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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HUNG SI VUONG, Defendant and Appellant.	B276627 Los Angeles County Super. Ct. No. KA110002

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Affirmed with directions.

Maggie Shrout, 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, and Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Hung Si Vuong of first degree residential burglary and found true an allegation that another person was present in the residence at the time. The jury also found true Vuong's prior strike conviction for first degree residential burglary. Vuong's sole contention on appeal is that the trial court erred in denying his last minute oral motion to continue the trial so he could fire his lawyer and retain new counsel. We find no error and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The charges, pretrial proceedings, and readiness for trial*

In 2015 the People charged Vuong with first degree residential burglary in violation of Penal Code section 459. The People alleged another person was present in the residence when the crime was committed. The People also alleged Vuong had suffered four prior strike convictions within the meaning of California's three strikes law: a first degree residential burglary in California in 2004, and three burglaries in Hawaii in 1995 and 1996.

Vuong's preliminary hearing took place on September 17, 2015. His privately-retained attorney Michael K. Jones represented him at the hearing. At the conclusion of the hearing, the court held Vuong to answer and set his arraignment for October 1, 2015. On October 1, Vuong appeared with Jones and orally moved to continue the arraignment. The court granted that motion and continued the arraignment to November 3, 2015. On November 3, Vuong—represented by Jones—entered a not guilty plea. The court set a trial date of January 5, 2016.

On December 21, 2015, Jones filed a motion to dismiss the burglary charge under Penal Code section 995. Vuong and Jones appeared that same day for a readiness hearing. The docket reflects that "[b]oth parties announce[d] ready to proceed to

trial." The docket says, "The date of 01/05/2016 remains on calendar for jury trial."

On January 5, 2016, the parties appeared in Department F of the court. The docket notes, "Both sides announce ready to proceed. By order of the supervising judge, this court, acting as a master calendar court[,] hereby transfers this matter to Department East H for jury trial and all further proceedings. All parties are ordered to report to Department East H forthwith." The prosecutor, Jones, and Vuong then appeared in Department H. The court gave a tentative ruling on the motion to dismiss, the parties submitted on the tentative, and the court denied the motion.

2. ***The disposition discussions and Vuong's belated request to delay his trial***

After the court denied the section 995 motion, it broached the subject of settlement. At that juncture, the parties and the court believed the case to be a third strike case, in which Vuong was facing a possible sentence of 25 years to life or more.[1] The court said, "The matter is here for trial, Mr. Vuong. And I understand that there's been an offer tendered to you of 13 years.[2] Is that correct?" The prosecutor and Jones then explained the status of the disposition discussions. The parties and the court discussed the "person present" allegation that, if found true, would require Vuong to serve 85 rather than 80

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[1] In post-trial proceedings, the court determined the People had not proved that Vuong's Hawaii convictions were strikes within the meaning of California's three strikes law.

[2] Jones explained the calculation of the 13 years: Vuong would receive the midterm of four years for the first degree burglary, doubled because of one strike prior, plus a five-year prior under Penal Code section 667(a)(1).

percent of his sentence. The court then—with Jones's permission—addressed Vuong directly. The court explained there are always risks in going to trial and the court's discretion would be limited if Vuong were found guilty and his strike priors were found true. The court asked Vuong if he understood and Vuong answered, "I do understand that, sir." The court then asked Vuong if he "want[ed] more time with [his] attorney to explore that now that the court ha[d] explained" the situation. Vuong did not immediately answer that question and the court explained again, in slightly different words, what it had told Vuong. The court continued, "And I want you to make an informed decision. And you have a constitutional right to have a trial. Both sides are ready to go. I am ready to go. We have jurors that we can begin calling so we can talk to them and see which 12 are going to listen to the case. We're ready to go. I just want to make sure you understand."

