Not Reported in Cal.Rptr.3d, 2011 WL 1534547 (Cal.App. 2 Dist.)
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second District, Division 3, California.

The PEOPLE, Plaintiff and Respondent,

v.

Armando HERNANDEZ, Defendant and Appellant.

No. B215707.
(Los Angeles County Super. Ct. No. BA312691).
April 25, 2011.

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Modified and, as so modified, affirmed.
Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

KLEIN, P.J.

*1 Armando Hernandez appeals the judgment entered following his conviction by jury of second degree murder committed for the benefit of a criminal street gang in which a principal personally discharged a firearm causing death. (Pen.Code, §§ 187, subd. (a), 186.22, subd. (b), 12022.53, subds. (d) and (e)(1).)

Hernandez contends there was insufficient evidence to support the conviction, the trial court erroneously denied a motion for new trial, and the trial court abused its discretion in failing to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. We reject Hernandez's claims of error but order the judgment modified to strike the award of presentence conduct credit and to correct the number of actual days of custody. As so modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The shooting.*

On April 5, 2006, at approximately 5:00 p.m., Pedro Flores, Jr., was playing baseball near 49th and Hoover Streets in Los Angeles. A gold four-door vehicle driving down 49th Street caught his attention. The vehicle, which Flores described as a Chrysler, passed Flores's location twice. The first time, it stopped and Flores heard a "firecracker" sound and saw smoke. Twenty or 30 minutes later, the vehicle returned, travelling slowly. It almost came to a stop "slightly behind" a parked white vehicle occupied by three people. Flores returned to playing baseball until he heard a gunshot. He looked back and saw the gold car driving away. Flores could see one person, a male, in the gold car. A female exited the white car screaming.

Giovanny Mancia, who had been seated in the passenger seat of the white car, suffered a fatal gunshot wound to the chest.

2. *Hernandez's statements to the police.*

Investigation of the shooting by Los Angeles Police Detective Peter Stone led to a gold Toyota Camry registered to Hernandez. On November 15, 2006, seven months after the shooting, Hernandez was arrested driving the Camry at 7:30 a.m. Hernandez was taken to the 77th Street Station where he waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]. Detective Stone and his partner, Detective Joseph Chavez, interviewed Hernandez several times on November 15, 2006, for a total of less than five hours. The first interview started at 10:30 a.m. and lasted approximately half an hour. A second interview lasted a similar amount of time. After lunch, Hernandez was transported to Parker Center. The detectives commenced an interview of Hernandez at 2:00 p.m. that included long breaks. The tape recording of the interview and the breaks is two hours and 42 minutes long. During the interviews at the 77th Street Station and the first interview at Parker Center, Hernandez denied involvement in the shooting.

The next interview started at about 5:00 p.m. and lasted approximately one hour. In this interview, Hernandez eventually stated fellow gang members Rascal and Flaco were in Hernandez's car on the day of the shooting and that Rascal was in the front passenger seat. Hernandez stated, "Deep down, I never circled the block. And if I gave a ride to that motherfucker that killed him, it was my mistake for letting those other fools jump into my car." Hernandez stated, "I mean, for me, I wasn't with them, but there could be a big chance that I gave them a ride."

*2 In a portion of the interview played for the jury, Hernandez said the shooting was not planned but was committed because the victim "was a rival gang member" and there had been graffiti written in the neighborhood by individuals from "the other side." The shooting was committed by Flaco, a "youngster," who had a gun "on him." Hernandez indicated the shooting occurred while he was taking Rascal home. Hernandez told the detectives, "Homie just got out and fired."

Hernandez then returned to his original story and said, "I just wasn't there. I just didn't do this." Hernandez claimed he was "just telling [the detectives] what Rascal told [him]." However, as the detectives prepared to complete the booking process, Hernandez stated he wanted to tell them "the full story."

The final interview started at 8:00 or 9:00 p.m. and a tape recording of it was played for the jury. In the interview, Hernandez stated he drove past Rascal's house, saw Rascal in front of the house and stopped to talk to him. Hernandez agreed to drive Rascal to the home of a female who lived behind Hernandez's home. Rascal got into the front passenger seat and a younger individual, Flaco, got into the rear seat. All three of them were members of the gang ATC. After learning the female was not home, they drove around the block. Hernandez intended to take Flaco home. Rascal saw "the two little guys and the girlfriend." Rascal said, "What? Who's those fools?" When Hernandez said he did not know, Rascal said, "Hold on," and got out of the car. Before exiting the car, Rascal said, "Let's fuck them." Hernandez assumed Rascal was going to commit a robbery and claimed he did not know Flaco had a gun. Rascal and Flaco got out of the car and Hernandez continued driving "up and away from them. Next thing I know, I just heard one shot." Hernandez indicated he knew the victim was from M.S. Hernandez said, "little homie smoked him." After Hernandez heard the shot, Rascal returned to the car and told Hernandez to leave. Hernandez was upset they had committed a shooting so close to his home and asked, "What the fuck?" Hernandez drove them to Rascal's house and then went home. Hernandez indicated he often had told Rascal to leave his gun at home but Rascal called him "a little bitch."

