Filed 10/26/17 P. v. Smith CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH SMITH, Defendant and Appellant.	B279607 (Los Angeles County Super. Ct. No. KA112612)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Syliva W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Joseph Smith (defendant) appeals from his attempted murder conviction. He contends that defense counsel rendered ineffective assistance, and that the trial court erred in granting his motion for self-representation after the verdict. We find no merit to defendant's contentions, and affirm the judgment.

BACKGROUND

Defendant was charged with the attempted murder of Gregory Whitaker (Whitaker), in violation of Penal Code sections 664 and 187, subdivision (a).[1] The information also alleged that the attempted murder was willful, deliberate, and premeditated, that defendant used a deadly and dangerous weapon (a knife) in the commission of the crime, within the meaning of section 12022, subdivision (b)(1), and that defendant inflicted great bodily injury on the victim, within the meaning of section 12022.7, subdivision (a). The information further alleged that defendant had suffered a prior serious or violent felony conviction within the meaning of 667, subdivision (a)(1), as well as the "Three Strikes" law (§ 667, subd. (b)-(j), § 1170.12, subd. (a)-(d)), and that he had served one prior prison term within the meaning of section 667.5, subdivision (b).

A jury found defendant guilty of attempted murder as charged, found that the attempted murder was willful, deliberate and premeditated, and found true the deadly weapon and great bodily injury allegations. A court trial on the prior conviction was bifurcated.

After the verdict, the trial court granted defendant's request to represent himself. The matter was then continued for 30 days, at which time a court trial on the prior conviction was

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

held. The court found true the prior conviction allegations, denied defendant's motion for new trial, and denied defendant's motion to strike the prior conviction. The trial court sentenced defendant to life in prison, with the seven-year minimum parole eligibility date doubled due to the prior strike conviction, plus a consecutive three years for the great bodily injury enhancement, one year for the deadly weapon enhancement, and five years for the recidivist enhancement of section 667, subdivision (a)(1). The court struck the prison prior allegation, ordered defendant to pay mandatory fines and fees, and awarded 235 days of combined presentence custody credit.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

On May 22, 2016, Pomona Police Officers Megan Gonzalez and Zane Holmes observed Whitaker and another man in conversation near a liquor store. The officers then saw defendant riding a bicycle very fast toward the two men. As defendant reached the men, he stood and angled his body backward, causing the bicycle to be propelled forward from under him, striking Whitaker. Officer Gonzalez saw Whitaker place his empty hands in the air and retreat a step away from defendant. A recording from the patrol car's cameras were played for jury, with narration provided by the two officers. As Whitaker backed up, defendant quickly stepped toward him, then threw several punches which landed on Whitaker's face. Whitaker held his hands up as if to protect himself, palms extended outward. Neither officer saw Whitaker attempt to hit defendant or hold anything in his hands, but they lost sight of the men momentarily after the two fell to the ground. Defendant was then observed on top of Whitaker, who was moving his arms as though he were trying to protect himself. Officer Gonzalez made a U-turn, lost sight of the men

for a half second, and then saw both men get up and separate. Both men were yelling at each other as defendant walked toward his bicycle.

The officers approached and ordered both men to the ground with hands in sight. Defendant appeared agitated and irate. Both men's hands were empty, but a bloodied knife with a six-inch blade was later found in a nearby planter. Whitaker was bleeding from a laceration near his mouth. There were no visible injuries on defendant. When Whitaker began bleeding profusely from a neck wound, Officer Gonzalez applied pressure with her hands until paramedics arrived and transported him to the hospital. Whitaker was treated for stab wounds and underwent surgery to tie off his internal jugular vein, which was severely injured.

Defense evidence

Defendant, the sole defense witness, testified that he had been convicted of robbery with a firearm in 2002, possession of a firearm by a felon in 2010, and misdemeanor battery on a police officer in 2016. Defendant testified that he had known Whitaker for some years before the incident, and that he had a reputation as a man who liked to "smack" women around and who used drugs. Defendant admitted he was depicted on the video throwing his bicycle at Whitaker and then punching him. Defendant claimed that about 20 minutes earlier, he had confronted Whitaker about a block from the liquor store and demanded the $5 owed to him. Defendant explained that he had sold Whitaker some drugs, had given him money for food, for a total of $10, and Whitaker had repaid only $5 earlier that day. Two other acquaintances of defendant, Robert Lee and Amanda were present at the first contact. As defendant was talking to them, Whitaker "blindsided" defendant, attacked him from the side, said, "I got your $5.00 right here," and then stabbed

defendant in the chest and on the back, while yelling and screaming. Whitaker held the knife cupped in his hand, behind his pant leg. Defendant fell to the ground and tried to pepper spray Whitaker, but without effect. As defendant picked up the drugs that fell from his hand and tried to get his bearings, Robert Lee placed himself between the two men to prevent Whitaker from stabbing defendant again. Whitaker tried to advance, but retreated when defendant held up the pepper spray. When Amanda and Whitaker's girlfriend got into a shoving match, Whitaker walked away southbound in the direction of the liquor store, yelling, ranting, and raving.