Vuong responded, "Before we go to trial, I would like to have something to say to the witness and the D.A. I am 50 years old. Now, I was—all these years, I was very ignorant of the law. And I also know and understand there's a saying, ignorance of the law is no excuse. To me that's very, very unfair. All my life I have been incarcerated twice. My first conviction all of my life . . . ." The court interrupted Vuong, seemingly concerned that he might say something incriminating. The court reiterated that Vuong would be wise to confer with his counsel and consider his options: "I urge you—and I don't know your attorney, but just in the few minutes that I have had an opportunity to exchange with him, it appears to me that he's very knowledgeable about what he's doing. And you listen to him and make your own decision and do that with an open mind. And if we march on with the trial, you are knowing that you made the right decision to move on."

Vuong then asked, "Are we still in the process of negotiation?" The prosecutor responded that the offer was open until jurors were called into the courtroom. She added that the prosecution *had* considered Vuong's age in making its offer; she had believed 17 years to be an appropriate offer, she said, but Jones had persuaded her to reduce that offer to 13 years. She noted, "So there has been some back and forth. I believe that's as far as we're gonna be able to go down." The court again urged Vuong to "take a moment with your attorney." The court explained yet again Vuong's absolute constitutional right to a jury trial and the importance of the decision he had to make. The court asked Vuong, "Do you want us to give you a few more minutes, or have you more or less made up your mind?" Vuong answered, "So first, in my explaining, according to what you say, that's not the—I am trying to express my feelings to you as a D.A. and the judge as a judge." Jones offered to try to "clarify." He reminded Vuong that he (Jones) had conveyed to the prosecutor Vuong's counteroffer of credit for time served. The prosecution had rejected that counteroffer. Jones reminded Vuong that the prosecutor had reduced the People's offer from 17 to 13 years that morning. Jones asked his client, "Did you accept or reject that?" Vuong answered, "I reject that." Jones reiterated Vuong's counteroffer of "two years at half."[3] Jones asked the prosecutor if the People would accept Vuong's counteroffer and the prosecutor said, "No."

The court then asked Vuong about the nine-year sentence he had received in his earlier residential burglary case. Vuong said, "Right. Right." The court said, "You have to be reasonable,"

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[3] That counteroffer presumably would have required the prosecution to strike all of Vuong's alleged prior strikes as well as the "person present" allegation.

suggesting a time-served counteroffer was not realistic given Vuong's record. Vuong answered, "I understand." Vuong continued: "That's why I am trying to ask for your consideration. My consideration. I am asking for your consideration regarding my last offense. The last offense was that I have the max. Everything was wrapped up in one month without—because I put completely trust in my lawyer. And that was a 6-year offer with half to me by the public defender. The very first offer. Now my lawyer concealed that offer to me [*sic*]." The court responded, "That's why we're having the discussion in open court." The court explained again Vuong's maximum potential exposure. The court continued: "You can either tell me, judge, 'I want to go back to the interview room and have a little bit more conversation with my attorney,' or you can tell me, 'judge, I am ready to go to trial.' "

Vuong then said, "Okay. Judge, I am ready to go to trial. At the same time, I would like to fire my lawyer. So if you can give me some time to obtain another lawyer. Is that all right with you?" The court said, "Well, I don't know." Vuong repeated, "I am asking to fire my lawyer." The court stated, "We are at this time ready to go to trial, sir. You are asking this right on—and I'm not sure that you are doing this for a valid reason because you disagree with your attorney or [are] looking for more time." Vuong responded, "No. Because I don't think this is fair at all. And I don't think there's any justice at all. And, D.A., based on what kind of evidence?" The court told Vuong, "[Y]ou have a right to an attorney, and you can fire your attorney, I think, pretty much at any time except if it interferes with the orderly process of the proceedings. But your attorney is not here to tell you what you want to hear, sir. The attorney is here to tell you what he feels is his experience, and I have to believe that

probably almost any attorney is gonna tell you something similar."

