extreme vaginal chafing and internal lacerations penetrating through the hymen to the vaginal wall. She also observed petechiae, which results from severe blunt force trauma. Also, the injuries were consistent with the history M.G. provided but inconsistent with digital penetration.

The police found a cock ring on which the DNA of defendant and M.G. was present. Myisha testified defendant wore a "cock ring and string" on his penis during sex.

g. Defense evidence

At trial, defendant, who did not testify, claimed innocence and self-defense. He relied on what M.G. and Myisha told police. M.G. stated she was not present when the gunfire began but thought the first shots came from outside. She said she had not been afraid. She did not say she had been raped.

Myisha told police despite breaking up, she and defendant "kind of worked on things" and were "civil." When he called about the Jacuzzi, she said "you can wait until I go in and you can use it afterward." She did not believe he meant to, or would have, hurt her or her daughter. She also did not believe he had held her against her will. Although admitting he did keep her mostly hidden under the bed, she said he told her and M.G. they were free to leave. Myisha explained she stayed, partly to allow him to talk and partly because she was unsure what he would do if they tried to leave. She "didn't want to put any tension" on him.

2. Procedural Background

On July 11, 2014, the trial court denied defendant's first *Marsden* motion.

On August 19, 2014, he made another *Marsden* motion, which the court deemed to be a *Faretta* motion and granted.

On October 23, 2014, the court revoked his in propria persona status and reappointed Joel Jones, a deputy public defender.

On January 21, 2015, the court denied defendant's request to reinstate his in propria persona status.

On March 12, 2015, defendant filed with this court a petition for writ of mandate.

On April 13, 2015, the trial court denied his *Marsden* motion.

On April 15, 2015, the trial court reinstated defendant's in propria persona status in response to this court's *Palma* notice (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171). This court then dismissed the writ petition as moot on April 22, 2015.

On May 5, 2015, the trial court ordered Ludlow B. Creary, as standby counsel, to appear on May 14, 2015.

On August 28, 2015, the court granted defendant's motion for a ballistics expert and appointed Ronald Helson to assist him.

On September 11, 2015, the court granted defendant's motion for Gary Harmor to become his DNA expert. After denying his motion to act as cocounsel with his standby counsel, the court granted his motion to be relieved of his in propria persona status and appointed Mr. Creary as counsel.

On February 29, 2016, the court denied defendant's *Marsden* motion to substitute out Mr. Creary, and trial commenced.

On March 1, 2016, when trial resumed, the trial court admonished defendant outside the presence of the jury that if he became "disruptive during the trial, he will be removed from the courtroom."

On March 3, 2016, the court denied defendant's *Marsden* motion.

On March 8, 2016, the court denied another *Marsden* motion.

On March 17, 2016, after the jury returned its verdict, defendant made a *Faretta* motion before sentencing. The court denied the motion and set sentencing for April 15, 2016. The

court subsequently continued sentencing from that date to May 18, 2016, and then to June 17, 2016.

On June 17, 2016, after denying a defense new trial motion for insufficient evidence and defendant's new trial motion for ineffective assistance of counsel, the court sentenced defendant.

DISCUSSION

1. Denial of Challenged *Marsden* Motions Not Abuse of Discretion

Defendant acknowledges "there is no actionable error in denial of [his] *Marsden* motions before February 29, 2016[.]" His challenge to the denial of his *Marsden* motion on that date and the denial of his "subsequent motions," however, is based "in part" on the denial of the earlier motions to the extent the trial court relied on his history of making *Marsden* motions to deny the challenged motions. Further, the court erred in denying the motions on the merits, because Mr. Creary had provided ineffective assistance of counsel. Defendant's contentions are without merit.

a. The challenged *Marsden* motions

On February 29, 2016, at the *Marsden* hearing, defendant described what he perceived to be Mr. Creary's shortcomings, among which was his failure to arrange for expert witnesses. He complained: "I asked him about my expert witnesses[, for whom the court] gave authorization[.] Why are they not on my case? Why are these ballistics and . . . DNA expert[s] not on my case?" He also asked: "How can I have a fair trial when I'm not having these ballistic [and DNA] experts and so forth . . . ?"

