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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JYRA ROCHELLE DATES,

Defendant and Appellant.

B342998

(Los Angeles County
Super. Ct. No. KA131339)

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

Travis Daily, under appointment by the Court of Appeal,
for Defendant and Appellant.

Rob Bonta, Attorney General, Charles G. Ragland, Chief
Assistant Attorney General, Susan Sullivan Pithey, Senior
Assistant Attorney General, Michael C. Keller and Viet H.
Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Jyra Rochelle Dates on multiple counts of transporting methamphetamine and possessing methamphetamine for sale. Dates argues that the trial court erred in denying her pretrial petition for mental health diversion, in denying her request under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) for substitute counsel without a hearing, and in imposing the upper term on one of her convictions without a jury finding the aggravating circumstance true beyond a reasonable doubt. We agree with her second and third arguments, but not her first. Therefore, we conditionally reverse her convictions with directions for the trial court to hold a hearing on Dates's request for substitute counsel and to resentence Dates.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Dates Has a History of Transporting and Selling Controlled Substances*

Over the past two decades Dates has been convicted of numerous crimes, most of which were for transporting and selling controlled substances. She is, and for a long time has been, in the business of selling methamphetamine, cocaine, and marijuana.

Sticking to Dates's felony convictions (and not including her numerous misdemeanor convictions), in 2012 she was convicted of possessing a controlled substance and marijuana for sale (Health & Saf. Code, §§ 11359, 11378) and sentenced to a prison term of one year four months. In 2014 she was convicted of possessing marijuana for sale and was sentenced to two years in

prison. In 2016 she was convicted of possessing marijuana for sale and again sentenced to two years in prison. Later in 2016 she was convicted of willfully fleeing a peace officer while driving in a direction opposite to traffic (Veh. Code, § 2800.4) and was sentenced to three years in prison. And in 2018 she was convicted of possessing marijuana for sale with prior convictions and sentenced to another two-year prison term.

B. *The People Charge Dates with Several Instances of Transporting and Selling Methamphetamine*

In this consolidated case the People charged Dates with seven crimes she committed between June 2022 and August 2023. On June 27, 2022 a sheriff's deputy saw Dates driving a car that had a broken taillight and expired registration and that was speeding and not staying in lanes. The deputy activated the lights and siren of her patrol car. Dates did not stop, continued speeding, and drove through several stop signs and red traffic lights without stopping. The deputy pursued. Other cars on the road had to swerve and brake to avoid colliding with Dates's car. At one point during her pursuit of Dates, the deputy saw Dates throw several bags and a "white crystallized object" out the front passenger side window. Several patrol cars joined the pursuit, which finally ended in the parking lot of a drug store. One of the deputies conducted a field sobriety test and a drug recognition examination on Dates, but the deputies did not cite her for driving under the influence.

Deputies searched Dates's car and observed a white substance on the driver's seat, passenger seat, and the driver's side floorboard, as well as sandwich bags on the passenger seat and floorboard. The deputies recovered from the car \$40 in cash

and a wallet containing \$722 and from the street the bags Dates had thrown from the car. A criminalist later determined the substance in the car and recovered from the street was methamphetamine, in the total amount of approximately 122 grams.

On April 19, 2023 a police officer saw Dates run a red light while driving a white car. After stopping Dates, the officer conducted a records check, determined Dates was not licensed to drive, and told Dates to step out of the car. The officer, who was trained in drug recognition and identifying symptoms of individuals under the influence of narcotics, observed Dates was not speaking extremely rapidly. The officer searched Dates's car and recovered a black sock containing three baggies (two with what appeared to be methamphetamine (8.6 grams and 55.9 grams, respectively) and one with what appeared to be cocaine (6.7 grams)), a digital scale, a clear plastic bag with two blue pills, marijuana (80 grams), and a backpack with additional clear plastic bags.

On July 23, 2023 a police officer saw Dates turn right at a red light without stopping and yielding to traffic. The officer stopped Dates, directed her to get out of the car, and told her to walk to the sidewalk; according to the officer, Dates "did not appear to be under the influence of any substance." As Dates walked away from her car, "a small transparent bag" containing methamphetamine fell "from either her waist area or under her sweater, some part of her body." The officer searched the car and recovered a large duffle bag with five plastic bags containing marijuana, a black sock containing approximately 150 grams of methamphetamine, another plastic bag containing five to

10 grams of cocaine, a wallet containing \$588 in cash (in small denominations), and an operable digital scale.