When Detective Chavez asked if Hernandez ever found an expended casing in his car, Hernandez indicated that, on another occasion sometime after February 5, Hernandez and Rascal were following a small red car at Exposition Boulevard and Vermont Avenue and Rascal produced a "little .25 and shot those fools up...." However, Hernandez never found a casing in the car.

On the day of Hernandez's arrest, Detective Stone conducted a search of Hernandez's home, which is approximately 150 yards from the scene of the shooting. In a room separate from the house at the rear of the property, Stone found Hernandez's driver's license, bullets and a CD holder with gang writing on it.

3. *Evidence related to the criminal street gang enhancement.*

*3 On April 6, 2003, Inglewood police officers went to a restaurant on Manchester Boulevard in response to a vandalism complaint. The officers found Hernandez sitting in a gold Toyota Camry. The letters ATC had been etched into the restaurant's bathroom mirror. Hernandez told Officer Brett Birkbeck he was a member of the gang ATC, his moniker was Liar and he lived on West 49th Street in Los Angeles. Hernandez told Officer Luis Jaramillo that he participated in the vandalism.

Los Angeles Police Officer John Flores testified as a gang expert. ATC, the gang claimed by Hernandez, was a tagging crew that became a criminal street gang in the early 1990's. The gang's territory is bordered by Vermont Avenue on the east, Arlington Avenue on the west, Exposition Boulevard on the north and Vernon Avenue on the south. The gang has at least 75 documented members. The gang has many rivals including 18th Street and Mara Salvatrucha (M.S.). The primary activities of the gang include felony vandalism, possessing illegal weapons, drug sales, robbery, drive-by shootings, attempted murder and murder.

Flores testified Hernandez was a member of ATC based on his admission of membership when interviewed by an Inglewood Police Officer, the fact he was writing gang graffiti in that incident, and Hernandez's disclosure of confidential gang information in the recorded interviews in this case. John Contreras, aka Rascal, is an admitted member of the gang and one of its leaders. Jose Orozco, aka Flaco, also is an admitted member of the gang. Orozco is viewed as an "up and comer" who is known to commit violent crimes.

Flores testified the most effective way to commit a drive by shooting is to have three people in the car, a driver, a shooter and a lookout. In response to a hypothetical question based on the facts of this case, Flores opined the shooting was committed for the benefit of the gang. Also, because there was a leader or shot-caller in the car, the shooting likely was a coordinated act. The young passenger may have committed the shooting as a gang initiation or to prove himself as worthy of being a member of the gang. Flores noted the shooting occurred near the border of the gang's territory, which a gang is always trying to extend, and the shooting eliminated a rival in the gang's territory.

4. *Defense evidence.*

a. *Interrogation technique expert.*

Richard Leo, Ph.D., testified as an expert on police interrogation, psychological coercion and involuntary confessions. Minimization is an interrogation technique that is a form of inducement which tries to persuade a suspect to agree to a version of events that minimizes the suspect's culpability. The likelihood an officer will break a suspect's resistance to admit something false is directly related to the length of the interrogation and the number of accusatory techniques employed. The Reid Manual, which is the Bible of modern interrogation, advises not to exceed four hours of interrogation because longer interrogations might be seen as coercive. Under the Reid method, the interviewer starts with a confrontational technique in which the subject is presented with evidence, and then transitions to inducement.

*4 Leo reviewed the transcripts of the interviews in this case and found evidence of coercive techniques. The detectives suggested Hernandez would be less culpable if he did not plan the shooting, implying leniency, and mentioned not getting to see his son again. The detectives asked Hernandez, "Are you the guy that did that, or are you the guy that got caught up in the circumstance that just happened? [Be]cause that's something that can be explained." This suggested Hernandez's explanation of the incident might not be criminal. This theme recurs throughout the interrogation. The detectives suggest they are going to help Hernandez present the case to the District Attorney in a way that will be beneficial to him and will not prevent him from not seeing his son for 20 years. The detectives gave Hernandez the impression the shooter was culpable and Hernandez was less culpable. At the end of the interview, Hernandez asked about "the timeframe on ... being out there with my boy?" This indicates Hernandez believed he would be released if he gave the detectives an account they found to be truthful. Leo concluded the detectives used many coercive techniques in the interviews.

b. *Testimony of Hernandez's father.*

Hernandez's father testified he heard sirens on the day of the shooting and went outside with the defendant and the defendant's child. The defendant and his child were at home the entire afternoon watching television.

5. *Post verdict proceedings.*

After the jury convicted Hernandez as charged, the trial court inquired about setting the matter for motions and sentencing. Hernandez asked if that would include the appeal. The trial court explained appeal was a different process and indicated defense counsel would speak to Hernandez regarding whether it would be appropriate to file motions prior to sentencing. When Hernandez responded he had questions, the trial court indicated it could put the matter over until the afternoon to permit Hernandez to confer with defense counsel and asked whether Hernandez wished to do that. Hernandez replied, "Sure, because I [have] questions. I ... just want an appeal for this and [to] get my witness from the Feds to come down, because [defense counsel] knew about it." After defense counsel conferred with Hernandez, the trial court set the matter for October 29, 2008, for sentencing and motions.

