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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. NORRIS D. MILLER, Defendant and Appellant.	B276754 (Los Angeles County Super. Ct. No. SA092229)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark T. Zuckman, Temporary Judge. (Pursuant to Cal. Const., article VI, § 21.) Affirmed.

Lise M. Breakey, 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, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Norris Miller appeals from the judgment entered after a jury convicted him on three counts of assault by force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4))[1] and one count of resisting an officer by means of threats and violence (§ 69). Miller contends the trial court violated his federal constitutional rights by allowing him to continue representing himself at trial without requiring a psychiatric evaluation. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Trial Court Grants Miller's Request To Represent Himself*

One morning in February 2016 Miller beat up a stranger he encountered in a crosswalk, assaulted two more strangers shortly after that, and then resisted when police officers arrested him. The People charged Miller with three counts of assault by force likely to produce great bodily injury, one count of attempted robbery (§ 213, subd. (b)), and two counts of resisting an officer by means of threats and violence. In connection with the assault counts, the People alleged Miller personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). The People also alleged Miller had a prior serious felony conviction within the meaning of section 667, subdivision (a)(1), a prior violent or serious felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and served

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1 Statutory references are to the Penal Code.

five prior prison terms for felonies within the meaning of section 667.5, subdivision (b).

At a pretrial hearing Miller asked the court to allow him to represent himself because he believed his appointed counsel was "railroading" him. The court strongly discouraged Miller from representing himself and warned him of the seriousness of the charges against him, but Miller insisted he wanted to represent himself. After examining Miller further about his understanding of his decision, the court found Miller "voluntarily and intelligently chooses self-representation" and "knowingly, intelligently, understandingly, and explicitly waives his right to counsel." The court also found Miller was competent to represent himself and the court granted Miller's request.

At a later pretrial hearing the court asked Miller if he still wanted to represent himself. The court stated: "I just want to make sure because I'm ready, willing, and able to give you an attorney if you want one." Miller thanked the court, and said he wanted to continue representing himself.

B. *Miller States During Trial That Police Officers Can "Read Minds"*

On the third day of trial, as the sixth and final prosecution witness was about to testify, the prosecutor asked the court's permission to have a different investigating officer sit at counsel table and remain there for the rest of the trial. That request prompted this exchange:

"[MILLER]: Excuse me, your honor. I'd like to object to that, because the officers clearly can hear from ten feet away. And while I'm doing my notes, all they doing over there is whispering. They read minds. The officers read minds. So I

would rather the officer sit back there somewhere. Because yesterday, the officer and the D.A. was whispering back and forth to each other.

"THE COURT: Well, they are allowed to be. The investigating officer is allowed to consult with the D.A. in putting on their case. That's why they are by the side of the D.A., and that's permitted by law."

"[MILLER]: But officers also hear from ten feet away. And I'm my own lawyer, and I don't want her looking in my head and trying to use a strategy and telling the D.A. what I'm doing in my head."

"THE COURT: Well, are you saying that the investigating officer is—"

The prosecutor interrupted to request that this discussion take place outside the presence of the jury. The trial court denied the request and continued with Miller.

"THE COURT: Are you saying the investigating officer is secretly looking at your notes? Is that what you're saying?

"[MILLER]: Officers can hear from ten feet away. They can read minds from ten feet away. Anybody knows that.

"THE COURT: They read minds?

"[MILLER]: Yes, from ten feet away. They can hear people, what you're saying and doing in your head, from ten feet away. And that's exactly what she's doing.

"THE COURT: Only the officers, or everybody can do that?

"[MILLER]: The officers.

"[THE PROSECUTOR]: Your Honor, if we may excuse the jury?

"THE COURT: No. Next witness."

C. *The Trial Court Allows Miller To Continue Representing Himself*

The following day, before trial resumed, the trial court had this exchange with Miller outside the presence of the jury:

"THE COURT: "Mr. Miller, for the first time in the course of the trial yesterday afternoon, you called to my attention an issue that I didn't directly address, when you indicated, in open court, that you believe that the investigating officer was reading your mind and the police have that ability. It was then and only then, for the first time, that I realized that you may be suffering from mental illness.

"[MILLER]: No, but you are.

"THE COURT: The court chose and continues to believe that you have a right to represent yourself. I don't believe, to the extent that you are mentally ill or delusional, that it has impaired your ability to represent yourself as best as you are able. No criminal defendant should represent himself, in the court's opinion, particularly a criminal defendant who is not trained as a lawyer. So there are dangers and disadvantages of self-representation, but the defendant does have a constitutional right, under [*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*)] and years of cases, along those lines. And the court cannot, in my opinion, deprive you of that constitutional right, just because you happen to be mentally ill. Now, if your mental illness prevents you from being—

"[MILLER]: Who's mentally ill?