Finally, on August 2, 2023 police officers, who had been conducting surveillance on Dates's apartment complex, searched her apartment pursuant to a warrant. When Dates saw the officers, she ran away, but was quickly detained. On a table in the living room of her apartment officers found a wallet, a scale, and narcotics. In the bedroom the officers found five bags of methamphetamine, "several bags of pre-packaged" methamphetamine weighing approximately one pound each, two clear plastic bags containing methamphetamine and one containing cocaine, a brown bag containing methamphetamine and cocaine, three pounds of marijuana, and 83 empty clear plastic bags. The total weight of methamphetamine obtained from Dates's apartment was approximately 9.5 pounds (approximately 4,300 grams), far exceeding an amount for personal use.

C. *The Jury Convicts Dates on All Counts, and the Trial Court Sentences Her*

The People charged Dates with seven crimes. For the June 27, 2022 incident, the People charged Dates with fleeing or attempting to elude a pursuing peace officer while driving a vehicle in willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)) and transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)). For the April 19, 2023 incident, the People charged Dates with possessing methamphetamine for sale (Health & Saf. Code, § 11378) and transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)). For the July 23, 2023 incident the

People again charged Dates with possessing methamphetamine for sale (Health & Saf. Code, § 11378) and transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)). And after the August 2, 2023 search of her apartment, the People charged Dates with possessing methamphetamine for sale (Health & Saf. Code, § 11378).

The jury convicted Dates on all seven counts. At the trial court's invitation the People moved to amend the information to add an allegation Dates's prior adjudications and convictions were numerous and of increasing seriousness, an aggravating circumstance under California Rules of Court, rule 4.421(b)(2). The court granted the motion and proceeded to find the allegation true. The court did not submit the aggravating circumstance allegation to a jury, and Dates did not waive her right to a jury trial on that allegation.

The trial court sentenced Dates to an aggregate prison term of six years eight months. The court imposed the upper term of four years on one of her convictions for transporting methamphetamine,¹ plus consecutive terms of eight months, one year, and one year on three of her other convictions. The court imposed and stayed execution of sentences on her remaining convictions. Dates timely appealed.

¹ Transporting or selling a controlled substance is punishable by a prison term of two, three, or four years. (Health & Saf. Code, § 11379, subd. (a); *People v. LaCross* (2001) 91 Cal.App.4th 182, 185.)

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Denying Dates's Request for Mental Health Diversion*

1. *Relevant Proceedings*

Before trial Dates filed a petition for diversion under Penal Code section 1001.36,² which “authorizes a pretrial diversion program for defendants with qualifying mental disorders.” (*People v. Frahs* (2020) 9 Cal.5th 618, 626.) Dates argued that she had been “examined by a qualifying mental health expert,” that she qualified for mental health diversion under section 1001.36, and that there was “a suitable treatment program” that would treat “the underlying cause of [her] involvement in the currently charged offense,” which would likely “prevent recidivism in the future.” Dates argued that the “essence” of the charges against her was that she was “allegedly driving with a taillamp out,” “allegedly failed to yield” to police officers, and “ran away from officers when they attempted to detain her.” Dates submitted a report by a clinical psychologist who, according to Dates, concluded Dates’s “behavior in this case is correlated to his [*sic*] untreated relationship with alcohol [*sic*]. It must be noted that when a person is under the influence of alcohol [*sic*], he/she can experience behavioral problems including inappropriate behavior, impulsive behavior, decreased inhibitions/poor self-control, unstable moods, and poor judgment.” Dates said the psychologist also concluded that she did “not pose an unreasonable risk of danger to public safety if treated in the

² Undesignated statutory references are to the Penal Code.

community” and that her “biggest obstacle is remaining sober and diligent, which may contribute to exacerbating his [*sic*] mental health symptoms.”

The psychologist stated in his report that Dates had the following disorders: Bipolar 1 Disorder, Generalized Anxiety Disorder, Amphetamine Use Disorder, Cocaine Use Disorder, and Cannabis Use Disorder. The psychologist concluded Dates “presented with symptoms that are consistent with the underlying disorder at or near the time of the incident” and that her “disorder was a substantial contributor or motivator of the defendant’s alleged criminal conduct.” The psychologist reported that Dates told him that she was under the influence of methamphetamine and cocaine at the time of her arrests. The psychologist stated “the symptoms of [Dates’s] mental disorder motivating the criminal behavior would respond to appropriate mental health treatment.”