At the start of the hearing on October 29, 2008, the trial indicated it had read a letter from Hernandez and had provided copies of the letter to both counsel.[FN1] The trial court stated it had "asked the attorneys to look into your claims before we go forward with the sentencing" and inquired whether Hernandez was willing to waive time for sentencing to permit defense counsel to investigate the issues raised in the letter.

FN1. Hernandez's letter stated "critical information" about the crime had not been presented at trial. An investigator for the public defender's office interviewed an eyewitness who said Hernandez was not the driver. However, defense counsel told Hernandez it would take two years to bring the eyewitness to court and not to worry. Hernandez indicated defense counsel failed to subpena the eyewitness and failed to mention the eyewitness to the trial court. Further, defense counsel told Hernandez's sister at the last minute not to take the witness stand to testify Hernandez was at home at the time of the shooting, an individual named Walter was mentioned at trial but was never questioned about the shooting, and Contreras was arrested for murder on October 15, 2008, but was released.

Hernandez replied he wanted the record to reflect his concern "about my eyewitness being subpoenaed—" The trial court indicated some of the issues raised in the letter would be addressed at a *Marsden* hearing (*People v. Marsden, supra,* 2 Cal.3d 118) after defense counsel's investigation into the matter had been completed. Defense counsel interjected that she intended to look into the information she previously did not have and most likely would prepare a motion for new trial. Hernandez waived time for sentencing and the trial court continued the matter for sentencing and motions, including a *Marsden* hearing, if needed.

*5 After several continuances, defense counsel filed a motion for new trial based on newly discovered evidence. Defense counsel's declaration in support of the motion stated that on October 26, 2007, approximately one year before the trial commenced, the defense investigator assigned to this case, Richard Santiago, was contacted by a potential witness named Oscar Chihuahua. In a telephonic interview, Chihuahua stated that on the evening of the shooting, he was walking near the park when he saw a small vehicle parked on the north curb occupied by two males and a female. He saw a gray four-door Buick driven by a Black male who possibly had a pony tail and was wearing a red cap. Chihuahua continued walking, heard gunshots and saw the Buick speed west on 49th Street. Chihuahua knows Hernandez's wife and knows Hernandez by sight. When Chihuahua heard Hernandez had been arrested in connection with the shooting, he immediately notified Hernandez's wife and described what he had seen.[FN2]

FN2. Santiago's Investigation Report was attached to defense counsel's declaration as an exhibit.

Santiago conducted a follow-up interview by telephone with Chihuahua on March 18, 2008, in which Chihuahua stated he was willing to testify for the defense. However, in July of 2008, the defense investigator was unable to serve a subpoena on Chihuahua. The Deputy District Attorney thereafter advised

defense counsel that Chihuahua was in federal custody on an unrelated narcotics matter. Defense counsel declared that, due to the age of the case, the trial court hearing pretrial motions was unwilling to allow defense counsel a continuance to have Chihuahua transferred into the custody of the sheriff's department. FN3

FN3. In a declaration in support of a motion for a continuance filed July 25, 2008, defense counsel stated Chihuahua was in federal custody and counsel was preparing a petition for writ of habeas corpus to secure his testimony at trial. The motion also sought a continuance on the grounds defense counsel would be engaged in trial until August 1, 2008, and the defense interrogation expert was unavailable until the end August of 2008. The trial court granted the motion and continued the matter to August 21, 2008.

Hernandez's declaration in support of the motion for new trial averred that, after he had been convicted in this case, he was housed in the same dorm of the county jail as Juan Contreras, aka Rascal, who had been arrested on a theft charge. Contreras told Hernandez that, on the day of the shooting, Walter Castillo and Brian were at Brian's house across the street from Hoover Park. Walter saw a green car occupied by a rival gang member. Walter chirped one Charro and told him to "smoke" the rival gang member. Charro drove to the area in a Chrysler but the rival gang member left before Charro arrived. Charro then went to Contreras's house. Approximately one hour later, Walter saw a white car occupied by Jaime Sanchez. Walter again chirped Charro and told him to return and "smoke" Jaime Sanchez. Charro pulled up next to the white car in the Chrysler and fired one shot with a 357 Magnum. Charro drove the Chrysler to Contreras's house and parked it in the backyard. Contreras said the Chrysler was in his name because he was doing Charro a favor.

Defense counsel declared her investigator had learned, through the Department of Motor Vehicles, that a Chrysler was registered to Contreras at the time of the shooting.

