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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT JULIO ARNAUD, Defendant and Appellant.	B283939 (Los Angeles County Super. Ct. No. GA097819)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed in part and remanded with directions.

Leslie Conrad, 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, Margaret E. Maxwell, Deputy Attorney

General, and Lindsay Boyd, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Robert Julio Arnaud appeals the judgment of conviction after a jury found him guilty of the attempted and premeditated first-degree murder of Antonio Lizarraga. (Pen. Code, §§ 664, subd. (a), 187, subd. (a).) [1] The jury also found true the allegations that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that Arnaud personally and intentionally discharged a firearm causing great bodily injury to the victim (§ 12022.53, subds. (b)-(d)).

Arnaud contends the trial court abused its discretion by failing to adequately address his request to replace appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Arnaud also contends he is entitled to remand so the trial court can exercise its newly enacted discretion to strike the firearm-use enhancements pursuant to Senate Bill No. 620 (Stats. 2017, ch. 682, § 2). We conclude remand for resentencing is warranted, but otherwise affirm.

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[1] All undesignated section references are to the Penal Code.

FACTUAL AND PROCEDURAL SUMMARY[2]

1. *Evidence at Trial*

Arnaud is an active member of the Pasadena Latin Kings (PLK or Latin Kings), a criminal street gang. He goes by the nickname "Chucky." As of December 2015, the PLK had approximately 15 to 20 active members. The PLK has a long-standing rivalry with the Villa Boys, another Hispanic street gang based in Pasadena.

In December 2015, Rafael Garcia Solorzano lived on Sunset Avenue in the city of Pasadena. His cousin, Jose Garcia[3], lived in the city of Azusa and was a Latin Kings member. Jose Moya, a friend of Solorzano's younger brother, was living in Solorzano's garage. Solorzano instructed Moya to move out of the house after learning he recently had been jumped into the Villa Boys.

On December 29, 2015, Solorzano arrived home from work where he saw a man walking up his driveway. The man was wearing a gray Los Angeles Dodgers hoodie. The man told Solorzano to stop letting Villa Boys "kick it" in his backyard. Solorzano asked the man who he was looking for. He did not receive an answer. As Solorzano continued his approach, the man pulled out a revolver and aimed it towards the ground. Solorzano did not recognize him but he later identified appellant Arnaud in a photographic lineup.

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[2] We present the facts in the light most favorable to the judgment in accord with established principles of appellate review. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

[3] Jose Garcia was charged as a codefendant for accessory after the fact and possession of a firearm by a felon. He was tried separately.

Later that night, Solorzano conducted a search on Facebook to identify the man who wielded the firearm. He found a person wearing the same gray Dodgers sweatshirt, whom he later identified as "Chucky." Solorzano discovered that Chucky shared a mutual friend on Facebook with his cousin, Garcia. Chucky had visited Solorzano's house on prior occasions.

At 8:35 p.m., Solorzano sent a message to Garcia on Facebook saying, "'Your homies are fucking up. Coming to my house pulling straps on my little bro and me.'" Solorzano then sent a text message to Garcia saying, "'Nigga, if you ain't gonna do shit, let me know right now so I can take care of this foo.'" Within less than one hour, Garcia replied to Solorzano through Facebook saying, "'I will take care of it. Give me an hour. Be at your house, cuz.'"

At approximately 10:00 p.m. that evening, a group of men, including Moya and Antonio Lizaragga, purchased some beer at a liquor store in Pasadena.[4] The group of men walked to a nearby Popeye's Chicken restaurant. As they approached Popeye's, a red Mustang convertible exited the parking lot across the street, made a U-turn, and pulled into the driveway in front of Popeye's. The vehicle stopped in the lot.

Lizarraga threw a beer can at the car. One of the passengers pulled out a firearm and fired two to three shots towards Moya and Lizarraga. One of the bullets struck Moya's can of beer. Lizarraga fell to the ground after he was shot in his left leg. The passenger who fired the shots was a Hispanic male who wore a gray hooded sweatshirt.

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[4] One witness testified she saw a group of three to four men while Moya testified that only he and Lizarraga were present.

Pasadena Police Department Officer Kourtney Zilbert responded to the shooting. She activated an audio recording device and interviewed Moya. Moya told Officer Zilbert that the red Mustang belonged to Chucky, and that Chucky was the shooter who sat in the passenger seat. was wearing a gray hoodie. Moya did not have a beef with Chucky and no gang signs were thrown. According to Officer Zilbert, Moya described the gun as a small revolver, possibly .22 caliber.[5]

Alex Padilla is a forensic specialist for the Pasadena Police Department. Padilla booked several items into evidence, including empty beer cans, a metal fragment, a fixed-blade knife, gunshot residue testing, and two bags of clothing from Lizarraga. The metal fragment was later determined to be the remnants of .22 caliber ammunition.