Although he had been stabbed defendant did not call the police because he was in possession of and under the influence of drugs; also, due to adrenaline, he did not know whether he was badly injured. Defendant waited awhile so he could go home without encountering Whitaker. After about 10 minutes, he rode his bicycle toward home, which was the same direction that Whitaker had taken. Defendant testified that he was "pretty upset" about Whitaker's stabbing him, but he was more scared than anything, because he realized he was bleeding and his back was kind of burning. When he saw Whitaker and the other man at the liquor store, defendant felt a "burst of fear" because the other man was a "big dude" and one of them pointed at defendant as he rode toward them. Defendant thought they would try to jump him, and was "terrified"; nevertheless, he did not cross the street to avoid the men because he did not want to be known as a coward in the neighborhood, or have to say he ran away, so defendant "made a decision to try to kick his ass."[2]

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[2] In the factual summary in his brief, defendant states that he made a "snap" decision, but in fact, defendant did not qualify the decision when giving testimony.

When defendant approached Whitaker at the liquor store, he was upset due to what had happened, but he was also in fear for his life. He explained: "I wasn't going to change my path. I was going home and I felt like if they -- if he would have moved out of the way, we would have, no confrontation, but him and that big dude were standing right there, so . . . I thought they were waiting on me."

Defendant denied owning the knife. He had intended to use only his fists to "pound" on Whitaker, and did strike him about 10 times. After the third blow, as Whitaker was backing up, defendant saw Whitaker reach into his pants pocket. Defendant explained that he tried to grab Whitaker and use a "lawnmower effect": holding him with the left hand while delivering closed fisted blows with the right hand. Defendant then saw Whitaker pull the knife, defendant grabbed him, and they both fell to the ground. Defendant grabbed at the knife during the struggle, but claimed he did not recall stabbing Whitaker. Defendant also explained his state of mind and his thought process during the struggle as "basically, just I'm going to get him before he gets me." Later in his testimony, defendant admitted that he stabbed Whitaker, thinking if Whitaker got the knife, he could do the same to defendant.

Asked on cross-examination to again describe the first incident, defendant testified that early that morning defendant had sold cocaine to Whitaker, who he knew to be a violent guy who attacked others for no reason. Later, some of defendant's neighbors were conducting a car wash fundraiser. Many people were there, including Selina, Amanda, Robert Lee, and other friends, who all saw what happened. Defendant stopped to buy a cupcake to support the fundraiser, and asked Whitaker for the $5 he owed defendant.

Defendant denied that it made him angry that Whitaker attacked him with a knife in front of his friends. Defendant explained: "I was a little upset, but I was more afraid of what just happened, like, of him really getting down and dirty with me." Defendant admitted that he told detectives that he was not going to let anyone "punk" him, but he denied that he thought Whitaker's attack made him look like a punk. Defendant intended to go home. Although he was familiar with Pomona and knew multiple ways to get home, defendant waited 20 minutes and then rode directly toward the area where Whitaker had gone. As he rode, defendant figured he could use his bicycle to create space and give himself the upper hand. Then, taking advantage of his position, he assaulted Whitaker first. He explained: "I was distraught. I was a little upset, mad, you know. I just wanted to kick his ass." When he saw Whitaker at the liquor store, he could have gone around him, but he felt "a burst of fear" and did not want Whitaker to try to assault him again, so he decided to get off his bicycle "and fuck him up." Defendant added, "That's all I wanted to do." Defendant explained that he tried to "feel out the situation," and ultimately concluded that because he wanted to kick his ass, the best move was to go on the offense, to fight.