Hernandez's wife, Vanesa Esquivel, also submitted a declaration in support of the motion for new trial. Ezquivel indicated Hernandez telephoned her on the day Hernandez was arrested and told her to speak to Rascal's girlfriend, Rosa. Two days later, Rosa told Esquivel that neither Rascal nor Hernandez was involved in the shooting and an individual named Leovardo Hernandez had committed the murder in a Chrysler he purchased under Rascal's name. Further, Leovardo Hernandez was attempting to leave the country. Esquivel and Rosa went to the 77th Street Station that evening and spoke to Detective Chavez on the telephone. Rosa advised Detective Chavez that Leovardo Hernandez, aka Charro, was responsible for the murder and he was planning to leave town. Rosa stated she was aware of this information because Charro and his girlfriend told her Charro committed the murder days after it happened. Rosa advised Detective Chavez the vehicle used in the crime currently was parked in front of Charro's house. Detective Chavez responded it would not matter because Charro was not a suspect. The next day, Rosa told Esquivel that an individual named Oscar who lived in the area knew what happened. They located Oscar and advised him Hernandez had been arrested for the murder. Oscar stated he observed the shooting and knew it was not committed by Hernandez but was committed by a young male driving a Chrysler. Esquivel attempted to contact Detective Chavez the following day but was advised he was out of town. Several days later, Rosa told Esquivel that Detective Chavez had contacted her and said he could not help because Charro was not a suspect. By this time, Rosa had been informed that Leovardo Hernandez was in Mexico.

*6 The People filed opposition to the motion which asserted the evidence cited in support of the motion was cumulative to the evidence adduced at trial, the evidence was not new and could have been produced with reasonable diligence, and the evidence would not lead to a different result on retrial. The People noted the defense was aware of Oscar Chihuahua as a potential witness several months before the trial commenced. However, defense announced ready for trial and Hernandez refused to waive time in September of 2008 because he was eager to start the trial.FN4

FN4. On August 27, 2008, defense counsel filed a motion for a continuance of the trial due to a death in counsel's family. On September 2, 2008, an attorney standing in for defense counsel at the hearing on the motion stated Hernandez was "really quite anxious to have this case begin and does not want to waive any time at this point...." The trial court denied the request for a continuance and, two days later, on September

4, 2008, defense counsel announced ready for trial.

At the hearing on Hernandez's motion for new trial, defense counsel submitted on the moving papers but indicated, in response to the People's suggestion the defense knew of the alleged new evidence prior to trial, that defense counsel was not aware of the evidence and would have used this information as part of the defense case had she been aware of it.

Before ruling on the motion, the trial court noted a defense motion to continue the trial to obtain the presence of a defense witness in federal custody had been denied. The trial court indicated that ruling was not being attacked in the motion for new trial. The trial court ruled the evidence cited in support of the motion for new trial was not newly discovered. Additionally, it was speculative how the assertedly newly discovered witnesses would have testified had they been called. The trial court found Hernandez was aware of these individuals before the case went to trial and the evidence could not be considered newly discovered merely because Hernandez did not disclose the evidence to counsel.

Following the denial of the motion for new trial, Hernandez asked whether the police report and other material would be reviewed at the appellate level. The trial court responded that would be up to Hernandez's appellate attorney. The trial court then stated it had Hernandez's letter of October 29, 2008, and asked if Hernandez wished "to say anything else to the court? You certainly can if you want to; or if you don't, you don't have to say anything. It's up to you, sir." Hernandez responded, "Negative."

The trial court sentenced Hernandez to prison and awarded Hernandez 948 days of presentence custody credit consisting of 825 actual days and 123 days of conduct credit.

CONTENTIONS

Hernandez contends the evidence was insufficient to support a conviction of murder on a theory of aiding and abetting, the trial court erroneously denied the motion for new trial, and the trial court abused its discretion in failing to inquire into the allegations of ineffective assistance of counsel contained in the letter of October 29, 2008.

The People contend Hernandez is not entitled to any conduct credit.

DISCUSSION

1. *The evidence supports the conviction of murder.*

Hernandez contends the evidence was insufficient to support a conviction of murder on the theory Hernandez aided and abetted the killing of Mancia. Hernandez argues the only evidence connecting him to the shooting was his own statement to Detectives Stone and Chavez. However, this statement does not permit the inference Hernandez knew Flaco intended to shoot anyone or that Hernandez stopped the car to aid Flaco. Rather, Hernandez's statement indicated Hernandez thought Rascal was going to rob the individuals in the white car. Hernandez told the detectives the shooting was not planned, Hernandez did not know Flaco had a gun, Flaco did not fire the gun from Hernandez's vehicle and Hernandez never saw the victim. Further, Flores, the percipient witness, identified a gold Chrysler occupied by a lone male at the scene of the shooting at the time shots were fired.

*7 Hernandez concludes the conviction of murder must be reversed.

" 'In reviewing a challenge to the sufficiency of the evidence, we ... "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence.... [Citation.] "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the

circumstances might also reasonably be reconciled with a contrary finding." [Citation.] We do not reweigh evidence or reevaluate a witness's credibility. [Citation.]' [Citations.]" (*People v. Nelson* (2011) 51 Cal.4th 198, 210.)