The People opposed Dates’s petition for diversion. After summarizing Dates’s prior convictions and current charges for selling drugs, the prosecutor argued Dates posed “an unreasonable risk of danger to the public because she has two evading cases of which there were multiple traffic violations, including running red lights and running stop signs. It only takes running one red light to collide with a vehicle and that could result in a super strike, meaning someone’s death.” The prosecutor also argued Dates was not evading law enforcement “because she has high anxiety,” but because she was “essentially a business running out of her vehicle.”

The trial court denied Dates’s request for mental health diversion. The court concluded Dates was a drug dealer. When counsel for Dates suggested Dates was more accurately

characterized as a “drug addict,” the court stated: “No, she’s a drug dealer She may be, in addition to being a drug dealer, a drug addict, but she has a history. Almost every single arrest for her is for possession for sales and pursuits. I don’t think she has any case where she’s charged with being under the influence.” After reciting Dates’s history of convictions for possessing controlled substances for sale, the court stated that “every single conviction” Dates had was for selling controlled substances and that “of course she’s going to have anxiety” and “of course she’s going to panic because she doesn’t want to go back to prison. That’s only logical and rational.” The court found “by clear and convincing evidence that the mental illness in this case [was] not a motivating factor or a causal factor or a contributing factor to [Dates’s] involvement in the alleged offense. It’s very simple and straightforward. She is a drug dealer. She has a history of selling drugs.” The court also found by clear and convincing evidence the disorders found by the psychologist “were not a causal factor, determining factor, or a motivating factor or mitigating factor. She’s a narcotics dealer. That’s how she makes a living and that’s what is motivating her. And I don’t think that mental health diversion is appropriate under these circumstances.”

2. *Applicable Law and Standard of Review*

Under section 1001.36 “a defendant is eligible for mental health diversion if: (1) the defendant presents evidence that in the last five years he has been diagnosed by a qualified mental health expert with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders; and (2) the defendant’s mental disorder was a

significant factor in the commission of the charged offense.” (*People v. Doron* (2023) 95 Cal.App.5th 1, 8 (*Doron*); see § 1001.36, subd. (b)(1), (2); *People v. Frahs*, *supra*, 9 Cal.5th at pp. 626-627 [discussing a former version of section 1001.36].) Regarding the second criterion, section 1001.36, subdivision (b)(2), creates a presumption the “defendant’s diagnosed “mental disorder” has a connection” to the offense and permits “the court to deny diversion if the People rebut[] the presumption.” (*Doron*, at p. 8.) Section 1001.36, subdivision (b)(2), states: “If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant’s mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant’s involvement in the alleged offense.” (See *People v. Brown* (2024) 101 Cal.App.5th 113, 120 (*Brown*).)

If the defendant satisfies the eligibility requirements for diversion, the court must then consider the defendant’s suitability for diversion. (§ 1001.36, subd. (c); see *Brown*, *supra*, 101 Cal.App.5th at p. 120 [“mental health diversion requires trial court findings that the defendant is both *eligible* for diversion and *suitable* for the program”].) A “defendant is suitable when the following criteria are met: (1) ‘[i]n the opinion of a qualified mental health expert, the defendant’s symptoms of the mental disorder’ related to the criminal behavior ‘would respond to mental health treatment’; (2) ‘[t]he defendant consents to diversion’; (3) ‘[t]he defendant agrees to comply with treatment’; and (4) ‘[t]he defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if

treated in the community.” (*Doron, supra*, 95 Cal.App.5th at p. 9; see § 1001.36, subd. (c).)

The court has discretion to grant or deny the defendant’s request for diversion, even if the defendant is eligible and suitable. (*Doron, supra*, 95 Cal.App.5th at p. 9; see *Brown, supra*, 101 Cal.App.5th at p. 121 [“even where defendants make a prima facie showing that they meet all the express statutory requirements, the court may still exercise its discretion to deny diversion”]; *People v. Whitmill* (2022) 86 Cal.App.5th 1138, 1147 [“A trial court has ‘broad discretion to determine whether a given defendant is a good candidate for mental health diversion.’”]; *People v. Oneal* (2021) 64 Cal.App.5th 581, 588 [section 1001.36 “affords the trial court discretion to grant or deny diversion if the defendant meets the statutory eligibility requirements”].) We review an order granting or denying a request for diversion under section 1001.36 for abuse of discretion. (*Vaughn v. Superior Court* (2024) 105 Cal.App.5th 124, 135; *People v. Graham* (2024) 102 Cal.App.5th 787, 795; *Doron*, at p. 9.) We review the trial court’s finding “whether the defendant’s disorder played a significant role in the commission of the charged offense” for substantial evidence. (*Oneal*, at p. 589; see *Brown*, at p. 121 [“[w]e review the trial court’s factual findings as to the enumerated statutory criteria for substantial evidence”]; *Whitmill*, at p. 1147 [“A trial court’s ruling on a motion for mental health diversion is reviewed for an abuse of discretion, and factual findings are reviewed for substantial evidence.”]; see also *Graham*, at p. 798 [we review for substantial evidence “the trial court’s finding that defendant would pose an unreasonable risk to public safety if granted diversion and treated in the community”].) ““Although we must ensure the evidence is

reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends.”” (Brown, at p. 121.)