Pasadena Police Department Officer Michael Herrera interviewed Lizarraga at the hospital following the shooting. Lizarraga confirmed the gunshots came from a red vehicle outside Popeye's.

Detective David Duran found a Facebook account under the name "'Chucky Arnaud.'" He later obtained a search warrant for the records associated with this account. The account was linked to Arnaud's e-mail address. Arnaud's Facebook account included photographs of: Arnaud wearing a blue and gray Los Angeles Dodgers jersey; the trunk area of a Ford mustang, along with a Mustang logo just below the keyhole

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[5] The record is conflicting on this point. Officer Zilbert testified that Moya described the revolver as "a small caliber revolver," "possibly a .22" caliber, but the audio transcript from the interview reflects that Moya did not actually see the gun.

of a red emblem; a "Chucky" doll from the movie "Child's Play"; and the gravestone of a deceased PLK member, surrounded by six rounds of ammunition.

Detective Duran also reviewed messages from Arnaud's Facebook account. In July 2015, Arnaud sent two messages about gang activity. The first message read: "'West banging homie? U from WCS right? I B hearin bout u lil niggas is tact active thas wassup hit me up we smash on niggas . . . fuk suckas, vanillas . . . u knoe.'"[6] The second message read: "'I stay puttin in work my nigga n I got a ride too so I'm down to pull up just get at me u knoe any of the homies I'm from P.L.K.'"

Detective Duran also obtained a warrant to search the contents of Arnaud's cell phone. An incoming message received on December 1, 2015 read, "'Fucking Vanilla smashed my van windows, . . .'" Nine days later, Arnaud received a message saying, "'Hey, Chucky, be careful my nigga. The ruffles had a meeting today. They're tryin to spray us up.'"[7]

An incoming message received on December 16, 2015 asked "'can you get a thing,'" and later asked "'You got the 22? Can we go pick it up?'" Arnaud responded, "'Pik it up from Spanky,'" which is the moniker for Jose Moreno, a Latin Kings member.

Detective Duran's investigation led him to Garcia's residence in Azusa. A 2007 red Ford Mustang with a beige convertible top was parked in the driveway. He observed a

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[6] PLK members use "vanillas" as a derogatory term in reference to Villa Boys.

[7] "Ruffles" is a derogatory term for members of the rival gang, Varrio Pasadena Riffa.

splash or spill pattern along the front fender and passenger door of the vehicle. A Chucky character mask was inside the trunk and a Chucky hood ornament was on the dashboard. No weapons or ammunition were found in the vehicle.

Detective Duran ran the vehicle's license plate number through an automated license plate reader system. The license plate reader placed the vehicle at the 1100 block of Sunset Avenue in Pasadena, near Solorzano's home, approximately two hours before the shooting.

Cell tower records showed Arnaud's phone was used near the scene of the shooting, starting at approximately 7:37 p.m. Arnaud's phone was tracked heading in an easterly direction towards Garcia's residence in Azusa, starting at 11:55 p.m. The following morning, Arnaud was arrested after he left Garcia's residence.

Detectives Duran and Gomez interviewed Arnaud in county jail. Arnaud admitted the red Mustang parked at Garcia's house belonged to him and that his nickname is Chucky. When asked if he "still bang[s] in the hood," Arnaud said that he still associates with certain gang members, including Garcia. His gang colors are black and gold. Arnaud denied his involvement in the shooting, claiming he was at his sister's house in Boyle Heights at the time of the shooting.

Following the interview, Arnaud called his girlfriend, Guadalupe Alcaraz. Arnaud told Alcaraz to call "Shorty" (Luis Rebollar) to tell him "[t]o call 'Stomps' [the leader of Villa Boys] and tell him to tell whoever the fuck is lying on me to fucking, you know . . . ." Alcaraz visited Arnaud in jail two days later. Arnaud claimed someone from Villa Boys had implicated him in the shooting. Alcaraz visited Arnaud again the next day.

Alcaraz said she talked to Shorty, who in turn talked to Stomper, and "nobody's saying anything."