An aider and abettor "must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find 'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense....' [Citations.]" (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1123; *People v. Beeman* (1984) 35 Cal.3d 547, 560.) In order for aiding and abetting liability to attach, the intent to render aid must be formed prior to or during the commission of the offense. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1165.)

Knowledge, like intent, is rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise. (See, e.g., *People v. Beeman, supra,* 35 Cal.3d at pp. 558–560 [proof of aider and abettor's intent].) However, "advance knowledge is *not* a prerequisite for liability as an aider and abettor." (*People v. Swanson–Birabent* (2003) 114 Cal.App.4th 733, 742.) "Aiding and abetting may be committed 'on the spur of the moment,' that is, as instantaneously as the criminal act itself. [Citation.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 532.) "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.]" (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094–1095.)

Here, the evidence permitted the jury to conclude Hernandez was aware his companions intended to commit the shooting before it occurred. Pedro Flores, the eyewitness who saw a gold four door vehicle leave the scene after he heard a gunshot, testified the same vehicle drove by 20 or 30 minutes earlier. When Flores saw the car for the first time, it stopped and Flores heard what sounded like a firecracker and saw smoke. When the gold vehicle returned, it stopped "slightly behind" the white vehicle and the shooting ensued.

*8 This evidence suggests Hernandez and his associates saw the rival gang members seated in the white car when they went by the first time and returned to shoot at them. This inference is supported by Hernandez's statement to the detectives in which Hernandez said Rascal saw the occupants of the car, asked who those "fools" were and said, "Let's fuck them." Hernandez also told the detectives he knew "for a fact" the victim was from M.S., a rival gang. Further, Hernandez complained that, prior to the shooting, he had seen graffiti in the neighborhood that had been posted by a rival gang.

The evidence also permitted the jury reasonably to infer Hernandez intended to facilitate the shooting. Hernandez stopped the car to permit Rascal and Flacco to get out. He waited at the scene with the engine running and, after Hernandez heard the gunshot, he allowed Rascal and Flaco to get back into the car and drove them from the scene. With respect to whether Hernandez knew a shooting was about to occur, Hernandez admitted Rascal shot at rival gang members from Hernandez's car on a prior occasion. Thus, Hernandez was aware of Rascal's proclivity for violent assaults. Indeed, he told the detectives he frequently cautioned Rascal to leave his handgun at home but Rascal called him "a little bitch."

As the People's gang expert explained, the shooting of a rival gang member in the gang's territory solidified the control of the neighborhood by Hernandez's gang, rid the area of a rival gang member and was an attempt to extend the gang's territory. The People's gang expert also explained that drive-by shootings ideally are committed by three individuals, a driver, a look-out and a shooter. Further, the presence of Rascal, a leader of the gang, and Flaco, an "up and comer" in the gang, indicated the shooting had been planned and that the young "up and comer" committed the shooting as a "gang initiation" or to prove himself.

In sum, viewed in the light most favorable to the judgment, the evidence permitted the jury to conclude the shooting was planned by Hernandez, Rascal and Flaco and that Hernandez actively participated in the commission of the crime.

2. *The trial court properly denied the motion for new trial.*

Hernandez contends the motion for new trial should have been granted to permit Hernandez an opportunity to present the testimony of Oscar Chihuahua and Juan Contreras which, according to Hernandez, would have established that one Charro committed the drive-by shooting. Hernandez contends the error denied Hernandez due process and a fair trial.

Hernandez asserts that, although defense counsel was aware of Oscar Chihuahua prior to trial, defense counsel was unable to subpoena Chihuahua because he was in federal custody and defense counsel was unable to have Chihuahua transferred to state custody in time for trial. Further, even if Chihuahua's testimony was not newly discovered, the motion should have been granted with respect to the evidence learned through Contreras because Hernandez became aware of Contreras's statement that Charro shot Mancia after the trial was completed.

*9 Hernandez claims the newly discovered evidence was not cumulative to the evidence presented at trial and it contradicted the only evidence introduced to establish Hernandez's guilt, namely, his statement to the detectives. (*People v. Martinez* (1984) 36 Cal.3d 816, 823 [a motion for new trial should be granted where newly discovered evidence contradicts the strongest evidence introduced against the defendant].) Hernandez notes the jury deliberated for approximately two days despite having heard audiotapes in which Hernandez eventually admitted involvement in the shooting and concludes the error requires reversal of his conviction and remand for a new trial.

We do not find Hernandez's arguments persuasive.

" ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' [Citations.] ' "[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background." ' [Citation.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

People v. Delgado identified five factors to consider when ruling on a motion for new trial based on newly discovered evidence: " ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the case; 4. That the party could not with reasonable diligence have produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits." ' " (*People v. Delgado, supra,* 5 Cal.4th at p. 328.)