3. *The Trial Court Did Not Abuse Its Discretion*

The trial court found the People rebutted the presumption under section 1001.36, subdivision (b)(2), by showing with clear and convincing evidence Dates’s mental disorders did not cause, motivate, or contribute to Dates committing the offenses. Substantial evidence supported that finding. (See *People v. Gerson* (2022) 80 Cal.App.5th 1067, 1079 [“The trial court’s determination ‘whether the defendant’s disorder played a significant role in the commission of the charged offense’ is ‘a quintessential factfinding process’ subject to review for substantial evidence.”]; see also *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1011 [“When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true.”].)

First, sheriff’s deputies and police officers consistently testified that, during their traffic stops and encounters with Dates, she was not under the influence of drugs. The officer who stopped Dates on July 23, 2023 testified that Dates did not appear to be under the influence of narcotics and that there were no lighters, pipes, straws, or other paraphernalia that might indicate usage, as opposed to sales. The deputies who stopped Dates on June 27, 2022 conducted field sobriety and drug recognition tests, but did not cite Dates for driving under the

influence, from which a reasonable factfinder could easily infer they concluded she was not under the influence of drugs or alcohol. And though police apparently gave Dates a field sobriety or drug recognition test on April 19, 2023, one of the officers testified on cross-examination that she was trained in recognizing symptoms of a person under the influence of methamphetamine or other narcotics and that Dates did not exhibit the symptom of (in counsel for Dates's words) "speaking extremely rapidly." To be sure, Dates told the psychologist she was under the influence of methamphetamine and cocaine when she was stopped by law enforcement. The trial court, however, was fully justified in finding the testimony of the law enforcement officers at trial more credible than Dates's statements to the psychologist. (See *Brown, supra*, 101 Cal.App.5th at pp. 123-124 [even where there is "some evidence to support the opposite conclusion," under the "applicable standard of review, we may not substitute our own judgment for that of the trial court, and instead must defer to the trial court's weighing of the evidence"]; *People v. Gerson, supra*, 80 Cal.App.5th at p. 1086 ["As a reviewing court, we do not reweigh the evidence or resolve evidentiary conflicts."].)

Second, the sheer volume of methamphetamine, cocaine, and marijuana law enforcement recovered from Dates, as well as the baggies, digital scales, and large amounts of cash, was strong evidence she possessed those drugs to sell, not to use. The People presented expert testimony that the large quantities of narcotics police officers recovered from Dates's apartment far exceeded an amount for personal use. The People's expert testified that "the amount recovered, as well as the currency that was in multiple denominations, as well as the baggies, would all be consistent

with somebody involved in narcotic sales”; that “it is not typical for a narcotics addict to purchase their narcotics in bulk”; and that “a typical narcotics addict is going to purchase narcotics for their one- to two-day needs, and they are going to what’s called ‘re-up,’ which is purchase narcotics again once they need it.” The expert testified it would take a user 2,884 days (almost eight years) to consume the 9.5 pounds of methamphetamine recovered from Dates’s apartment.

Third, Dates’s criminal history strongly suggested she possessed narcotics to sell to others, not to use herself. Dates’s prior felony convictions, and the charges in this case, were for transporting and possessing controlled substances for sale, not for personally using controlled substances or being under the influence. From this history the trial court could find it was highly probable that Dates’s current crimes, like her prior ones, were motivated by economics, not mental illness. (See *People v. Bunas* (2022) 79 Cal.App.5th 840, 861-862 [in determining whether the defendant is eligible for diversion, the court may consider the circumstances of the charged offenses]; *People v. Banner* (2022) 77 Cal.App.5th 226, 236 [“Based on the entire record, . . . the court could reasonably conclude [the defendant’s] mental health was not a significant factor underlying the crime.”]; *People v. Williams* (2021) 63 Cal.App.5th 990, 1002 [in ruling on a request for diversion under section 1001.36, the trial court may consider the defendant’s “criminal record and the circumstances of the pending charges”].) Treating Dates’s mental disorders and substance addictions might reduce whatever amount of methamphetamine and cocaine she used herself, but it would do nothing to address the financial incentives that motivate her to sell drugs. (See *Vaughn v. Superior Court*, *supra*,