Mr. Creary responded "[j]ust because [defendant] wants me to do something or call a particular expert, doesn't mean I'm going to do it if I don't think it's professionally within my

judgment to do that." After a "long talk" following an earlier hearing, he believed he and defendant "had an understanding" about the case and that defendant knew what the "weaknesses and strengths are in this case." He offered to "sit down today and . . . explain to [defendant] what my strategy is going forward." Mr. Creary explained "the way I practice law and the way I try cases is I sort of wait and see what the D.A. is going to do, and then I . . . adjust my strategy to what's coming at me. That's my style." He was "waiting to see what's going to happen in this trial. That's how I do trials." He commented defendant was not "in the dark," because he had represented himself. Mr. Creary advised that in his "professional judgment," he was "ready to try this case." The trial court denied the *Marsden* motion.

On March 3, 2016, the third day of trial, defendant voiced various concerns about Mr. Creary. He renewed his complaint about the absence of expert witnesses needed "to contradict and prove otherwise . . . what the prosecution is alleging." When asked if he had "reports from experts that have already been appointed that contradict the prosecution," defendant acknowledged he had no such evidence. The court explained, "Merely because an expert is appointed doesn't mean that an expert will find items that are contra to the People's experts." Mr. Creary advised he had "made a strategic decision in regards to how [he was] going to deal with the ballistic evidence and the DNA evidence." The trial court denied the *Marsden* motion.

On March 8, 2016, a hearing was held on the third challenged *Marsden* motion. Defendant complained Mr. Creary failed to move for dismissal, because the prosecutor had "mumbled something" to a witness while she was testifying. Mr. Creary stated he did not observe the prosecutor say anything

to the witness. In denying the *Marsden* motion, the court admonished defendant that defense counsel "is not your puppet."

On June 17, 2016, the court deemed defendant's new trial motion for ineffective assistance of counsel to be under *Marsden*. Defendant complained, among other things, Mr. Creary had not "investigate[d] all defenses of facts and of the law[.]" After finding defendant failed to show counsel was ineffective, the court denied the motion.

b. Standard of review

"A trial court should grant a . . . *Marsden* motion only when the defendant has made 'a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation.' [Citation.]" (*People v. Hines* (1997) 15 Cal.4th 997, 1025.) The courts must " 'listen to and evaluate a defendant's claim that counsel [is] failing to perform adequately,' " but they are entitled to credit counsel's factual assertions and are not compelled to adopt defendant's contrary ones. (*People v. Clark* (2011) 52 Cal.4th 856, 918; *People v. Smith* (1993) 6 Cal.4th 684, 696.) Denial of such a *Marsden* motion is reviewed for abuse of discretion, i.e., "defendant has shown that a failure to replace [counsel] would substantially impair the [defendant's] right to assistance of counsel." (*Smith*, at p. 696.)

c. Denial of challenged *Marsden* motions not abuse of discretion

The record refutes defendant's claim the trial court denied the challenged *Marsden* motions "in part" based on his history of making the earlier *Marsden* motions. Further, there is no merit to defendant's claim his counsel was remiss in failing to consult adequately with him regarding his defense; to investigate potential defenses, i.e., "a DNA or a ballistics expert"; and to

present a proper defense. The trial court therefore did not abuse its discretion in denying the challenged *Marsden* motions.

Defendant is unsuccessful in his contention that "[w]hile . . . there may be no minimum number of meetings required between client and counsel . . . , *one* seems both *de minimus* and deficient when accompanied as here, by specific failures to investigate and present a defense[.]" This is not the situation of a single meeting and nothing more between a criminal defendant and his counsel. Prior to trial, Mr. Creary, as defense counsel, met and spoke with defendant at length. Further, he was not a stranger to defendant or unacquainted with this case, having been a participant as defendant's standby counsel while he was in propria persona. Mr. Creary did not fail to present a defense. He played the taped police interview of M.G. and Myisha, which reflected favorably on defendant. It is of no import that the jury rejected the defense, which it was entitled to do.

