Filed 7/17/18 P. v. Howard 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TYREE HOWARD, Defendant and Appellant.	B284281 (Los Angeles County Super. Ct. No. MA067388)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank M. Tavelman, Judge. Affirmed.

SW Smyth and Andrew E. Smyth for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant appeals from the judgment of conviction following denial of his motion to withdraw his no contest plea to burglary. Concluding that defendant was properly advised and all of his arguments are unavailing, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Burglary*

Defendant and three cohorts, Troy Sweazie, Jason Morehead, Jr., and Jeremiah Knott, burglarized a home in Lancaster in broad daylight. Defendant was the getaway driver.

On November 11, 2015, before noon, Sweazie knocked on the victim's door. The victim looked through her peephole and did not know Sweazie, so she did not answer the door. Instead, she walked upstairs and watched from a window. Sweazie then walked to a neighboring house and knocked on that door. Getting no response, he left, got into a car parked in front of the victim's home, where the other three would-be burglars sat, and waited. The victim stopped watching.

Fifteen minutes later, Knott and Morehead broke into the victim's house, by putting a chair under her bathroom window and prying open the screen, while Sweazie waited outside. When the victim heard them enter, she locked herself in her room and called the Los Angeles Sheriff's Department. The sheriffs responded immediately. When Knott and Morehead heard sirens, they ran from the house. Sweazie fled as well.

The sheriffs interviewed the victim, who gave a description of the car – a two-tone (tan/brown) Lexus. Deputy Maurice Austin searched the street and found Morehead hiding in a trash can a few houses away. While Deputy Austin was placing Morehead in the police car, he saw the two-tone Lexus drive past with two men in it. He asked the victim if that was the car; she

answered affirmatively. Deputy Austin radioed to other law enforcement in the area to stop the car.

The Lexus was stopped about an hour later. Defendant was driving; Sweazie's identification was in the back seat.

2. *Further Evidence*

The victim identified Sweazie as the man who first knocked on her door and also identified Knott, whom she had seen from her window. Shoeprint evidence confirmed that Knott and Morehead had entered the victim's house and Sweazie had waited outside.

Knott confessed that the four men had come to Lancaster to try to break into a house; they had heard it was easy to break into homes in the area. Knott explained that defendant had dropped the three of them off and was supposed to wait for them down the street; Knott and Morehead had entered the house; and Sweazie was the lookout.

Morehead also confessed, admitting that he had entered the house, and left when he heard sirens.

Sweazie claimed that his uncle lived there and that he had planned to scare his uncle by entering the house through the back sliding door. When he heard sirens, Sweazie thought that he might have been at the wrong house and ran.

Defendant first told police that he did not know why he was arrested; he had been at the park playing basketball all day. Deputy Austin told defendant that he had recognized defendant driving the Lexus when he drove past; defendant said that was not him. Deputy Austin questioned defendant again after he had spoken with defendant's associates. Defendant changed his story and said he had been home all day and a relative had borrowed his car. When Deputy Austin pointed out the contradiction with

defendant's earlier statement, defendant "just stuck with the statement that he didn't do anything wrong."

3. *Charges*

On January 21, 2016, defendant, Morehead and Sweazie proceeded to a preliminary hearing. After the hearing, they were charged by information with one count of burglary. (Pen. Code, § 459.) It was further alleged that the crime was a violent felony because there was a person present. (Pen. Code, § 667.5, subd. (c).)

4. *The Plea Offer*

Prior to the preliminary hearing, the court asked if there was a plea offer. The prosecutor stated, "Yes, Your Honor, the same with regards to all three defendants: It is a plea to count 1, which is first-degree burglary, person present, for the low term of two years in state prison, and restitution, if any." (Proceedings as to suspect Knott had been "terminated.") There is no indication, at this point, that the offer was a package deal. Each defendant individually rejected the offer on the record and proceeded to a preliminary hearing.

One year later, on January 30, 2017, the defendants were ready to change their pleas, accepting the offer of the two-year low term.

5. *Defendant's Plea*

On January 30, 2017, defendant and his counsel signed a form document entitled "Plea Form, with Explanations and Waiver of Rights—Felony." In the form, defendant agreed that he would receive a sentence of two years. He acknowledged the consequences of the plea, including that the effect of a no contest plea is the same as a guilty plea. He specifically acknowledged his constitutional rights – including the right to a jury trial in

which he "could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were convinced beyond a reasonable doubt" of his guilt; the right to confront and cross-examine witnesses; and the right to remain silent and that his silence "cannot be considered as evidence" against him.