When defendant saw Whitaker take the knife from his pocket, he thought Whitaker would try to stab him again, but he was not thinking that it was a situation of kill or be killed; he was trying his best to defend himself. Defendant also testified that he thought that Whitaker would kill him, but he denied trying to kill Whitaker. Defendant claimed that Whitaker suffered his facial wound because he fell face first holding the knife when they both fell to the ground. After they wrestled over the knife, defendant took it from Whitaker's hands while Whitaker was on top of defendant. Defendant also testified that the knife fell on the ground when they both fell, and that

defendant picked it up and swung it at Whitaker. Defendant stabbed Whitaker hard in the throat, believing that Whitaker would kill defendant if he got the knife, but still did not intend to kill Whitaker. Defendant was angry, scared, a little of both, and just wanted it to stop.

Defendant identified the knife as the same knife Whitaker used in the first incident. At the hospital defendant's stab wounds were treated with a Band-aid and a tetanus shot.

Rebuttal

Later that evening, defendant was interviewed by Detective Anthony Luna and his partner, Detective John Edson. A CD of the video and audio recording of the interview was played for the jury.

Defendant's account of his attack on Whitaker differed somewhat from the patrol car video and the officer's narration. Defendant told the detectives that he saw Whitaker in front of the liquor store with the other man, and was intending to avoid him, but Whitaker came toward him, so defendant jumped off his bicycle before Whitaker could grab him, and "ghost[ed]" the bicycle into him. Defendant denied that he had a knife, and claimed that he did not know that Whitaker had been stabbed or what had caused his injury. When Detective Luna noted that defendant could have made a U-turn to avoid Whitaker, defendant said, "I could of did a lot of things, man, but I, at the end of the day, . . . I'm not gonna run man. I'm not gonna run, and I -- I live that way."

Defendant told the detectives that he was on his way home when Whitaker approached, they started fighting, and during the fight his mind blanked out. Defendant denied being the aggressor, and suggested that the officers' dashboard camera would show that he was attacked, that Whitaker was on top of him, and that defendant was trying to defend himself. In the

process Whitaker was wounded on his neck. Defendant denied ever having a knife in his hand, at least not when the fight started, but thought that he took the knife while Whitaker was trying to stab him on the ground, then pushed it up, and it hit Whitaker in the throat.

Toward the end of the interview defendant repeatedly said he had blanked out. He said, "I blanked out trying to defend myself." When asked when he blanked out, defendant replied, "I blanked out when it happened. When we started fighting."

DISCUSSION

I. Assistance of counsel

Defendant contends that his defense counsel rendered ineffective assistance, in violation of his Sixth Amendment right to counsel.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) It is defendant's burden to demonstrate that trial counsel's "representation fell below an objective standard of reasonableness . . . under prevailing professional norms," and that prejudice resulted. (*Strickland*, *supra*, 466 U.S. at pp. 687-688; *People v. Lucas* (1995) 12 Cal.4th 415, 436.)

We presume that counsel's tactical decisions were reasonable, unless "'"the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."' [Citation.]" (*People v. Lucas*, *supra*, 12 Cal.4th at pp. 436-437.) "If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]" (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Defendant contends that counsel rendered deficient performance by failing to request a pinpoint instruction to the effect that provocation which is inadequate to reduce the charge from attempted murder to attempted manslaughter may suffice to negate premeditation and deliberation, thus allowing the jury to find the defendant guilty of attempted murder without a finding of premeditation and deliberation. The trial court instructed the jury on attempted murder with premeditation and deliberation with CALCRIM No. 601, which included the following: "A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate or premeditated." At defendant's request, the trial court also instructed with regard to the lesser offense of attempted voluntary manslaughter based on heat of passion, observing that there was "clear evidence of heat of passion, some type of uncontrollable rage or impulsive act."[3] CALCRIM No. 603, which in relevant part instructed the jury that to be guilty of attempted voluntary manslaughter, not only must defendant have acted rashly, he must have acted in response to provocation that "would have caused an ordinary person of average in disposition to act rashly, without due deliberations."

Defendant suggests that his trial counsel should have proposed a version of CALCRIM No. 522,[4] modified to extend the

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[3] The court also included an instruction on self-defense and imperfect self-defense, with CALCRIM Nos. 505, 3471, 3472, 3474, and 604.

[4] Unmodified, CALCRIM No. 522 reads: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime

reasoning of *People v. Thomas* (1945) 25 Cal.2d 880 (*Thomas*), to attempted murder instead of first and second degree murder. In *Thomas*, the California Supreme Court explained: "Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative [*sic*] or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation." (*Id.* at p. 903.)

Defendant suggests that appropriately modified, CALCRIM No. 522 could be read as follows: "Provocation may reduce an attempted premeditated murder to only attempted murder. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed an attempted murder but was provoked, consider the provocation in deciding whether the crime was premeditated attempted murder or simply attempted murder, even if the provocation is not sufficient to reduce the offense to attempted manslaughter."

