

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RENE ARANA,

Defendant and Appellant.

B282544

(Los Angeles County
Super. Ct. No. BA451720)

APPEAL from the judgment of the Superior Court of Los Angeles County. Stephen A. Marcus, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and John R. Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant and appellant Rene Arana appeals from his conviction by jury of two counts of second degree robbery as to two separate victims. The jury also found true that defendant used a knife in the commission of both offenses within the meaning of Penal Code section 12022, subdivision (b)(1). Defendant challenges the true findings on the dangerous weapon enhancements as to both counts, and argues the trial court erred in denying his motion to represent himself at trial pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We conclude there is ample evidence in the record to support the jury's true findings, and that the trial court acted within its discretion in denying defendant's *Faretta* motion. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with two counts of second degree robbery (Pen. Code, § 211). As to both counts, defendant was alleged to have used a knife in the commission of the offenses within the meaning of section 12022, subdivision (b)(1). It was further alleged defendant had suffered a prior qualifying strike (§ 667, subds. (b)-(i), § 1170.12), a prior serious felony (§ 667, subd. (a)(1)), and a prior prison term (§ 667.5, subd. (b)).

The charges arose from the following events on November 9, 2016, as established at trial.

Just before noon on November 9, Zachariah King was waiting for his brother to pick him up from outside an electronics store in Boyle Heights. Mr. King was looking at videos on his cell phone. Defendant approached him and asked for a cigarette and lighter. Mr. King said he did not have either one. Defendant then asked to use his phone, and Mr. King said no.

Defendant immediately pulled a "flip blade" out and held it in front of his body "in a threatening position." Mr. King was "scared for [his] life" and handed the phone to defendant. Defendant

started to erase the contacts list in the phone and then walked a short distance away. After maybe 20 minutes, defendant left the area completely. Mr. King had been too scared to do anything before he left, but once defendant was gone he spoke to a security guard standing outside the store. Mr. King's brother then arrived and they drove home. Mr. King did not call 911. When explaining the incident at trial, Mr. King denied that he simply loaned his phone to defendant. He reiterated that he only gave the phone to defendant because he had threatened him with a knife.

Several blocks away, Abraham Espinoza was standing at the cash register in his discount store on 1st Street. Sometime after noon, defendant came into the store and asked Mr. Espinoza if he sold bandannas. Mr. Espinoza pointed toward the end of one of the aisles where they were located. He watched defendant on the store's video surveillance system. Mr. Espinoza saw defendant get a bandanna, and then walk down another aisle, pick up a can of deodorant and put it in his pocket.

Defendant then headed toward the front of the store. Mr. Espinoza came out from behind the register and walked up toward defendant. He asked him if he was ready to pay for the items. Defendant reached into his pocket and pulled out a knife and flipped it open, about waist-high, in front of Mr. Espinoza. The knife was pointed toward Mr. Espinoza's stomach. Mr. Espinoza felt "nervous" and in a "panic." Defendant then took a bag of chips and left the store. Mr. Espinoza called 911.

Officer Roy Reza, and his partner Officer Soria, of the Los Angeles Police Department were on patrol that afternoon near the intersection of 1st Street and Dacotah. They received a report of a robbery at a nearby store and a suspect description. They saw defendant, who matched the description, walking down 1st Street. They pulled over and detained defendant. He had in his possession

two cell phones, a silver flip knife, a bandanna and a can of deodorant/body spray. Defendant was placed under arrest.

After Mr. King and his brother arrived at home, they used another family cell phone to locate his cell phone with a Google tracking app. They saw that his cell phone was in the vicinity of 1st and Mott Streets, so he and his brother drove to that location. A few blocks away they saw police officers talking with defendant, so they pulled over. Mr. King spoke with the officers and explained what happened. When he was able to show them he could unlock the password on the cell phone, they returned it to him.

Mr. Espinoza provided the surveillance video to the investigating officers. Both the surveillance video and the officers' body camera footage was played for the jury.

The jury found defendant guilty as charged. Defendant admitted his prior qualifying strike. The court sentenced defendant to an aggregate state prison term of 15 years and four months.

This appeal followed.

DISCUSSION

1. The Dangerous Weapon Enhancements

Defendant contends there is no substantial evidence supporting the dangerous weapon enhancement as to either robbery count. Defendant argues the testimony showed no more than a passive display of the knife to both victims, and we should therefore reverse both true findings. We are not persuaded.