Defendant, Morehead and Sweazie had a joint plea hearing. Prior to entering their pleas, the court asked each of them if they had carefully reviewed the plea form with counsel; they agreed. The court asked if they had questions about their rights or the consequences of their pleas; they said no. The court reminded them that they "each have the right to a jury trial or a court trial, the right to confront and cross-examine the witnesses, to subpoena witnesses free of charge who can testify on [their] behalf, a right to put on a defense, and the right to remain silent." They each stated they understood these rights and chose to give them up. Each defendant was specifically and separately asked if he was pleading "freely and voluntarily" because he believed it was in his best interest to do so; they all agreed. They were then asked whether anyone had threatened them or anyone close to them or made promises to get them to plead guilty. Each individually answered no. Finally, all three said they had no questions for their counsel or the court.

Defendant and his codefendants each pleaded no contest and admitted the person present allegation. Counsel joined and stipulated to a factual basis for the pleas. The court accepted the pleas and found defendants guilty. The matter was continued for sentencing.

6. *Codefendants' Sentencing Hearing*

On March 2, 2017, the matter was called for sentencing. Morehead and Sweazie were sentenced to the agreed-upon term. Defendant sought an additional few weeks before sentencing; he wanted a bit more time to save money for his child. The trial court agreed to continue defendant's sentencing hearing.

Prior to sentencing Morehead and Sweazie, the court stated, "I don't recall. Did all three get the same sentence?" Sweazie's counsel responded, "That's correct." The court asked, "Low term package?" Morehead's counsel said, "Yes." This is the first indication in the record that the plea had, in fact, been a package deal.

7. *Defendant's Sentencing is Repeatedly Continued to Obtain New Counsel*

At defendant's sentencing hearing on March 23, defendant asked the court to read a brief letter prior to sentencing. The court read the letter and believed it to be a motion to withdraw the plea, saying, "I'm looking at this letter and it states among other things, 'I am innocent. I didn't have the knowledge, and I didn't understand what I was signing.' He's saying he didn't understand his waiver."[1] Defendant's counsel represented that

---

[1] The record on appeal includes a single-page letter to the judge, although it was not placed in the record until March 30, 2017. The letter reads, "I am writing this letter, for a sentence reduction, I want you to reevaluate my case, I am a first time offender, I never had a criminal history, I am innocent, I didn't have the knowledge, and I didn't understand what I was signing, I'm sorry for the misunderstanding I did when I made the plea they told me that I could be looking at 5 to 6 years if I took it to trial, and then they told me if I plead guilty, I be looking at 2 years. I am innocent, I got scared, and nervous hearing both

defendant had told him he did not want to withdraw the plea. The court put the matter over to second call, so that defendant could discuss with counsel whether he wanted to move to withdraw his plea. After consultation, defendant indicated both that he wanted to withdraw his plea and that he wished to pursue a *Marsden* motion. (*People v. Marsden* (1970) 2 Cal.3d 118.) The court continued the matter to March 30 for the *Marsden* hearing. Defendant asked "And if I get granted, can I hire my own attorney?" The court responded, "If you are able to hire one, bring him in on the next court date." The court added, "But if not, we'll make a determination if you qualify for another public attorney."

At the hearing on March 30, defendant informed the court that he had retained counsel, although his new attorney had been unable to attend that hearing. Defendant agreed that he no longer wanted the *Marsden* hearing since he had hired new counsel. The court indicated it would hear defendant's motion to withdraw his plea on April 24, 2017.

At the hearing on April 24, defendant indicated the counsel he had previously retained raised his price at the last minute, so defendant retained a different attorney. That attorney told

---

plea, I never been in a situation like this, I have no criminal history, there is no evidence of me being on the scene, they are labeling me for first degree burglary. If I go to Prison a long time this is harmful to me, and my family, and my mother who is about to be having surgery, and I have a 8 month old baby, and the loss of my employment income places stress hardship on my family. I am asking for a much lower reduction sentence, [or] House arrest, [or] probation, [or] community service since, I already made a plea that I didn't have knowledge on. Thank You Judge for taking the time to read the letter. God bless you."

defendant he could be at court in two weeks. At this point, defendant's appointed counsel offered that he had a conflict situation that "has been developing" and asked to be relieved. The court stated counsel could put the conflict in writing under seal, but thought the issue might be moot as defendant claimed to have new counsel. Appointed counsel agreed to hold off. The matter was continued for two weeks to allow defendant's newly retained counsel to appear.