105 Cal.App.5th at p. 138 [trial court may deny mental health diversion “where the purposes of the statute would not be achieved”].)³

Finally, in his report the psychologist did not definitively state Dates’s mental disorders were a significant factor contributing to her transporting and selling methamphetamine. In describing the charges against Dates, the psychologist described the June 27, 2022 incident as one involving “fleeing a pursuing peace officer’s motor vehicle while driving recklessly as well as sale/offer to sell/transportation of a controlled substance.” He described the “essence” of the case as “driving with a taillamp out” and failing “to yield to the officers,” after which officers searched the car and found the methamphetamine. He described the other charges as based on incidents where Dates “ran away from the officers when they attempted to detain her,” after which they found methamphetamine and other controlled substances in her car and, after the search, her home. The psychologist reported that, in his interview of Dates, she said about the June 27, 2022 incident that she was “driving regular” when the sheriff’s deputies “jumped behind” her, which made her panic, become scared, and feel they were after her. She said about one of the other incidents (it’s not clear which one) she felt the officers were after her, “retaliating against” her, and harassing her.

The psychologist stated his professional opinion Dates’s “behavior is correlated to her untreated mental illness that was exacerbated by her drug abuse.” It is unclear from his report, however, whether the psychologist was referring to Dates’s behavior in fleeing from law enforcement or her behavior in

³ Dates does not argue she sold drugs to support her addiction.

selling methamphetamine and cocaine. But it sounds like he was referring to the former. The psychologist stated it was “important to note that under the influence of methamphetamines, a person’s perceptions of reality become distorted, causing them to have trouble differentiating between what is real and what is not. This distortion can sometimes take the form of hallucinations or paranoid feelings. Moreover, while under the influence of cocaine, a person might experience agitation, paranoia, hallucinations, delusions, and violence (some of these symptoms were observed in [Dates’s] behavior in both incidents).” The psychologist seemed to be saying that the methamphetamine and cocaine in Dates’s system caused her to drive recklessly as she fled from law enforcement because she was paranoid and afraid of them, not that using those drugs caused her to sell them for profit. He concluded by stating the conduct for which Dates “was arrested appears to be strongly correlated to her untreated mental illness,” but he did not say what that conduct was. Given the lack of clarity and specificity in the psychologist’s report, the trial court was justified in giving more weight to the evidence Dates’s drug usage and other mental health disorders did not cause the criminal acts the jury found she committed and in concluding Dates was motivated by profit, not a mental health disorder.

Gomez v. Superior Court (2025) 113 Cal.App.5th 671, not cited by either side, is readily distinguishable. In that case the court found substantial evidence did not support the trial court’s finding the defendant’s mental health disorders were not a motivating, causal, or contributing factor in committing a robbery with other individuals. (*Id.* at p. 688.) The defendant in *Gomez* was homeless, living in a tent in the bushes, and had no criminal

history; had a history of alcohol and drug abuse; experienced depression, social withdrawal, and suicide ideations; had impaired function in major life activities and posttraumatic stress disorder; and had a history of abusive relationships with men. (*Id.* at pp. 681-682, 690.) The court in *Gomez* held the trial court erred in ruling the prosecution rebutted the presumption “based on a lack of ‘indication [in the police reports] that she was suffering from a disorder at the time’ of the robbery.” (*Id.* at p. 688.) The court concluded the absence of evidence the defendant’s mental disorder was a contributing factor to the commission of the crime did not overcome the presumption because denying diversion based on “the mere *absence of evidence* demonstrating that [the defendant’s] mental illness was a factor in the alleged offenses . . . effectively shift[s] the burden to [the defendant] to affirmatively prove that [his, her, or their] mental disorder contributed to the offenses.” (*Id.* at pp. 688-689.)