Defendant asserts that the discretion of counsel whether to call certain witnesses does not apply when the decision results from an unreasonable failure to investigate. Defendant invites this court to infer the existence and availability of potential favorable defense evidence that his counsel failed and refused to investigate and procure. He does not, however, in any way identify or describe what that evidence is and how such evidence would be beneficial to the defense. We therefore reject his assigned omissions of counsel as sheer speculation. Speculation and inferences drawn from speculation are not evidence. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174; *People v. Kraft* (2000) 23 Cal.4th 978, 1035; *People v. Morris* (1988) 46 Cal.3d 1, 21, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 543-545, fns. 5 & 6.) Defendant thus fails to show counsel's

omission to call expert witnesses constitutes an unreasonable failure to investigate.

We are not persuaded that a contrary conclusion is compelled based on defendant's claim that the decision not to investigate and call defense experts was simply the product of Mr. Creary's self-proclaimed practice of flatly discrediting prosecution experts through cross-examination rather than an informed exercise of discretion. This claim is unsupported by the record. At the February 29, 2016 *Marsden* hearing, defendant asked if Mr. Creary would still have time to present ballistics and DNA experts after the jury was selected. He responded: "I would" or "would present cross-examination questions to [the prosecution] experts that could, would probably be adequate for our defense. I can also question those experts without bringing my own expert to court." In context, the import of Mr. Creary's response was to explain an expert may not be necessary to counter a prosecution expert and why he might decide not to call a defense expert.

2. No Prejudicial Ineffective Assistance of Counsel Shown

Defendant contends Mr. Creary "fail[ed] to interview possible expert witnesses or to investigate potential impeachment evidence." He has failed to meet his burden of proof to show Mr. Creary was ineffective.

Generally speaking, "[a] defendant who asserts he has received ineffective assistance of counsel must establish both that 'counsel's representation fell below an objective standard of reasonableness' and that the defendant suffered prejudice as a result." (*People v. Welch* (1999) 20 Cal.4th 701, 743.) Nonetheless, "[i]f a defendant has failed to show that the

challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' " (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) Prejudice in this sense equates with " 'a reasonable probability that a more favorable outcome would have resulted . . . , i.e., a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Ibid*.)

The trial court appointed both defense ballistics and DNA experts while defendant was in propria persona and, when queried by the court during the March 3, 2016 hearing, defendant acknowledged he had no evidence to contradict the prosecution experts. Moreover, the evidence of defendant's guilt was overwhelming even absent the prosecution's expert testimony regarding DNA and ballistics. The uncontroverted evidence reveals defendant dragged M.G. back to the house; defendant fired a gun at police; an officer outside was shot in the chest through the door; defendant, armed with a gun, forced Myisha and M.G. from one room to another; defendant incriminated himself during his 911 call; he handcuffed Myisha to the shower to get her out of the way; he raped 14-year-old M.G. under threat of death; and the gun was found where defendant hid it before his surrender. Further, Mr. Creary was able to impeach the prosecution's DNA expert by eliciting her testimony that no semen was found on the cock ring. It therefore is not reasonably probable that a result more favorable to defendant would have ensued if favorable defense expert testimony existed and had been presented.

3. Denial of Post-conviction *Faretta* Motion Not Error

Defendant contends the trial court erred in denying his March 17, 2016 post-conviction *Faretta* motion to represent himself. No error occurred.

a. March 17, 2016 *Faretta* motion

On March 17, 2016, the jury returned its verdict. Asked by the court whether he agreed to sentencing on April 15, 2016, the date agreed upon by both counsel, defendant refused and stated, "I would like to take my pro per status back and declare ineffective assistance of counsel."

After acknowledging that according to *People v. Miller* (2007) 153 Cal.App.4th 1015 (*Miller*), a "defendant's unequivocal request for self-representation made in advance of the sentencing hearing is timely," the trial court stated "that does not end the inquiry, because in *Miller* the defendant was not self-represented at any time prior to the end of the trial." The court noted, in contrast, defendant "was [self-]represented for a lengthy time and gave up self-representation at a timely period and had counsel step in." The court recalled it had warned him before about "obstreperous acts during trial" and that while he was in propria persona "he was becoming obstreperous[.]" After announcing "[i]t appears that you are game-playing," the court asked: "Why should I give you self-representation right now?" Defendant denied playing games.

After the court stated he had "done this before and . . . gave it up," defendant responded the only reason he "gave up [his] pro per status on September 11th . . . was for better [re]presentation [by Mr. Creary] because [his self-representation] wasn't being adhered to [*sic*]."