At the next hearing on May 10, defendant claimed that his next retained attorney had also raised his price. The court continued the case one last time and told defendant that his appointed counsel could prepare the motion to withdraw the plea. Defendant stated, "If there's nothing I can do to try to get a different public defender, then I'd just like to go forward withdrawing the plea." The court indicated that plea withdrawal was not automatic and that there had to be a motion with legitimate grounds to do so. At this point, defendant's mother spoke, volunteering that her son was innocent and asking that he get "another public defender." When she repeated her claims that defendant was innocent and had a clean record, the court responded, "Everyone has a first time if they actually are committing crimes. I have no idea if it didn't happen or if it did happen. I just know he pled on the case, and there is a variety of reasons why people plead." The court set the next hearing for May 31, telling defendant he had 21 days to hire someone to file whatever paperwork he wanted, and that, if there was no new retained counsel, the matter would proceed with defendant's appointed counsel. The court inquired if the plea had been a package; defendant's counsel said that it had.

8. *Defendant's Motion to Withdraw the Plea*

On May 24, 2017, defendant submitted a written motion to withdraw his plea. His arguments were "based upon his adamant admissions due to his lack of sophistication and experience with the criminal justice system, fear and confusion and pressure imposed upon him by his codefendants to settle the case." The motion did not, however, include a declaration of defendant or any further explanation of the "pressure" allegedly imposed by his codefendants.

At the May 31 hearing, defendant was questioned by the court, under oath, as to his claim of lack of understanding and his assertion of codefendant coercion. As to lack of understanding, he admitted that he signed the waiver form before his plea, but claimed his appointed counsel had not properly explained the form to him. Defendant said counsel rushed him because his case was about to be called. Defendant said, "it's a very big packet" and counsel went over it with him "in 30 minutes." The court pointed out that the form was only seven pages long, and asked what parts of it defendant did not understand. Defendant agreed that counsel explained his "right to a jury trial and all of that," but believed there were "five different pages I couldn't even tell you what were in the pages." When specifically asked, he agreed that he knew he was pleading to a strike, and that his potential exposure was six years. Defendant said that he still does not know what "no contest" is, explaining that counsel "told me it was a guilty plea. Basically, you're pleading guilty. I don't even know what no contest means, sir." In contrast, defendant's counsel volunteered that he personally went over the terms of the waiver form with defendant before the plea, and did so again when they first returned for sentencing.

As to codefendant coercion, defendant conceded that he had answered affirmatively at the plea hearing to the court's questions regarding his understanding, and "the reason I agreed on that is because I had codefendants." He testified that "since day one all the other codefendants – they pressured me. They told me, if you go to trial with us, we go. We're guilty. We have fingerprints. You'll get six years too. I have a newborn little girl, and I wasn't trying to be out of her life six years." When the court said that this sounded more like a discussion of the consequences rather than threats, defendant stated, "It wasn't so much threatening. It was so much of their family." The court said, "Now it's the family threatening you?" Defendant replied, "No, I've been telling everyone. There's so many people in my ears about this case, basically saying if you go to trial and get my son six years, we'll do this and that and this and that, sir." He explained, "We were all cool before this whole case happened, and since then, I haven't talked to no one, their side of the family. No one talks to me anymore."

Defendant represented that he had retained private counsel, Attorney Andrew Smyth (who is now representing defendant on appeal). Attorney Smyth had been unable to attend the hearing due to another appearance.

On the issue of whether defendant had been properly advised, the court stated that, to the extent there was a conflict between defendant and his appointed counsel, the court believed counsel. The court denied the motion to withdraw the plea. However, the court stated that, in light of defendant having retained new counsel, the motion was denied without prejudice. The court explained, "If you want [new counsel] to file a new one, you have 120 days potentially to try to vacate the plea and be re-

sentenced. But it's my plan to sentence you today on the case to what you agreed upon, and if that new attorney wants to come in and file new paperwork and take another crack at it, I'll give you that option."