Here, Hernandez concedes the testimony Chihuahua allegedly would have presented was not newly discovered. He claims Contreras's statement that Charro shot Mancia was newly discovered evidence because Hernandez learned this information while he was in custody after the guilty verdict. However, Hernandez associated with Contreras, aka Rascal, prior to the shooting and, in the statement to the detectives, Hernandez claimed Rascal and Flaco were responsible for Mancia's death. Further, Hernandez's wife, Vanesa Esquivel, declared that Hernandez telephoned her on the day he was arrested and told her to speak with Rosa, Rascal's girlfriend. Two days later, Rosa told Esquivel that Leovardo Hernandez, aka Charro, committed the shooting. Given Hernandez's association with Contreras and his ability to have his wife contact Contreras's girlfriend shortly after his arrest, the trial court reasonably could conclude that, prior to trial, Hernandez either knew, or with reasonable diligence could have discovered, that Contreras allegedly had information implicating Charro in the shooting. Upon this basis alone, the trial court's denial of the motion was appropriate.

Additionally, the evidence offered in support of motion for the new trial was not " ' "shown by the best evidence of which the case admits." ' " (*People v. Delgado, supra,* 5 Cal.4th at p. 328.) Penal Code section 1181, subdivision 8, states: "When a motion for new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing ... the affidavits of the witnesses by whom such evidence is expected to be given...." (Pen.Code, § 1181, subd. 8.) Declarations containing

inadmissible hearsay are insufficient to justify the granting of a new trial. (*People v. House* (1969) 268 Cal.App.2d 922, 924; *People v. Merrill* (1951) 104 Cal.App.2d 257, 268.)

*10 The evidence Hernandez claimed Chihuahua would give at a new trial was based on the hearsay declarations of the defense investigator and Hernandez's wife. The evidence Hernandez claimed Contreras would provide was based on Hernandez's hearsay declaration. Under Penal Code section 1181, subdivision 8, this hearsay evidence failed to sustain Hernandez's burden of proof on a motion for new trial.

Further, the trial court properly could have denied the motion because the proffered evidence did not render it probable Hernandez would obtain a different result on retrial. (*People v. Delgado, supra,* 5 Cal.4th at p. 328.) The defense investigator's summary indicated Chihuahua knew Hernandez's wife and knew Hernandez by sight. Thus, assuming Chihuahua would have testified as indicated in the motion for new trial, Chihuahua was not an independent witness and his testimony would have been questioned based on his preexisting connection to Hernandez's family. With respect to the evidence Hernandez claimed Contreras would provide, Hernandez told the detectives that Contreras, aka Rascal, and Flaco were responsible for the shooting. Thus, the jury would not have credited Contreras's self-serving testimony that neither he nor Hernandez committed the shooting. Further, the testimony of Chihuahua and Contreras was in conflict in that Chihuahua identified the shooter as a Black male and Contreras stated the shooter was Leovardo Hernandez, an Hispanic male. It is therefore apparent the evidence relied upon by Hernandez would not have produced a different result at trial.

Finally, the record suggests Hernandez may have insisted the trial go forward without Chihuahua's testimony. When counsel standing in for defense counsel sought a brief continuance to accommodate a death in defense counsel's family, stand-in counsel advised the trial court Hernandez was unwilling to waive time and was “quite anxious” to start the trial.

Based on the foregoing, we conclude the trial court committed no error in denying Hernandez's motion for new trial.

3. *On the facts presented, the trial court had no obligation to conduct a Marsden hearing.*

Hernandez contends the trial court abused its discretion in failing to inquire into the allegations of ineffective assistance of counsel contained in Hernandez's letter dated October 29, 2008. In the letter, Hernandez stated defense counsel failed to subpena Oscar Chihuahua and failed to advise the trial court of the need to subpoena Chihuahua, failed to call Hernandez's sister to testify Hernandez was at home at the time of the shooting, and failed to interview Walter Castillo about the shooting. In response to the letter and Hernandez's statement he wanted the record to reflect an eyewitness had not been subpoenaed for trial, the trial court told Hernandez it would conduct a *Marsden* hearing after the issues raised in the letter had been investigated. However, after denying defense counsel's motion for new trial, the trial court did not conduct a *Marsden* hearing.

*11 Hernandez argues his letter dated October 28, 2008, put the trial court on notice Hernandez believed defense counsel's performance at trial was deficient and that Hernandez wanted a new trial on that basis. (*People v. Reed* (2010) 183 Cal.App.4th 1137, 1145–1146.) Thus, the trial court was required to conduct a *Marsden* hearing to address Hernandez's claim of ineffective assistance of counsel in failing to subpoena a key eyewitness. (*People v. Mendez* (2008) 161 Cal.App.4th 1362, 1367–1368; *People v. Eastman* (2007) 146 Cal.App.4th 688, 695–696.)

Hernandez notes the motion for new trial did not contend the failure to present the testimony of Chihuahua and Contreras was due to a lack of diligence on the part of defense counsel. Had the trial court listened to Hernandez's complaints about defense counsel's ineffectiveness as required by *Marsden,* the trial court might have appointed new counsel and thereafter granted a motion for new trial based on defense counsel's incompetence. Hernandez concludes the error requires reversal because the People cannot demonstrate the error was harmless beyond a reasonable doubt. (*People v. Marsden, supra,* 2 Cal.3d at p. 126.)