2. *Verdict and Sentencing*

Arnaud was found guilty of the attempted murder of Lizarraga. The jury found true the allegations that the attempted murder was willful, deliberate and premeditated (§ 664, subd. (a)), and that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The jury also found true three enhancement allegations for personal use of a firearm (§ 12022.53, subd. (b)), personally and intentionally discharging a firearm (§ 12022.53, subd. (c)), and personally and intentionally discharging a firearm, causing great bodily injury (§ 12022.53, subd. (d)). Arnaud admitted he suffered a prior strike within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) and a prior serious felony conviction (§ 667, subd. (a)(1)).

The trial court sentenced Arnaud to 60 years to life. The sentence consisted of 15 years to life for the base offense and corresponding gang enhancement (§ 186.22, subd. (b)(5) [15-year minimum term required before defendant may be considered for parole], doubled pursuant to the Three Strikes law, plus five years for the prior serious felony conviction, plus a consecutive 25 years-to-life term for personally and intentionally discharging a firearm, causing great bodily injury. The court stayed the imposition of sentence on the remaining firearm use enhancements, and struck the sentence on the gang enhancement.

DISCUSSION

1. *The Denial of Arnaud's Marsden Motion Was Not Error*

Arnaud contends the trial court's failure to adequately address his request for a substitution of appointed counsel violated his constitutional rights.[8] We disagree.

1.1 Proceedings Below

On April 19, 2016, before the beginning of his preliminary hearing, Arnaud requested a substitution of counsel, deputy alternate public defender Thomas Lee. According to Arnaud: "me and Mr. Lee are [not] seeing eye-to-eye in my case. He doesn't come to see me. We don't talk much about my case. And I just feel like I need somebody else to represent me. I don't feel like I need a P.D. Nobody out of Pasadena. I feel like I should get a state appointed. . . . I feel like I need somebody else to represent me basically."

The court told Arnaud that it was very early in the process and that counsel only had access to police reports at that point in the case. Lee conceded he had not had the opportunity to communicate with Arnaud for the last few weeks, but stated that

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[8] Although Arnaud's appellate arguments sometimes conflate portions of the record from both the April 19 and May 9 *Marsden* hearings, as we read his briefs, Arnaud is challenging only the validity of the court's decision following the latter hearing. It appears to us that he refers to the first *Marsden* proceeding for context only. To the extent he challenges the ruling on his first *Marsden* motion, we deem it to be forfeited for two reasons: (1) failure to make a meaningful and intelligible argument concerning that proceeding; and (2) failure to state every point under a separate heading or subheading summarizing the point. (Cal. Rules of Court, rule 8.204(a)(1)(B); *In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

during their last meeting he advised Arnaud what to expect at the preliminary hearing and explained what evidence would be leveled against him. Lee also placed blame on co-defendant Garcia's "inability to work with us on scheduling." Lee assured the court he would make himself more available to Arnaud going forward.

The court told Arnaud that Lee was an excellent lawyer and asked if Arnaud had anything to add about why they don't see eye-to-eye. Arnaud responded: "Honestly, I don't know. I don't think he's going to represent me to the best of his abilities. We have kind of like -- I don't know. I don't see eye-to-eye with him. I just don't. And if you don't want to change my attorney, that's fine. But I would like to go pro per then. I don't feel like he's going to represent me as much."

The court denied the *Marsden* motion without prejudice, explaining that Arnaud was free to renew his motion in the future. The court observed that Arnaud was obviously frustrated with the fact that Lee had not spent much time with him, but it believed Lee would provide effective assistance of counsel going forward. The case proceeded to trial.

On May 9, 2017, following defense cross-examination of FBI Special Agent Michael Easter[9], the People recalled Detective Duran. Arnaud interjected, stating, "Dude. I'm fucking fighting life, dude. Not you. I'm fighting life. If you're not even going to ask him nothing. You didn't ask him nothing yesterday." The court excused the jury and conducted a *Marsden* hearing.

Arnaud told the court he talked to Lee about settling the case prior to trial. At that time, Lee told Arnaud that the

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[9] Special Agent Easter testified about cell phone tower geo-location methods.

prosecutor would not accept less than 33 years and that he "most likely won't win." The day before the hearing, Lee reiterated to Arnaud that he was not going to win. Arnaud opined that Lee had not made a sufficient effort to win the case, and that he would have a better chance with another attorney.

The court noted the People were almost done presenting their case-in-chief, and Lee confirmed he was going to call defense witnesses. The court then asked Arnaud for any specific complaints about counsel's performance. Arnaud believed Lee should have cross-examined Detective Duran more extensively, and complained that Lee failed to pursue an alibi defense. Arnaud also complained that a private investigator retained by Lee only interviewed his family, and failed to talk to Lizarraga, Moya or Garcia. The court asked them to attempt to resolve these issues during a break.