9. *Sentence and Appeal*

On May 31, 2017, defendant was sentenced to two years in prison, as agreed. He did not file a new motion to withdraw his plea. On July 26, 2017, defendant, represented by Attorney Smyth, filed a notice of appeal, challenging the validity of his plea. A certificate of probable cause issued.

DISCUSSION

On appeal, defendant contends: (1) he was improperly advised of his rights in connection with his plea; (2) he was coerced by his codefendants' families in connection with his plea; (3) the trial court failed to find a factual basis in connection with his plea; and (4) his counsel rendered ineffective assistance in connection with the motion to withdraw. Upon our review of the record, we raised two further issues: (5) whether defendant had reasserted his *Marsden* motion when it was apparent he could not timely retain new counsel; and (6) whether there was error in the court's failure to further inquire into appointed counsel's assertion of a conflict.

1. *Defendant was Properly Advised of His Rights*

"A change of plea must be voluntary and intelligent, with a defendant being advised of his or her constitutional rights, and of the direct consequences of the conviction. [Citation.]" (*People v. Dillard* (2017) 8 Cal.App.5th 657, 664.) Unless special circumstances indicate the plea might otherwise be involuntary, a defendant may be sufficiently advised of his constitutional rights by means of a written waiver form, explained by counsel

prior to the plea hearing. (*In re Ibarra* (1983) 34 Cal.3d 277, 285-286, disagreed with on another ground by *People v. Howard* (1992) 1 Cal.4th 1132, 1175-1178.)

Here, defendant was advised by means of the written form, which he agreed was explained to him for a half hour prior to his plea.[2] He was adequately advised.

Defendant specifically argues that, at the time of his plea, the trial court did not explain that at a jury trial, the prosecution would have to convince all 12 jurors of his guilt beyond a reasonable doubt. He also argues that the trial court did not explain that if he remained silent, his silence could not be considered as evidence of guilt. But both of these things were explicitly discussed in the plea form which defendant signed.

On appeal, defendant overlooks the advisement he received by means of the form, and instead claims that the trial court's oral advisement of constitutional rights at the plea hearing failed to meet the American Bar Association's standards on advisement. (See ABA Stds. for Crim. Justice, Pleas of Guilty (3d ed. 1999) std. 14-1.4., pp. 35-37.) Defendant cites to no authority that these ABA standards have been adopted in California, and independent research has disclosed none. In fact, the commentary on the ABA standard explains that not all of the recommended ABA advisements are constitutionally mandated and "the failure to give particular advisements may not constitute error invalidating a conviction, a question which will turn on the jurisdiction's law . . . ." (*Id.* at com. to std. 14-1.4, pp. 37-38.)

---

[2] Defendant also signed a second plea form prior to his initial sentencing hearing on March 23, 2017. The parties raise no appellate issues regarding this second form.

2. *Defendant Has Not Established Improper Coercion*

Defendant next challenges his plea as improperly coercive, although it is unclear whether he is arguing the court erred in its initial acceptance of the plea or its denial of the motion to withdraw the plea. Somewhat different standards apply.

A package deal plea bargain is not intrinsically coercive, but may be so under the totality of the circumstances. (*In re Ibarra, supra,* 34 Cal.3d at pp. 286-287.) Therefore, a court taking a plea should inquire into whether the plea is entered into pursuant to a package deal and, if so, conduct an inquiry into the totality of the circumstances to ensure that the plea is not improperly coercive. (*Id*. at pp. 287-288.) Here, the trial court did not inquire at the time of the plea as to whether it was a package deal plea, and therefore did not conduct the further inquiry. However, the *Ibarra* inquiry is not of constitutional dimension. Therefore, in seeking on appeal to set aside a plea as involuntary under *Ibarra*, a defendant "must point to facts to show not only the lack of an inquiry but also the involuntary character of his plea." (*Id.* at p. 290, fn. 6.)