Here, unlike in *Gomez*, there was plenty of evidence to rebut the presumption Dates’s mental health disorders were a causal or motivating factor in her conduct of transporting and possessing methamphetamine for sale. Dates had large quantities of controlled substances stored and packaged for sale, digital scales for use in making sales, large amounts of cash (which Dates’s mental health disorders did not affect her ability to use in drug sales), and plenty of clear plastic bags for future transactions, all which indicated a thriving illegal narcotics business. Unlike the defendant in *Gomez*, Dates had prior convictions for transporting and selling drugs. And Dates was not under the influence of anything when she ran through red lights and stop signs in her attempts to escape from pursuing sheriff’s deputies and police officers. Though Dates, unlike the

defendant in *Gomez*, supported her petition for diversion with a report from a psychologist, that report suggested that her mental health disorders caused her to drive recklessly while trying to evade police, not necessarily that it caused her to sell drugs.

B. *The Trial Court's Error in Not Conducting a Hearing Under Marsden Requires a Limited Remand*

1. *Relevant Proceedings*

Here are the proceedings (such as they were) regarding Dates's request for substitute counsel under *Marsden, supra*, 2 Cal.3d 118. They occurred on a Tuesday, immediately after the court swore in the prospective jurors:

"The Court: Miss Dates, you indicate that you want to fire [your attorney]; is that correct?

"[Dates]: Yeah. I just feel like—

"The Court: No. No. No. 'Yes' or 'no'? You want to fire him. You haven't hired him because he's court appointed, so you've not hired him. You don't want him to represent you?

"[Dates]: Is today my only day to decide this?

"The Court: Yes, absolutely."

The trial court went on to say:

"The Court: Let me give you the down low. I'm looking at this as an attempt to delay this case. He's been your attorney forever. And now, when we're talking to the jurors that are seated in the jury box, you come up and say you want to fire him. Now, let me tell you what the rules are. You have the absolute right to have the attorney of your choice, but you do not have the right to have an appointed attorney of your choice. So, we don't come back until . . . Thursday. If you show up with an attorney

that is ready to proceed, pick up right where we left off, I'll excuse [Dates's appointed counsel] and we'll let that attorney take his place. Or, if you come back [Thursday] and you say, I want [appointed counsel] not to be my attorney, but I'm going to represent myself. We'll go through a little scenario where I have you read some documentation, whatever, and then you begin your representation as your own attorney on [Thursday].

"I'm not going to give you a continuance. I'll not have [appointed counsel] be your attorney. Other than that, I'm not going to substitute [him]. It's untimely, and . . . you've been delaying this case for a long time. And I view this as another attempt to delay the case.

"But that being said, you have the absolute right to the attorney of your choice. So if . . . between now and Thursday—I know it's a tough challenge. But if between now and Thursday, you find an attorney who is willing to come in and pick up where we left off today, I'll grant your request. Or, if you come in on Thursday and say, I want to represent myself, and I find that you're capable and I think—based on what I know—I think you're capable of representing yourself. If that's what you want to do, I will grant you pro per status, but you have to pick up where we left off. We're not going to delay the case anymore. That make sense?

"[Dates]: Yeah.

"The Court: Something to think about."

The parties returned to court two days later, on Thursday:

"The Court: Ms. Dates, the last time we left, you were contemplating perhaps speaking to an attorney. Have you done that?

"[Dates]: No, sir.

“The Court: Okay. And also, are you going to ask the court to represent yourself?

“[Dates]: No.

“The Court: All right. Let’s have the jurors come in.”

2. *The Trial Court Erred in Denying Dates’s Request Under Marsden Without a Hearing*

“““““When a defendant seeks to discharge his appointed counsel and substitute another attorney, and *asserts inadequate representation*, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance.””””” (*People v. Johnson* (2018) 6 Cal.5th 541, 572; accord, *People v. Wilson* (2023) 14 Cal.5th 839, 863-864.) “[O]nce the defendant clearly indicates to the trial court a request for the discharge and replacement of appointed counsel, the court must hold a hearing to allow the defendant to explain the basis for the request.” (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1179.) “[A] proper and formal’ *Marsden* motion is not required—the defendant need only clearly indicate to the trial court ‘in some manner’ that he or she is requesting the discharge and replacement of appointed counsel.” (*Id.* at p. 1178.)