We find Hernandez failed to request substitution of counsel and, in the absence of any clear indication Hernandez desired new counsel, the trial court was not required to conduct a *Marsden* hearing.

Under *Marsden,* when a defendant complains about the adequacy of appointed counsel, the trial court must permit the defendant to articulate the basis for his or her concerns so the trial court can determine if they have merit and, if necessary, appoint new counsel. (*People v. Marsden, supra,* 2 Cal.3d at pp. 123–124.) The denial of a *Marsden* motion without careful inquiry into the defendant's reasons for requesting the substitution of counsel does not qualify as an informed judicial determination. (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1666.) *Marsden* principles apply to post-trial proceedings. (*People v. Smith* (1993) 6 Cal.4th 684, 695.)

" ' "Although no formal motion is necessary, there must be 'at least some clear indication by the defendant that he wanted a substitute attorney' " [Citations.]' [Citation.]" (*People v. Dickey* (2005) 35 Cal.4th 884, 920; *People v. Richardson* (2009) 171 Cal.App.4th 479, 485.)

Here, although Hernandez's letter dated October 29, 2008, complained about defense counsel's performance, it did not request new counsel. Rather, the letter asked the trial court to ensure "that the facts of this crime be looked at in detail because I am innocent and ... critical information was left out." Hernandez also stated his purpose in writing to the trial court was "to bring forth vital info[rmation] to the court for hopefully a re-trial...."

After reading Hernandez's letter, the trial court continued the matter to permit defense counsel to investigate the matter and for a *Marsden* motion, if appropriate. Defense counsel thereafter filed a motion for new trial which alleged Hernandez should be permitted an opportunity to present the testimony of Chihuahua and Contreras. After the trial court denied the motion, it advised Hernandez it had the letter dated October 29, 2008, and asked whether Hernandez wished "to say anything else to the court? You certainly can if you want to; or if you don't, you don't have to say anything. It's up to you, sir." Hernandez responded, "Negative."

*12 Because Hernandez never suggested he wanted substitution of appointed counsel based on ineffective representation, the trial court was not required to conduct a *Marsden* hearing. (*People v. Dickey, supra,* 35 Cal.4th at p. 920; *People v. Richardson, supra,* 171 Cal.App.4th at p. 485; see also *People v. Gay* (1990) 221 Cal.App.3d 1065, 1069–1071 [a motion for new trial filed in propria persona alleging ineffective assistance of counsel does not trigger an obligation to conduct a *Marsden* hearing absent a request for substitute counsel].)

The cases cited by Hernandez, *People v. Reed, supra,* 183 Cal.App.4th 1137, *People v. Mendez, supra,* 161 Cal.App.4th 1362, and *People v. Eastman, supra,* 146 Cal.App.4th 688, do not compel a contrary result.

Reed is distinguishable in that the defendant in *Reed* made prior unsuccessful *Marsden* motions and, when he expressed a desire to pursue a motion for new trial based on counsel's incompetence, defense counsel said "I cannot make it for him...." (*People v. Reed, supra,* 183 Cal.App.4th at p. 1142 .) Thus, it was sufficiently clear the defendant was requesting substitute counsel to pursue the motion for new trial.

In *Eastman* the defendant wrote letters to the trial court seeking to withdraw a negotiated plea on the grounds defense counsel had failed to investigate and had conspired with the prosecutor to persuade him to accept the plea offer. Although the defendant did not expressly ask for new counsel, *Eastman* concluded the trial court was required to conduct a *Marsden* hearing because the defendant's "complaints set forth an arguable case that a fundamental breakdown had occurred in the attorney-client relationship that required replacement of counsel." (*People v. Eastman, supra,* 146 Cal.App.4th at p. 696.)

In *Mendez,* the defendant stated he wanted to make a motion for new trial based on defense counsel's incompetence. (*People v. Mendez, supra,* 161 Cal.App.4th at pp. 1365–1366.) The defendant indicated defense counsel did not call numerous possible defense witnesses and did not introduce exculpatory

evidence. The trial court appointed new counsel to investigate whether there was a basis for a new trial motion based on ineffective assistance. After the newly appointed attorney indicated such a motion was not appropriate, the trial court again assigned the case to the original attorney. (*Id.* at p. 1366.) *Mendez* held the trial court erred in failing to conduct a *Marsden* hearing to permit the defendant to make a record that disclosed the nature of the defendant's complaints and defense counsel's responses to them. (*Id.* at pp. 1367–1368.)

Richardson rejected the notion that *Eastman* and *Mendez* properly concluded a request for new trial based on ineffective assistance of counsel triggers an obligation to conduct a *Marsden* hearing. *Richardson* declined to follow *Mendez* and *Eastman* as neither case discussed *People v. Dickey, supra,* 35 Cal.4th 884. (*People v. Richardson, supra,* 171 Cal.App.4th at p. 485.)