"THE COURT: If your mental illness prevents you from being competent, in terms of understanding the nature of the criminal proceedings, understanding the role of the various parties and the role of the judge, the D.A., the jury, et cetera,

then I might have authority to relieve you of your pro per status. But it's clear to the court that you fully understand the various roles of the parties. You understand your objectives, in terms of trying to convince the jury that you are not guilty. You've made legal arguments. And for the most part, you've been respectful. I know you've taken issue with the court, in terms of the court's fairness, but there are plenty of lawyers that, in the course of my career, have complained on both sides about the court's fairness. So I don't believe that's a basis to relieve you. And I have not relieved you from your status as a pro per, but I did want to put on the record the court's perceptions, based on what occurred yesterday afternoon."

D. *The Jury Convicts Miller*

The jury acquitted Miller of attempted robbery and one count of resisting an officer by means of threats and violence, but convicted him on all other counts. The jury also found, in connection with the assault counts, Miller personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a). Miller admitted a prior serious felony conviction under section 667, subdivision (a), a prior violent or serious felony conviction under section 667, subdivisions (b) through (j), and four prior prison terms under section 667.5, subdivision (b).[2] The court sentenced Miller to a prison term of 21 years, and Miller timely appealed.

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[2] The court granted a motion by the People to strike their allegation of a fifth prior prison term under section 667.5, subdivision (b).

DISCUSSION

Miller does not challenge the trial court's initial ruling granting his request to represent himself. Nor does he contend he was mentally incompetent to stand trial. Rather, he contends that, under the United States Supreme Court's decision in *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*) and the California Supreme Court's decision in *People v. Johnson* (2012) 53 Cal.4th 519 (*Johnson*), the trial court violated his constitutional rights when, after expressing concern Miller may have a mental illness, the court continued to allow Miller to represent himself without requiring a psychiatric evaluation. This argument has no merit.

A. *Applicable Law*

Under the Sixth Amendment to the United States Constitution, a criminal defendant has a "constitutional right to conduct his own defense." (*Faretta*, *supra*, 422 U.S. at p. 836.) In *Edwards*, *supra*, 554 U.S. 164 the United States Supreme Court held the Constitution nevertheless permits states to insist upon representation by counsel for criminal defendants who are mentally competent enough to stand trial "but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id.* at p. 178; see *id.* at p. 176 [quoting the American Psychiatric Association's statement that "'[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even

if he can play the lesser role of represented defendant'"].) The *Edwards* court observed that trial judges "will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant." (*Id.* at p. 177.) Consequently, the court concluded, "the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." (*Id.* at pp. 177-178.)

In *People v. Taylor* (2009) 47 Cal.4th 850 (*Taylor*) the California Supreme Court rejected the defendant's argument that the trial court in his case erred under *Edwards* by failing to exercise its discretion to deny his request to represent himself, or later revoke his self-representation status, on grounds of mental incompetence. (*Id.* at pp. 866-867.) The *Taylor* court emphasized the limited holding of *Edwards*: "*Edwards* did not hold . . . that due process mandates a higher standard of mental competence for self-representation than for trial with counsel. The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard . . . . [Citation.] 'In light of *Edwards*, it is clear . . . that we are free to adopt for mentally ill or mentally incapacitated defendants who wish to represent themselves at trial a competency standard that differs from the standard for determining whether such a defendant is competent to stand trial. It is equally clear, however, that *Edwards* does not *mandate* the application of such a dual standard of competency for mentally ill defendants. In other words, *Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct

the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.' [Citation.] *Edwards* thus does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted." (*Taylor*, at pp. 877-878.)

Finally, in *Johnson*, *supra*, 53 Cal.4th 519, the California Supreme Court noted that in *Edwards* "the United States Supreme Court held that states may, but need not, deny self-representation to defendants who, although competent to stand trial, lack the mental health or capacity to represent themselves at trial." (*Johnson*, at p. 523.) The *Johnson* court then took up the question "whether California courts may accept this invitation and apply a higher standard of mental competence for self-representation than for competency to stand trial," and concluded the answer was yes: "California courts may deny self-representation when the United States Constitution permits such denial." (*Ibid.*) But in doing so, the *Johnson* court reiterated its observation in *Taylor* that "the *Edwards* rule is permissive, not mandatory," and "*Edwards* 'does not support a claim of federal constitutional error in a case . . . in which defendant's request to represent himself was granted.'" (*Johnson*, at p. 527.)

B. *Miller Has Not Demonstrated Error*

Because the trial court granted Miller's request to represent himself, *Edwards* and *Johnson* do not support his claim of constitutional error. (*Taylor*, *supra*, 47 Cal.4th at pp. 877-878; see *People v. Miranda* (2015) 236 Cal.App.4th 978, 988 (*Miranda*) ["no constitutional error occurs when a mentally ill defendant's request to represent himself is granted"].) *Edwards*

and *Johnson* address what a trial court may do in the way of restricting a defendant's constitutional right to self-representation, not what it must do before (or after) honoring that right. Consequently, Miller's contention that the trial court violated his constitutional rights by allowing him to continue representing himself fails. (See *Miranda*, at p. 988 [rejecting the contention that "once the trial court learned about [the defendant's] mental health condition it was required to conduct an inquiry into his competence to represent himself and should then have terminated his right to do so"].)