The trial court erred in not holding a *Marsden* hearing when Dates said she wanted to “fire” her court-appointed attorney. While stating a desire to fire one’s court-appointed attorney, without more, may not be sufficient to require a *Marsden* hearing, the trial court interrupted Dates after she said “I feel like” and did not allow her to say more. And though Dates never said she wanted to replace her current attorney with a different court-appointed attorney, that’s because, when Dates

began to explain why she did not want her current attorney to represent her, the court did not give her the chance to state her reasons. (See *People v. Sanchez* (2011) 53 Cal.4th 80, 90 (*Sanchez*) [if “at any time during criminal proceedings, . . . a defendant requests substitute counsel, the trial court is obligated, pursuant to . . . *Marsden*, to give the defendant an opportunity to state any grounds for dissatisfaction with the current appointed attorney”]; *People v. Chavez* (1980) 26 Cal.3d 334, 346 [“refusal by the trial court to afford a defendant an opportunity to set forth the reasons underlying his request for the substitution of appointed counsel constitutes an abuse of discretion”].) The trial court’s concern Dates’s request during jury selection was a delay tactic was legitimate, but it did not justify refusing to hold a *Marsden* hearing that would allow the court to hear Dates’s reasons and weigh them against the effects of delaying the trial. (See *People v. Williams* (2021) 61 Cal.App.5th 627, 652 [“delay in resolving [a] *Marsden* motion” is a “significant factor that the court [is] obligated to consider in evaluating the timeliness of [the defendant’s] request to substitute counsel”].)

The court also erred in ruling Dates’s only choices were to retain an attorney or represent herself. Those were not Dates’s only two choices. She also had the right to make a showing under *Marsden*, if she could, she was entitled to substitute counsel. (See *People v. Johnson, supra*, 6 Cal.5th at p. 573 [defendant may request “substitute counsel ‘at any time during criminal proceedings’”]; *Sanchez, supra*, 53 Cal.4th at p. 90 [same].)

The People argue the trial court did not err in holding a hearing under *Marsden* because Dates did not clearly and unequivocally indicate she was making a request for substitute

counsel. (See *People v. Wilson* (2023) 14 Cal.5th 839, 864 [“For the duty to hold a *Marsden* hearing to be triggered, . . . there must be “at least some clear indication by defendant,” either personally or through his current counsel, that defendant “wants a substitute attorney.””]; *Sanchez, supra*, 53 Cal.4th at p. 84 [same].) But again, the trial court prevented Dates from saying, more clearly and unequivocally, that and why she wanted a different court-appointed lawyer. It is hard to say Dates’s request was not clear and unequivocal where the court did not let her articulate her request and its grounds.

Finally, on the issue of prejudice, the “standard for prejudice regarding a denied *Marsden* motion is under *Chapman v. California* (1967) 386 U.S. 18.” (*People v. Loya* (2016) 1 Cal.App.5th 932, 945; see *People v. Taylor* (2010) 48 Cal.4th 574, 601.) “Under the *Chapman* harmless error standard, the burden is on the People, not the defendant, to demonstrate that the violation of the defendant’s federal constitutional right was harmless beyond a reasonable doubt.” (*People v. Cutting* (2019) 42 Cal.App.5th 344, 349.)

The People do not argue that, if the trial court erred in denying Dates a *Marsden* hearing, the error was harmless. And for good reason: We do not know what Dates would have said about her relationship with her trial counsel or his competence in representing her. The trial court did not allow Dates to finish her sentence regarding whether she was making a motion under *Marsden*, let alone state what facts and reasons she wanted the court to consider. Under these circumstances, we cannot conclude the error in not having a *Marsden* hearing was harmless beyond a reasonable doubt. (See *People v. Armijo, supra*, 10 Cal.App.5th at p. 1183 [trial court’s error in failing to hold a

Marsden hearing was not harmless beyond a reasonable doubt where the reviewing court could not “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”].) An erroneous refusal to hold a *Marsden* hearing is not harmless where the court does not allow the defendant to make any kind of a statement on the issue. (See *Sanchez, supra*, 53 Cal.4th at p. 92 [it is “prejudicial error to deny the defendant the opportunity to explain the basis for his claim because a trial court that ‘denies a motion for substitution of attorneys solely on the basis of [its] courtroom observations, despite a defendant’s offer to relate specific instances of misconduct, abuses the exercise of [its] discretion to determine the competency of the attorney’”].)

Therefore, we will conditionally reverse Dates’s convictions and direct the trial court to conduct a proper *Marsden* hearing. In particular, as sanctioned by the Supreme Court in *Sanchez, supra*, 53 Cal.4th 80, we will direct the trial court to hold a hearing on Dates’s representation by the deputy public defender and, if the court finds failure to replace her appointed attorney substantially impaired her right to assistance of counsel, to appoint new counsel to represent Dates and set the case for a new trial. We will further direct the trial court that, if the court hears and denies Dates’s *Marsden* motion, the court should reinstate Dates’s convictions and resentence her (as discussed in the next section). (See *Sanchez*, at pp. 92-93; *People v. Armijo, supra*, 10 Cal.App.5th at pp. 1183-1184 & fn. 6.)