In comparison, a defendant moving to withdraw his plea must prove, by clear and convincing evidence, that there is good cause for withdrawal of the plea – that he was operating under mistake, ignorance, inadvertence, fraud or duress. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416.) The decision to grant or deny a motion to withdraw a plea is left to the sound discretion of the court. (*Id*. at p. 1416.) We do not reverse a denial of the motion absent a showing of abuse of discretion. (*Ibid.*) Moreover, we adopt the trial court's factual findings if supported by substantial evidence. (*Ibid.*)

Extraneous factors to be considered in a package deal plea situation include: (1) the propriety of the inducement for the plea; (2) the factual basis for the plea; (3) psychological pressures which may be present if a close friend or family member is promised leniency or a third party made a specific threat against the defendant if he refused to plead guilty; and (4) how significant the promised leniency to the third party was to the defendant's decision to plead guilty. (*In re Ibarra, supra,* 34 Cal.3d at pp. 288-290.)

Here, defendant contends his package deal plea was coercive, relying on his testimony at his motion to withdraw the plea. But his testimony was insufficient to establish coercion under either standard. We consider the four factors above. (1) The package plea was proper; the three defendants were charged together for committing the same burglary. (2) The factual basis for the plea was strong; Morehead was arrested near the scene and shoeprint evidence established that Morehead, Sweazie and Knott committed the burglary; Knott confessed to police that all four men drove to Lancaster planning to break into a house and defendant was the getaway driver; defendant was found an hour later in the getaway vehicle with Sweazie's identification in the car, and made inconsistent statements to police. (3) The evidence of psychological pressures is minimal; while it is apparent from defendant's testimony that he and some or all of his codefendants are related, there is no evidence as to how closely they are related or why he would feel pressured to save his codefendants from lengthy prison terms. As to threats, defendant testified that relatives told him that if his codefendants were sentenced to six years because defendant chose to go to trial, "we'll do this and that and this and that,"

with no further explanation. This testimony could mean anything from physical threats to a promise to disinvite defendant from family gatherings. (4) While defendant testified that he (falsely) told the court he understood all of the plea advisements "because [he] had codefendants," he also testified that he took the deal because his codefendants had told him that if they got six years, he would get six years too, and he did not want to be away from his child for that long. Taken together, defendant has not established that his plea was involuntary.[3]

3. *The Court Found a Factual Basis for the Plea*

Defendant next contends that, subsequent to the plea, the trial court admitted that it did not find a factual basis for the plea. Here, defendant relies on the trial court's statement to defendant's mother that, with respect to this crime, "I have no idea if it didn't happen or if it did happen." The contention is meritless. At the plea hearing, counsel stipulated to a factual basis for the plea in the preliminary hearing and police report. The court accepted the plea and found a factual basis. Our review of the preliminary hearing transcript indisputably shows

---

[3] To the extent defendant argues the trial court's inquiry at the motion to withdraw the plea was inadequate, we disagree. Defendant takes issue with particular questions the court asked defendant – for example, asking defendant *when* his codefendants' relatives allegedly threatened him, rather than asking *what* threats had been made. We do not parse the court's questions so narrowly. A review of the entirety of the transcript reveals a court repeatedly trying to elicit from the defendant any concrete evidence of coercion, rather than the generalized assertions the defendant seemed determined to supply. The court continued questioning defendant until it was confident the defendant had no specific factual support to offer.

a factual basis exists. That the trial judge, three months later, told defendant's mother that he personally did not know if defendant had actually committed the crime does not undermine the prior finding of a factual basis.

4. *There was no Prejudicial Ineffective Assistance of Counsel*

Defendant next contends his appointed counsel rendered ineffective assistance in connection with the motion to withdraw the plea. Specifically, he argues the written motion was inadequate as it failed to include evidentiary support, and was unclear on the arguments it was making.[4]

"A defendant has the burden of proving a claim of ineffective assistance of counsel by showing that (1) his or her trial counsel's representation fell below an objective standard of reasonableness and (2) he or she was prejudiced (i.e., there is a reasonable probability that a more favorable determination would have resulted in the absence of counsel's deficient performance)." (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1372.)

---

[4] Defendant also argues that the motion was improper because it included "numerous miscites, misspellings and is far below the standard for pleadings filed in California Courts." (Italics omitted.) There is certainly irony in an appellate brief which calls out trial counsel for citing to a case by title and year, without a volume or page number, when the appellate brief itself states a legal proposition with *no* citation to authority, but unhelpfully states only, "Cite." Similarly, the appellate brief includes the incomprehensible, "It's all coupled with the Wii Kevin this is a preliminary hearing incompetent new trial motion . . . ." To be sure, proofreading would have greatly improved the quality of the submissions of both trial and appellate counsel. That said, sloppy submissions do not constitute prejudicial ineffective assistance.