“In determining whether there was substantial evidence of [a defendant's] knife use, we may properly consult cases construing the term ‘uses’ in other enhancement statutes under ‘“The Dangerous Weapons’ Control Law.”’ [Citation.] Hence, we may rely on cases construing the term as it is understood for purposes of section 12022.5, which addresses personal use of a firearm [Citations.] As we have recognized in the context of former section

12022.5, subdivision (a), ‘ “The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that ‘uses’ be broadly construed.” [Citation.] “Thus when a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a *facilitative use* rather than an incidental or inadvertent exposure.” ’ ’ ’ (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1198, italics added, overruled in part on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; accord, *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059 [dangerous weapon enhancement not limited to situations where weapon is pointed at victim; personal use may be found when display of weapon is used “to facilitate the commission of an underlying crime”].)

Here, there was solid evidence that defendant used the knife against both victims in order to facilitate the robberies. Defendant was physically close to each victim at the time he pulled the knife from his pocket and displayed it. Mr. King testified defendant presented it in a threatening manner and it was the reason he turned over his phone. He said he was “scared for his life” and refrained from even trying to contact anyone to help him until after defendant left the area. Prior to defendant displaying the knife, Mr. King had told defendant “no” when he asked to use the phone. His testimony plainly demonstrated that he felt compelled to comply with defendant only after defendant pulled the knife.

Similarly, Mr. Espinoza testified he walked out from behind the register to obtain payment from defendant after he saw that he had pocketed the deodorant and taken a bandanna without paying. Defendant then pulled the knife on Mr. Espinoza who backed up and allowed defendant to leave the store without paying.

Mr. Espinoza said he was nervous and in a panic upon having the knife drawn on him.

There was substantial evidence upon which the jury could reasonably rest their true findings.

2. The *Faretta* Motion

Defendant argues he had an absolute right to proceed to trial in propria persona, and the trial court therefore abused its discretion in denying his *Faretta* motion. We find no error in the court's ruling.

On March 29, 2017, six days before trial, defendant asked the court to substitute different counsel. The court conducted a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. Defendant expressed concern that his appointed counsel was not looking out for his interests. Defense counsel said defendant had been reluctant to speak with her, particularly when she tried to explain the case was going to be difficult in light of the videotape evidence, and his prior strike meant he faced significant exposure.

The court denied defendant's request. Defendant responded, "I want somebody else to represent me, and if not, then I would like to go pro per." The court asked if he would be ready to go to trial, and defendant said he would need a little more time. The court denied the *Faretta* motion as untimely. "We are 22 of 30 today. My intention is to send this into Department 100. Mr. Arana would not be ready to proceed in that period of time." Defendant interjected that he wanted to hire a private lawyer or get an "extension" and go in propria persona. Counsel indicated the trial estimate was five days, with six witnesses and multiple exhibits. The court reiterated that defendant's *Faretta* request was untimely.

"Although a defendant has a federal constitutional right to represent himself [citation], in order to invoke an unconditional right he must assert it "within a reasonable time prior to the

commencement of trial.’ ” [Citations.] *A motion made after this period is addressed to the sound discretion of the trial court.* [Citation.]’ ” (*People v. Clark* (1992) 3 Cal.4th 41, 98, italics added.)

In discussing what is a reasonable time before commencement of trial, our Supreme Court has observed that “we have held on numerous occasions that *Faretta* motions made on the eve of trial are untimely.” (*People v. Lynch* (2010) 50 Cal.4th 693, 722 (*Lynch*), abrogated in part on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.) “[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made. An analysis based on these considerations is in accord with the purpose of the timeliness requirement, which is ‘to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice.’ ” (*Lynch*, at p. 724.)

The factors that may be considered in judging the timeliness of a *Faretta* request include “not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.” (*Lynch, supra*, 50 Cal.4th at p. 726.)

Here, the court was faced with an eve-of-trial request by defendant in a case that included multiple witnesses and exhibits, including videotape evidence. Defendant was not ready to proceed and said he would need time to review, and possibly undertake, discovery before he could proceed. The trial court acted well within its discretion in denying defendant’s motion as untimely.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

DUNNING, J.*

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