The court reiterated it was trying to ensure Vuong understood "where [he would] stand should [he] lose [his] case." Vuong responded, "I am fully aware of this. I would like to take this to trial. And I don't feel confident to have Michael Jones take me to trial. That's all I am requesting." The court asked Vuong if he had the money to hire another lawyer and Vuong said, "Yes." In response to the court's questions, Vuong said he *would* talk to another attorney; then he said he *had* talked to another attorney, one of his prior lawyers named Joe. Jones then told the court that Joseph Gutierrez had been involved in the case at some point before Vuong hired Jones. Jones said, "There was a decision made to have me come on the case. And I have had regular contact. I spoke with him this morning about this case, and he's expressed interest in assisting in any way. And I actually referenced something with the People perhaps Mr. Gutierrez acting as co-counsel, and as we got closer and closer to this event that became unrealistic because he was tied up in another trial." The court noted Gutierrez had just finished a trial in that court. The court said it understood Gutierrez was engaged in another matter; Jones responded that Gutierrez was "fighting the flu."

The court asked the prosecutor her position. She said the People objected to delaying the trial. After a short break, the court returned with its ruling: "The court has considered Mr. Vuong's request for substitution of counsel. And when a defendant is represented by a retained counsel, the court must allow a great deal of leeway in allowing the defendant to be represented by counsel of his choice. However, the right of a defendant to appear and defend with counsel of his own choice is not absolute. [A] [c]ontinuance may be denied if the accused is

unjustifiabl[y] dilatory in obtaining counsel or if he arbitrarily chooses to substitute counsel at the time of trial. [¶] Just so that the record is clear, this case came on calendar in . . . Department F. [The] [m]atter was set previously for trial on this date. Both sides announced ready to go to trial. At no time was there mention by Mr. Vuong that he wanted to substitute counsel. More importantly, the court reviewed the file. Defendant was arrested on April 30, 2015, nearly eight months ago. Mr. Joseph Gutierrez, the attorney you mentioned earlier, appeared once, and he didn't actually appear. An attorney appeared for him. . . . [¶] That was [on] June 30th, 2015. That was the one and only appearance in this case." Addressing Vuong, the court continued: "Mr. Jones, your present attorney, substituted in on July 16, 2015, and he's been your attorney ever since." Vuong said, "That's right."

The court noted Jones had handled the preliminary hearing as well as "all settlement negotiations," and was "very well versed in the facts of [the] case." The court said the preliminary hearing had been more than three months earlier and Jones had made three appearances in the case since then. The court stated, "And not once was there a request to substitute counsel. Today is the date of trial." The court repeated that Jones was doing his job by giving Vuong his evaluation of the case. The court said, "The fact that you disagree with him now and you are trying to, I think, buy more time for—I don't know what the reason is[.] I think it's insufficient for this court to grant your request to substitute attorney at this time. I don't think you have made a good faith effort in hiring another attorney. This has been your attorney from the beginning. You had plenty [of] opportunity to substitute attorneys. And you have had months to do that, sir. And now you are choosing to do this on the date of trial when both sides have announced ready. It's an inconvenience to the

witnesses and inconvenient to the court and the orderly process of judicial administration."

The court asked Vuong if he would like to say anything. Vuong said he had asked Jones for the "police report" and "transcripts" and had not received them. Vuong said he had been "in the dark" about his case. The court then stated it was denying Vuong's request for a continuance because it was untimely and was based on Jones's inability "to force the prosecution to accept something that the prosecution is not going to accept."

3. ***The trial, new trial motion, and sentencing***

The trial went forward. Because Vuong does not challenge the sufficiency of the evidence or any rulings at the trial itself, we summarize the evidence only briefly. On April 30, 2015, around 11:00 a.m., Armand Vargas left his townhome to take his mother to the hairdresser. He returned home less than an hour later. Vargas drove into his garage, walked across his covered patio, and went into the townhome through a sliding glass door. Vargas noticed the glass door was open about 12 inches. He heard footsteps upstairs. Vargas walked quietly around the kitchen and living room for a few minutes. He went to the base of the stairs where there was a mirror to see if he could see anything, but he could not. Then he went back outside, into the alley, and called 911.