*13 In *Dickey*, the defendant in a capital case made a motion for appointment of separate counsel to represent him in the preparation of a motion for new trial to address the defendant's claim he received incompetent representation in the guilt phase. (*People v.. Dickey, supra,* 35 Cal.4th at pp. 918–920.) The trial court appointed separate counsel to prepare the motion which was based, in part, on the claims defense counsel was ineffective during the guilt phase and the trial court erred in failing to conduct a *Marsden* hearing. (*Id.* at p. 920.) The trial court denied the motion, finding it was not required to hold a *Marsden* hearing because defendant did not request one. (*Ibid.*) *Dickey* agreed and found no *Marsden* error in the absence of "some clear indication by defendant that he wants a substitute attorney.' " [Citations.]" (*People v. Dickey, supra,* 35 Cal.4th at pp. 920–921.)

In *Richardson,* the defendant submitted letters to the trial court requesting a new trial based in part on alleged ineffective assistance of counsel including the claim defense counsel persuaded him not to testify and promised he would be convicted only of a minor offense. (*People v. Richardson, supra,* 171 Cal.App.4th at p. 482–483.) Without discharging defense counsel, the trial court appointed separate counsel to investigate the defendant's allegations and the new attorney concluded there was no legal basis for a motion for new trial. (*Id.* at p. 483.) *Richardson* rejected the claim the defendant's letters required the trial court to conduct a *Marsden* hearing. Relying on *Dickey, Richardson* found no error in the failure to conduct a *Marsden* hearing absent some clear indication the defendant wanted a substitute attorney. (*People v. Richardson, supra,* at p. 484.)

To the extent *Eastman* and *Mendez* hold an expression of dissatisfaction with defense counsel's representation triggers an obligation to conduct a *Marsden* hearing, we conclude *Richardson,* which relied on *People v. Dickey, supra,* 35 Cal.4th 884 in holding there must be some indication of a request for substitution of counsel, is more persuasive.

Concededly, the facts of *Dickey* and *Richardson* differ slightly from Hernandez's case in that the trial courts in *Dickey* and *Richardson* appointed separate counsel to investigate the defendants' claims of inadequacy of counsel and whether those allegations would support a motion for new trial. (*People v. Dickey, supra,* 35 Cal.4th at p. 920; *People v. Richardson, supra,* 171 Cal.App.4th at p. 485.) However, we do not interpret *Dickey* or *Richardson* as requiring the appointment of separate counsel when a defendant complains of ineffective assistance of counsel at trial and requests investigation into the propriety of filing a motion for new trial on that basis. The appointment of separate counsel to investigate and/or prepare a motion for new trial based on ineffective assistance of counsel does not satisfy or alter the trial court's *Marsden* obligation when substitution of counsel is requested. Further, neither *Dickey* nor *Richardson* indicated the appointment of counsel for the purpose of investigating or presenting a motion for new trial based on ineffective assistance of counsel was necessary or significant to their holdings. Thus, the fact the trial court did not appoint separate counsel to investigate Hernandez's claims does not distinguish this case from *Dickey* and *Richardson* in a meaningful way.

*14 Here, nothing Hernandez said at the post verdict hearings or wrote in the letter of October 29, 2008, suggested Hernandez wanted the trial court to appoint new counsel or separate counsel to prepare a motion for a new trial based on defense counsel's incompetence. Although the trial court stated a *Marsden* motion might be appropriate after the matter had been investigated, at no time did Hernandez request

substitution of counsel. Even when the trial court indicated it had Hernandez's letter in hand and directly inquired of Hernandez, Hernandez declined to make any statements.

We conclude Hernandez failed to request substitution of counsel and reject Hernandez's claim of *Marsden* error on that basis.

4. *The award of custody credit must be stricken and the number of actual days spent in custody prior to sentencing must be corrected.*

The trial court awarded Hernandez 948 days of presentence custody credit consisting of 825 actual days and 123 days of conduct credit.

The People contend Hernandez is not entitled to conduct credit, citing Penal Code section 2933.2, subdivision (c), which precludes conduct credit pursuant to Penal Code section 4019 for a defendant convicted of murder. (*People v. Ly* (2001) 89 Cal.App.4th 44, 47.)

Hernandez does not dispute this assertion but claims he is entitled to 857 actual days of presentence custody based on his custody from November 15, 2006, through sentencing on March 20, 2009. (Pen.Code, § 2900.5.)

It appears Hernandez's computation of the number of days he spent in actual presentence custody is correct. We shall order the abstract of judgment corrected to strike the award of conduct credit and to reflect 857 days of actual custody.

DISPOSITION

The judgment is modified to strike the award of conduct credit and to reflect 857 days of actual presentence custody credit. As so modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment reflecting these modifications and forward it to the Department of Corrections and Rehabilitation.

We concur: CROSKEY and KITCHING, JJ.

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Not Reported in Cal.Rptr.3d, 2011 WL 1534547 (Cal.App. 2 Dist.)
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
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