After the break, Arnaud addressed the court as follows:

"The Defendant: I don't think there was anything that we can do now. I mean he hasn't -- we didn't come to no agreement or nothing back there. Actually, it was the opposite, so --

The Court: Okay. So, Mr. Lee, do you have your witnesses?

Mr. Lee: I do.

The Court: Okay. So the defense hasn't rested. I don't know if you had a chance to speak with your client about testifying if that's an opposition [*sic*]. But—

Mr. Lee: I was going to get into that when I was called out.

The Court: Okay. So let's do this, Mr. Arnaud, at this time, I have to deny the motion. Because for me to grant it I would have to find that there is a conflict here that can't be fixed; can't be remedied; and that your attorney—or that your attorney is providing ineffective assistance. [¶] And in all candor, he is doing

what he can do with what he is working with. I don't know what else there is that you wanted him to do earlier on that he hasn't done. But I promise you we can address it at another time. I just can't do anything with it right now because we are in the middle of trial. [¶] But I would—so I'm going to deny the *Marsden*."

The issue was never revisited.

1.2 Applicable Law

A defendant is entitled to new appointed counsel if the record clearly shows counsel is not providing adequate representation or that he and counsel have become so embroiled in conflict that ineffective representation is likely to result. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.) When a defendant complains about the adequacy of appointed counsel, the trial court must (1) give him or her an opportunity to explain the causes of dissatisfaction and, if any of them suggest ineffective assistance, (2) conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. (*Ibid*; *Marsden*, *supra*, 2 Cal.3d at pp. 123–124.)

Tactical disagreements between the defendant and counsel do not by themselves constitute an irreconcilable conflict. (*In re M.P.* (2013) 217 Cal.App.4th 441, 458.) "In addition, 'the number of times one sees [her] attorney, and the way in which one relates with [her] attorney, does not sufficiently establish incompetence.' [Citation.]" (*Id*. at pp. 458–459.)

"Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether or not to grant a motion for substitution of counsel lies within the discretion of the trial judge. The court does not abuse its discretion in denying a *Marsden* motion

"'unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to assistance of counsel.'" [Citations.] Substantial impairment of the right to counsel can occur when the appointed counsel is providing inadequate representation or when 'the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation].' [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 912.)

The court has wide latitude in balancing the right to counsel of choice against the needs of fairness and the demands of its calendar. (*People v. Alexander* (2010) 49 Cal.4th 846, 872.) This is because "[s]ubstitution of appointed counsel threatens to waste public resources by creating 'duplicative representation and repetitive investigation at taxpayer expense.' [Citation.] Free substitution as a matter of right would present an 'undesirable opportunity to "delay trials and otherwise embarrass effective prosecution" of crime.' [Citations.]" (*People v. Lara* (2001) 86 Cal.App.4th 139, 151.)

1.3 Analysis

Applying the *Marsden* test to this case, we find no error in denying the motion for substitute counsel. The trial court gave Arnaud wide latitude to articulate his complaints about counsel, and none of his complaints rise to the level of ineffective assistance or an irreconcilable conflict.

Arnaud relies on *People v. Munoz* (1974) 41 Cal.App.3d 62 (*Munoz*) to support his argument that Lee was unable to adequately defend him in light of Lee's evaluation of his prospects at trial. Not so.

In *Munoz*, the defendant requested a substitution of counsel after complaining that his appointed counsel said he did not want to defend him, and also told the defendant he was guilty and had no chance at trial. (*Munoz*, *supra*, 41 Cal.App.3d at pp. 64–66.) The court denied the defendant's request, assuring him that counsel's private opinion did not prevent him from providing effective representation. (*Id*. at p. 64.) The Court of Appeal reversed, concluding "the attorney-client relationship contemplates trust and mutual cooperation, particularly when the attorney is defending the client's liberty," and "if after appointment the attorney becomes convinced of his client's guilt to the extent that he is unable to defend the client vigorously and effectively at the trial, he should withdraw from the case." (*Id*. at p. 66.)

Unlike *Munoz*, the record does not reflect that Lee took a position on Arnaud's guilt or expressed an unwillingness to remain on the case. According to Arnaud's own representations, Lee simply expressed a candid evaluation of his prospects at trial in a private setting. Counsel is not expected to misrepresent the likely results to his client. (See *In re Vargas* (2000) 83 Cal.App.4th 1125, 1139 [counsel is obligated to provide "a candid evaluation of the case" to meet the standard of professionalism].) Thus, *Munoz* is unavailing.