As Vargas was talking to the 911 operator, Vuong came through the gate from Vargas's patio into the alleyway. Vuong "seemed surprised" to see Vargas. Seeing that Vargas was on the phone, Vuong "asked [him] to wait" then said, "I made a mistake." Vargas asked Vuong, "What are you doing in my house?" At trial, Vargas could not recall Vuong's response. At some point, Vuong said "verify" and pointed to a nearby

townhome that was under construction. After this brief exchange with Vargas, Vuong started to walk briskly around the corner.

Officer Davis Reyes arrived and found Vuong in a white van near the front of Vargas's townhome. Reyes conducted a field show up and Vargas identified Vuong as the man he had seen coming out of his patio.

Vargas did not find any of his property missing.

On January 12, 2016, the jury found Vuong guilty of first degree burglary. The jury found the "person present" allegation true. After a priors trial, the jury found the allegations of Vuong's California and Hawaii convictions to be true.

Vuong retained Antony Myers to represent him in post-trial proceedings. On June 2, 2016, Myers filed a motion for a new trial on several grounds, including the court's denial of Vuong's motion for a continuance. On July 7, 2016, the trial court denied the motion and sentenced Vuong to state prison for 18 years, calculated as the upper term of six years, doubled because of the California strike prior, plus a five-year prior under Penal Code section 667(a)(1)[4], plus a one-year prison prior for the Hawaii case under Penal Code section 667.5(b).

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[4] The reporter's transcript, docket, and abstract of judgment indicate the court imposed the five years under Penal Code section 667.5(a). This appears to be an error. The information filed October 1, 2015, alleged five-year priors under section 667(a)(1) for the 2004 California burglary and the Hawaii burglaries, as well as one-year prison priors under section 667.5(b). Section 667.5(a) provides for a three-year, not five-year, prior. We will remand for clarification and correction of the sentence.

DISCUSSION

Vuong's sole contention on appeal is that the trial court violated his federal and state constitutional rights by denying his request on the day of trial to fire Jones and hire Gutierrez or another lawyer.

A criminal defendant has a due process right to appear and defend with retained counsel of his choice. (*People v. Lara* (2001) 86 Cal.App.4th 139, 152 (*Lara*).) Underlying "the right to retain counsel of one's own choosing" "is the premise that 'chosen representation is the preferred representation. [A] [d]efendant's confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected whenever feasible.' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 789 (*Courts*).)

California has long recognized the right of a criminal defendant who is not indigent to discharge his retained attorney, with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983 (*Ortiz*).) Our Supreme Court has "recognized competing values of substantial importance to trial courts, including the speedy determination of criminal charges," but reminds us "the state should keep to a 'necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources.' [Citation.]" (*Id.* at p. 982.)

"A nonindigent defendant's right to discharge his retained counsel, however, is not absolute." (*Ortiz*, *supra*, 51 Cal.3d at p. 983.) A trial court in its discretion may deny such a motion "if discharge will result in 'significant prejudice' to the defendant [citation], or if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice.' [Citations.]" (*Ibid.*) "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state

interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time." ' " (*Id.* at pp. 983–984, citation omitted. See also *People v. Verdugo* (2010) 50 Cal.4th 263, 311 ["a trial court has 'wide latitute in balancing the right to counsel of choice against the needs of fairness' and 'against the demands of its calendar' " (citation omitted)]; *People v. Keshishian* (2008) 162 Cal.App.4th 425, 428 (*Keshishian*).)

"Generally the trial court has discretion whether to grant a continuance to permit a defendant to be represented by retained counsel. [Citation.]" (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) "A continuance may be denied if the accused is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*Courts, supra*, 37 Cal.3d at pp. 790–791.) "In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, ' "particularly in the reasons presented to the trial judge at the time the request [was] denied." ' [Citations.]" (*Id.* at p. 791; see also *People v. Blake* (1980) 105 Cal.App.3d 619, 624 (*Blake*) ["it is within the sound discretion of the trial court to determine whether a defendant shall be granted a continuance to obtain private counsel"; "there is no mechanical test"; "rather each case must be decided on its own facts"].)