In arguing otherwise, Miller cites language from the California Supreme Court's decision in *Johnson* that "[a] trial court need not routinely inquire into the mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental competence." (*Johnson*, *supra*, 53 Cal.4th at p. 530.) According to Miller, this language suggests that, "when the court has a doubt that the defendant may not be competent to represent himself, it *should* apply the heightened standard of *Edwards* and *Johnson*." In fact, Miller contends that, "[a]lthough the language as to the appointment of an expert in *Edwards* and *Johnson* is permissive rather than mandatory, sufficient evidence of mental illness should make the failure to obtain a psychiatric evaluation an abuse of discretion." Miller suggests the trial court committed that abuse of discretion here because it entertained doubts about his mental competence to represent himself but allowed him to continue to do so without obtaining a psychiatric evaluation.

The first problem with this argument is that the very paragraph Miller cites in *Johnson* emphasizes that the obligation to apply a heightened standard of mental competence and the caution to obtain an expert psychiatric evaluation arise when a trial court *denies* a request for self-representation, not when, as here, it grants that request. (See *Johnson*, *supra*, 53 Cal.4th at pp. 530-531 ["[t]o minimize the risk of improperly denying self-representation to a competent defendant, 'trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation, though the judge's own observations of the defendant's in-court behavior will also provide key support for an incompetence finding and should be expressly placed on the record'"].) Thus, the authority on which Miller relies is contrary to his position.

Second, the record does not demonstrate the trial court doubted Miller's competence to represent himself, only that the court thought Miller suffered from a mental illness. (See *Edwards*, *supra*, 554 U.S. at p. 175 ["[m]ental illness itself is not a unitary concept"].) In fact, the trial court stated its belief that, to the extent Miller may have had a mental illness, that illness did not impair Miller's ability to represent himself. Thus, even under what Miller suggests the law "should" be, the trial court would not have been obligated to apply the heightened standard of mental competence from *Edwards* and *Johnson*.

Third, the trial court essentially concluded Miller satisfied the heightened standard before the court allowed him to continue representing himself, and substantial evidence supports that

conclusion.[3] According to *Johnson*, the heightened standard "is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Johnson*, *supra*, 53 Cal.4th at p. 530.) As noted, the trial court found Miller's mental illness had not impaired his ability to represent himself, based on the court's observation that Miller fully understood the various roles of the parties, understood his objectives in convincing the jury he was not guilty, made legal arguments, and for the most part behaved respectfully. Miller does not dispute the accuracy of those observations, and the record confirms them. In addition, Miller made an opening statement conveying the essence of his defense (i.e., that the victims made inconsistent statements in their descriptions of their attacker and that the police officers who arrested him were the aggressors), cross-examined all six prosecution witnesses, obtained an acquittal on two charges, and successfully challenged one of the allegations of a prior prison term. (See *Miranda*, *supra*, 236 Cal.App.4th at p. 989 ["under any possible standard of review" the record showed the defendant was capable of performing the basic tasks of self-representation without the assistance of counsel because, among other things, he made an opening statement that, "although brief and inelegant, still

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[3] As the court noted in *Miranda*, *supra*, 236 Cal.App.4th 978, even "[a]ssuming that a defendant has a 'right' to have the court revoke his propria persona status if the court becomes aware of defendant's serious mental disability, we . . . have no guidance as to the appropriate standard of review." (*Id.* at p. 989.) We (hypothetically) apply the substantial evidence standard because that is the standard Miller suggests would apply.

conveyed the essence of his defense," cross-examined witnesses, and made objections].)

Fourth, Miller cites no authority for his contention that under the heightened standard for mental competence (assuming it even applied) the trial court's "failure to obtain a psychiatric evaluation [was] an abuse of discretion." The only case he cites, *Tyrone B. v. Superior Court* (2008) 164 Cal.App.4th 227, concerned appointing an expert to evaluate a defendant's mental competence to stand trial, not his competence to represent himself. (See *id.* at pp. 230-231.) And *Johnson*, while urging caution in making a determination under the heightened standard without an expert evaluation, did not rule out a trial court's discretion to do so. (See *Johnson*, *supra*, 53 Cal.4th at pp. 530-531 [when the trial court doubts a defendant's mental competence for self-representation, the court "may" order a psychiatric evaluation]; *Miranda*, *supra*, 236 Cal.App.4th at p. 988 [when a trial court doubts a defendant's mental competence to represent himself, it "may order a psychological examination on that issue"].)

Miller's reliance on *People v. Shiga* (2016) 6 Cal.App.5th 22 (*Shiga*) is misplaced. In that case, we held the trial court abused its discretion where "it [was] apparent from the record that the trial court was unaware that it had the discretion both to conduct an inquiry regarding whether defendant was mentally incapable of representing himself and, if necessary, to deny [his request to represent himself] on that ground." (*Id.* at p. 40.) In contrast, the trial court's comments here reflected that the court understood it could revoke Miller's right of self-representation if

the court found he was not competent to represent himself.[4] Miller has not demonstrated the trial court abused its discretion.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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[4] In *Shiga* we also found there was sufficient evidence to foster a doubt the defendant was even mentally competent to stand trial, a circumstance absent here. (*Shiga*, *supra*, 6 Cal.App.5th at p. 44.)

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