Arnaud's complaint about the scope of Lee's cross-examination was a disagreement over trial tactics, which does not warrant a substitution of counsel. (*People v. McKenzie* (1983) 34 Cal.3d 616, 631 [scope of whether and how to conduct cross-examination is one such tactical decision, which must yield to appointed counsel], abrogated on other grounds in *People v. Crayton* (2002) 28 Cal.4th 346, 365.) A defendant is not entitled

to claim that an irreconcilable conflict has arisen merely due to a disagreement with counsel over reasonable tactical decisions. (*People v. Lara*, *supra*, 86 Cal.App.4th at p. 151.)

Similarly, Arnaud's complaint that counsel did not "help set up something that can coerce to my alibi" [*sic*] and that the private investigator did not interview certain witnesses were tactical decisions and do not rise to the level of ineffective assistance of counsel. The record gives us no reason to question whether counsel made a reasonable choice by declining to pursue Arnaud's unidentified alibi defense. "[D]efense counsel was not obliged to pursue futile lines of defense simply because defendant demanded them, and his refusal to do so did not justify his removal as counsel." (*People v. Panah* (2005) 35 Cal.4th 395, 432; see *People v. Barnett*, *supra*, 17 Cal.4th at p. 1096 [no right to appointed counsel who will accede to all of defendant's whims].)

Lastly, Arnaud contends his complaints warranted further questioning of Lee, and the court's failure to do so prevented adequate appellate review. Citing *People v. Armijo* (2017) 10 Cal.App.5th 1171 (*Armijo*), Arnaud asserts the error cannot be treated as harmless because it is impossible to determine what other evidence he might have offered had he been afforded the opportunity to press his claims. *Armijo* does not support Arnaud's position.

In *Armijo*, the trial court failed to hold a *Marsden* hearing after the defendant wrote two letters to the court requesting the discharge of the public defender. (*People v. Armijo, supra,* at p. 1173.) The Court of Appeal conditionally reversed the judgment with directions to hold a *Marsden* hearing, noting "[u]nder these circumstances, we 'cannot speculate upon the basis of a silent record that the trial court, after listening to

defendant's reasons, would decide the appointment of new counsel was unnecessary.'" (*Id.* at p. 1183.)

Unlike *Armijo*, the trial court conducted two *Marsden* hearings in response to Arnaud's complaints about counsel. Arnaud was afforded the opportunity to explain the basis of his *Marsden* requests and to cite specific instances of counsel's purported inadequate performance. While the court's inquiry of counsel was limited, his complaints were nothing more than tactical disagreements between Arnaud and Lee. (*People v. Panah*, *supra*, 35 Cal.4th at pp. 431–432.) Given the nature of Arnaud's complaints, it was not necessary for the court to further question Lee. (See *People v. Turner* (1992) 7 Cal.App.4th 1214, 1219 ["[d]epending on the nature of the grievances related by defendant, it may be necessary for the court also to question his attorney"].) Accordingly, we find no basis for concluding that the trial court either failed to conduct an adequate *Marsden* inquiry or abused its discretion in declining Arnaud's request to substitute new counsel.

B. *Remand Pursuant to Senate Bill No. 620*

As discussed, the trial court imposed a 25-years-to-life sentence enhancement for personally and intentionally discharging a firearm and proximately causing great bodily injury (§ 12022.53, subd. (d)), and stayed the remaining firearm-use enhancements (§ 12022.53, subds. (b)-(c)). At the time of sentencing, the court was not authorized to strike these enhancements in the interest of justice. (Former § 12022.53, subd. (h); *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.)

In 2017, the Governor signed Senate Bill No. 620 (Stats.

2017, ch. 682, § 2), which amended section 12022.53. The statute now allows the trial court, in the interest of justice, to strike or dismiss an enhancement otherwise required to be imposed under section 12022.53. (§ 12022.53, subd. (h).)

Arnaud contends he is entitled to the retroactive benefit of Senate Bill No. 620 because the judgment is not final. The Attorney General concedes the statute is retroactive and that Arnaud is entitled to a remand for resentencing. We accept this concession. (*People v. Woods*, *supra*, 19 Cal.App.5th at pp. 1089–1091.)

DISPOSITION

The sentence is vacated and the case is remanded to allow the trial court an opportunity to strike the firearm enhancement, in the interest of justice, pursuant to section 12022.53, subdivision (h). The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORT

MICON, J.*

We concur:

MANELLA, P. J. COLLINS, J.

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