Here, Vuong's request to fire Jones and hire another lawyer, coupled with his request for a continuance, was untimely. It was made on the day trial was to commence. Nothing in the record suggests Vuong had made a good faith, diligent effort to substitute retained counsel in the months leading up to trial. Vuong had the opportunity for many weeks to substitute retained

counsel if he wished, but he did not. Nor did he ever present the trial court with any reasons for waiting until the day of trial—after settlement negotiations had failed—to ask to delay the trial to hire a different lawyer. Vuong's motion to relieve Jones and continue the case so he could hire Gutierrez or someone else was made in the midst of a failed plea negotiation, after he rejected the People's acquiescence to a sentence Jones had proposed on Vuong's behalf and the People had rejected Vuong's extraordinarly low-ball offer of one year in custody or credit for time served. (Cf. *People v. Lau* (1986) 177 Cal.App.3d 473, 477−479 [court did not err in denying defendant's request to replace his retained counsel as jury selection was to begin; court noted defendant was unhappy with his lawyer who urged him to accept plea deal].)

Under these circumstances, the trial court properly found Vuong unjustifiably delayed his request to substitute retained counsel until the day of trial, after both parties repeatedly had answered ready, witnesses had been subpoenaed, a trial court had been assigned (thereby rendering that court unavailable for other ready trials), and jurors ordered. (See *Blake, supra,* 105 Cal.App.3d at pp. 623−624 ["[A] defendant who desires to retain his own counsel is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory or if he arbitrarily desires to substitute counsel at the time of the trial."].) The trial court was properly concerned about the untimeliness of Vuong's request and the obvious inability of new counsel—who had not even been retained, much less appeared in the courtroom—to step in without delaying the trial. We agree with the trial court's finding that continuing the trial under the circumstances would have adversely affected the orderly administration of justice. (See *People v. Johnson* (1970) 5 Cal.App.3d 851, 859; cf. *Keshishian*, *supra*, 162 Cal.App.4th at

pp. 428–429 [court properly denied defendant's "last-minute attempt to discharge counsel and delay the start of trial"; request was made on day set for trial; defendant said only that he had "lost confidence" in his attorneys; defendant had neither identified nor retained new counsel; witnesses whose appearances already had been scheduled would be inconvenienced by delay].) There was no violation of Vuong's constitutional rights to counsel of his choice or to due process.[5]

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[5] On April 23, 2018, the day this case was submitted for decision (argument having been waived), Vuong's counsel submitted a letter brief bringing to our attention *People v. Lopez* (2018) 22 Cal.App.5th 40, issued April 11, 2018. *Lopez* applied existing law, including *Lara* and *Keshishian*, and does not change our result here. In that case, the defendant, charged with nine felony counts of sexual assault against two minor victims, asked at a final readiness conference to replace his retained attorney and continue the trial. (*Id*. at pp. 180–181.) His attorney told the court he had had difficulty meeting with his client because of a language difference and Lopez's transfer between jails. Counsel said he had not been retained for trial. (*Id*. at p. 180.) A settlement offer was pending, and the court of appeal noted Lopez "asked to discharge [his lawyer] before it was clear whether the trial would proceed." (*Id*. at pp. 181, 184.) The prosecutor did not object to Lopez's request to delay the trial. (*Id*. at p. 185.) And the trial court did not believe Lopez had any "improper motives in seeking to discharge his counsel." (*Id*. at p. 184.) Here, by contrast, the parties had exhausted settlement discussions and Vuong appeared annoyed that his lawyer had not been able to obtain the time-served or minimal-custody-time offer he wanted from the prosecutor or the court. The prosecutor *did* object to postponing the trial. And the trial court found Vuong was not acting in good faith.

DISPOSITION

The judgment of conviction is affirmed. We remand to the trial court for correction of the code section under which the court imposed the five-year prior.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.