When asked how much time he needed for his new trial motion, defendant responded "[i]t depends on my resources, Your Honor. Meaning that, when I go back to the county jail, and if you allow me to have my pro per status back, then there are certain obstacles that still [are] in front of me because . . . the law library [is the] means to be able to ascertain all my pertinent legal information." The court pointed out: "Well, you know, the law library is not going to change. You are not going to get anything extra that any other pro per doesn't have. [¶] So about how much time do you think you would need?" Defendant first responded a month. After the court questioned that estimate and his revised three weeks estimate, defendant told the court: "I can't give[] you no estimate[.] I'm pro per. I have to get my paperwork in proper perspective. I have to do my resources." He added: "I don't have that available. Only an hour and-a-half a day of pro per in the law library." The court responded: "I understand. [¶] As I said, I'm not taking that into consideration. . . . What I am taking into consideration is you're game-playing. I do not believe that this is an unequivocal, good faith request for self-representation. It is denied."

b. Standard of review

"A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution, including sentencing. [Citations.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 453 (*Doolin*).) Further, "[t]he right of self-representation is absolute, but only if a request to do so is knowingly and voluntarily made and if asserted a reasonable time before trial begins. Otherwise, requests for self-representation are addressed to the trial court's sound discretion. [Citation.] Moreover,

whether timely or untimely, a request for self-representation must be unequivocal. [Citation.]" (*Ibid*.)

c. Denial of *Faretta* motion not error

Respondent's brief points out defendant only relinquished his in propria persona status after denial of his request for his standby counsel to be appointed his cocounsel and argues his meritless *Marsden* motions reflected his "proclivity for trying to substitute defense counsel." Respondent argues defendant's "self-representation request was a matter of 'game-playing' designed to delay his day of reckoning." Respondent also referred to instances in the record where defendant "repeatedly refused to heed court instructions, and [he] raised his voice to the judge on at least one occasion[.]"

Defendant does not dispute respondent's assigned pretrial disruptive, delaying, and obstructionist conduct or challenge respondent's characterization of his posttrial *Faretta* motion as a "mere exercise[] in gamesmanship, intended to obstruct and delay his sentencing." Rather, his position is that "[g]iven that no prejudice is worked by such delay, no witnesses lost, no evidence aged, and justice thus remains undeferred, a timely post-trial motion for self-representation may not be properly denied on the discretionary grounds of gamesmanship," which he denies exists. We disagree defendant's right to self-representation was absolute and that the trial court therefore erred in denying his *Faretta* motion.

In *Miller*, after denial of his new trial motion, the defendant advised the court the reason for an immediate ruling on his *Faretta* motion was to enable him to perform an investigation and legal research before sentencing. Further, he told the court he would be ready on the day scheduled for

sentencing. (*Miller, supra*, 153 Cal.App.4th at pp. 1019-1020.) It was in this context that the appellate court concluded that in view of his timely *Faretta* request, defendant "had an absolute right to represent himself at sentencing and the trial court was required to grant his request for self-representation, which was unequivocal . . . ." (*Miller,* at p. 1024.) These are not our facts. As in *Doolin*, defendant was not ready to proceed with sentencing on the date set. (*Doolin, supra*, 45 Cal.4th at pp. 452, 454-455.) He offered no explanation as to any new information or evidence he expected to find that would make April 15, 2016, the date for sentencing, premature. Instead of providing concrete, cogent responses, defendant merely did a back-and-forth, side-step dance when the court attempted to pinpoint when he would be ready for sentencing. The court did not err in denying his *Faretta* motion as equivocal.

4. Denial of New Trial Motion Proper

Defendant moved for a new trial on the ground of ineffective assistance of counsel. As discussed above, defendant failed to carry his burden to show prejudice flowing from counsel's performance, and thus, to demonstrate his counsel was ineffective. Substantial evidence supports the trial court's findings in this regard. We conclude de novo defendant failed to demonstrate ineffective assistance of counsel, and thus, the new trial motion was properly denied. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725.)

5. No Error Much Less Cumulative Error Shown

Defendant contends the cumulative errors committed by the trial court require reversal of the judgment. In the absence of error, there is no cumulative error. (*People v. Samayoa* (1997) 15 Cal.4th 795, 849.)

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.