Apart from whether trial counsel's performance fell below an objective standard of reasonableness in presenting the motion to withdraw the plea, defendant has failed to establish he was prejudiced by any such failure. Defendant contends counsel was ineffective in not supporting the motion to withdraw with a declaration, but the court questioned defendant at length in order to obtain his testimony and make up for any lack of evidence in support of the written motion. Similarly, defendant was given the opportunity to explain the grounds he wished to pursue on the motion, even if counsel had not fully explained them. Finally, the trial court denied the motion to withdraw without prejudice, specifically granting defendant the opportunity to refile the motion with new counsel if he wanted to do so. Under these circumstances, defendant has failed to establish prejudice.

5. *Defendant's Marsden Motion Should Have Been Heard, But the Error was Harmless*

At defendant's original sentencing hearing, he made a *Marsden* motion, which the court set for hearing. However, the motion was taken off calendar when defendant believed he had retained new counsel. Some months later, retained counsel had not materialized, and the court told defendant his appointed counsel would proceed with the motion to withdraw his plea. Defendant stated, "If there's nothing I can do to try to get a different public defender, then I'd just like to go forward withdrawing the plea." We asked the parties, by letter brief, to address the issue of whether defendant had, by this statement, reasserted his *Marsden* motion. The prosecution, by letter brief, conceded that defendant had. However, the prosecution argued that the court's failure to hold a *Marsden* hearing was harmless beyond a reasonable doubt. We agree.

"*Marsden* does not establish a rule of per se reversible error. [Citation.]" (*People v. Washington* (1994) 27 Cal.App.4th 940, 944.) Here, defendant first raised the issue of a conflict with counsel at his sentencing hearing, after he had submitted his single-page letter to the court. The court believed the letter constituted a motion to withdraw the plea; defendant's counsel stated that defendant did not, in fact, want to withdraw his plea. The court directed counsel to consult with defendant; the result was both a motion to withdraw the plea and a *Marsden* motion. It is apparent from this course of events that the disagreement between defendant and his counsel which prompted the *Marsden* motion was defendant's desire to withdraw his plea and his counsel's disagreement with that strategy. This conclusion is further supported by the conflict, at the hearing on the motion to withdraw, between defendant's testimony and his counsel's representation regarding whether counsel had, in fact, fully advised defendant as to his rights and the consequences of the plea. But if that was the conflict between defendant and appointed counsel, the failure to conduct a *Marsden* hearing did not deprive defendant of any arguments or irrevocably affect his sentence. This is so for the same reasons there was no prejudicial ineffective assistance: defendant had an opportunity to testify in support of his motion to withdraw the plea; the court fully explored the bases on which he sought to withdraw the plea; and the court gave him the opportunity to file the motion again with his new counsel. "Under the circumstances, and on the record before us, we cannot see that [defendant] would have obtained a result more favorable to him had the motion been entertained." (*Washington, supra,* 27 Cal.App.4th at p. 944.)

6. *There Was No Prejudicial Error in the Court's Failure to Inquire Into Counsel's Claimed Conflict*

At the April 24 hearing, defendant's counsel represented that he had a conflict with defendant and asked to be replaced. Counsel was given the choice to put the conflict in writing or wait and see if defendant's promised retain counsel would appear – mooting the need for counsel's withdrawal. We sought additional briefing on whether the court had erred in ultimately proceeding with defendant represented by original appointed counsel without further inquiry into the claimed conflict.

" ' "When a defendant claims that a trial court's inquiry into a possible conflict was inadequate, the defendant still must demonstrate the impact of the conflict on counsel's performance." [Citation.]' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1071.) "Absent a demonstration of prejudice, we will not remand to the trial court for further inquiry. [Citation.]" (*Id.* at p. 1072.) Despite our invitation for further briefing, defendant made no effort to show what the supposed conflict was or that he was prejudiced by the court's failure to inquire into counsel's claimed conflict.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

I CONCUR:

BIGELOW, P. J. ROGAN, J.*

---

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