C. *The Trial Court's Error in Imposing the Upper Term on One of Dates's Convictions Was Not Harmless*

As stated, the trial court imposed the upper term of four years on one of Dates's convictions for transporting methamphetamine. The court imposed the upper term based on the court's finding Dates's prior convictions and adjudications were numerous and of increasing seriousness, within the meaning of California Rules of Court, rule 4.421(b)(2). The trial court imposed the upper term without a finding beyond a reasonable doubt by a jury on this aggravating circumstance. Here's how that came about:

"[The Prosecutor]: My marching orders are . . . to seek the [upper] term, given the amount of methamphetamine that was recovered. . . .

"The Court: Doesn't that have to be submitted to the jury or did she waive jury?

"[Counsel for Dates]: We didn't waive jury.

"The Court: I'm not sure if she waived jury or not. The court cannot find an aggravating factor unless it is prior history."

. . . .

"[Counsel for Dates]: I believe that is the law. I believe that a jury has to make a finding of the aggravating factors alleged."

. . . .

"The Court: The court can find an aggravating factor without a jury if it's based on prior history, but the court needs—and I see the prior history here and it's plentiful and it's for the same thing, but I would need a certified rap sheet."

After reviewing a certified record of Dates's convictions provided by the prosecutor, and asking the prosecutor to amend

the information to add an allegation Dates's prior convictions were numerous and of increasing seriousness (which the prosecutor did), the trial court found the allegation true. The trial court stated its view the court could make that finding because it was based on a certified record of conviction.

Dates argues, the People concede, and we agree the trial court erred. Section 1170, subdivision (b)(2), provides: "The court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term and the facts underlying those circumstances have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial." (See *People v. Wiley* (2025) 17 Cal.5th 1069, 1078; *People v. Lynch* (2024) 16 Cal.5th 730, 742.) The Sixth Amendment to the United States Constitution requires a jury to determine the aggravating factor of "increasing seriousness" of the defendant's prior convictions. (*Wiley*, at p. 1082.) The aggravating circumstance the trial court relied on here in imposing the upper term, increasing seriousness of Dates's prior convictions, was not found true beyond a reasonable doubt by a jury (or by the court after a jury trial waiver).

The People argue the error was harmless beyond a reasonable doubt. We cannot say that is so. Such an error "is prejudicial unless an appellate court can conclude beyond a reasonable doubt that a jury would have found true all of the aggravating facts relied upon by the trial court to justify an upper term sentence, or that those facts were otherwise proved true in compliance with the current statutory requirements. If the reviewing court cannot so determine, applying the *Chapman*

standard of review, the defendant is entitled to a remand for resentencing.” (*People v. Lynch, supra*, 16 Cal.5th at p. 768.) Here, the court relied on only one aggravating circumstance: prior convictions that are numerous and of increasing seriousness. Determining whether that allegation is true, however, “requires a comparison and evaluation of the relationship among a defendant’s prior convictions, and a determination as to their relative seriousness. As a result, it involves something more than a narrow factual finding that the convictions were sustained and what elements were required to prove them.” (*People v. Wiley, supra*, 17 Cal.5th at p. 1082.) Dates certainly had a lot of prior felony convictions, but they were all for selling and transporting methamphetamine and cocaine. Her current convictions were for the same kind of criminal conduct. It is true, as the People point out, Dates may have transported and sold more drugs than she had in the past, but in terms of conduct it was essentially more of the same. As in *Wiley*, “while the evidence may have been sufficient to support a finding of increasing seriousness,” a “rational juror could have reached the opposite conclusion” based on the totality of Dates’s “criminal conduct and the applicable sentences for those transgressions.” (*Id.* at p. 1090.) Because a rational juror could find Dates’s convictions were not of increasing seriousness, the error is not harmless under *Chapman*.

DISPOSITION

The trial court’s order denying Dates’s request for mental health diversion is affirmed. The convictions are conditionally reversed, and the trial court is directed to hold a hearing on

Dates's *Marsden* motion. If the court grants the motion, the court must appoint new counsel to represent her and conduct a new trial. If the court denies the motion, the court is to reinstate the convictions. The judgment is reversed, and the trial court is directed to give the People an opportunity to prove applicable aggravating circumstances beyond a reasonable doubt to a jury (or the court, if Dates waives her right to a jury trial on aggravating circumstances) and to resentence Dates.

SEGAL, Acting P. J.

We concur:

FEUER, J.

STONE, J.