Defendant offers no evidence of why his trial attorney did not request an instruction such as CALCRIM No. 522, modified as defendant suggests here, but defendant notes that in closing argument defense counsel said that "this is a crime that did not show willful and premeditation to sustain an attempted murder charge." Defendant argues this demonstrated a misunderstanding of the law, not a reasoned tactical decision not

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was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] . . . ."

to request such an instruction, because counsel was arguing, in essence that premeditation was an element of attempted murder.

We disagree. First, the quotation was taken from a part of closing argument in which counsel was advocating a heat of passion theory of voluntary manslaughter. In introducing that argument, counsel told the jury that defendant's actions did not "support willful and premeditated attempted murder," and then he recounted the evidence of provocation and defendant's reaction to it. Counsel finished this portion of his argument with the passage quoted by defendant, that "this is a crime that did not show willful and premeditation to sustain an attempted murder charge." In context it is apparent that the second statement was merely an inarticulate attempt to make the same point as in the first statement.

Second, the record, including counsel's ambiguous statement in argument, suggests that defense counsel made a strategic decision to focus his argument on persuading the jury to find defendant guilty of attempted voluntary manslaughter, rather than attempted murder. The language of CALCRIM No. 522 relates the evidence of provocation to the specific legal issue of premeditation and deliberation. (*People v. Rogers* (2006) 39 Cal.4th 826, 878 [referring to CALJIC No. 8.73, the equivalent of CALCRIM No. 522].) As the trial court read CALCRIM No. 601, the jury had the instruction needed to reject a finding of premeditation and deliberation without regard to provocation or the sufficiency of any provocation, by finding that defendant acted rashly, impulsively, or without careful consideration of the choice and its consequences. The modified instruction would have focused the jury's attention on provocation and attempted murder, rather than on attempted voluntary manslaughter without regard to provocation. Defense counsel's argument shows an avoidance of that focus, and gives weight to the

probability that defense counsel intentionally refrained from requesting a pinpoint instruction in the hope that he could persuade the jury to convict on the lesser offense, in lieu of the greater. Indeed, defendant argues at length that there was substantial evidence to support a heat of passion theory of voluntary manslaughter. Apparently, defense counsel considered this the better strategy, and that to emphasize the issue of the sufficiency of the provocation would detract from that strategy. It is not unusual for an attorney to gamble on a stronger theory of defense by seeking to omit nonmandatory instructions regarding weaker theories. (See *People v. Barton* (1995) 12 Cal.4th 186, 196-197.)

The fact that the tactic was unsuccessful does not demonstrate that counsel's performance was defective: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." (*Strickland*, *supra*, 466 U.S. at p. 689.) Thus, defendant has not met his burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Ibid.*)

Nor has defendant shown prejudice. Prejudice is shown by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) The jury was instructed that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate or premeditated." In finding premeditation and deliberation, the jury necessarily found that defendant had not acted rashly, impulsively, or without careful consideration.

Overwhelming evidence supported that finding, and came from defendant's own admissions that he was only a little upset, that he made a conscious decision to "kick [Whitaker's] ass" because he did not want to be known as a coward, and that as he rode toward Whitaker, he decided on a strategy to gain the upper hand. Defendant testified that after Whitaker attacked and stabbed him, he was "pretty upset" but more scared, and he waited about 20 minutes to get his bearings. Defendant then rode directly toward Whitaker because he did not want to be known as a coward in the neighborhood, or to say he ran away, and he "*made a decision* to try to kick his ass."[5] (Italics added.) Defendant denied being very angry, explaining, "I just wanted to kick his ass." Defendant described his feelings as he approached the men as "a *little* bit" scared, angry, and upset, but more trying to "feel out the situation," ultimately concluding that the best move was to go on the offense and fight. (Italics added.) He rode directly toward Whitaker, because he "*figured*" he could use his bicycle to create space and take the upper hand. Defendant admitted that he assaulted Whitaker first.

In his interview, defendant told Detective Luna that he rode directly toward Whitaker and his companion instead of turning, because, "at the end of the day, . . . I'm not gonna run man. I'm not gonna run, and I -- I live that way." Defendant denied in the police interview that he was the aggressor, and claimed he "blanked out" and had no memory of how Whitaker was stabbed. However, in his trial testimony, he admitted attacking Whitaker and gave a detailed description of the claimed struggle for the knife and stabbing Whitaker hard in the neck. Defendant did not describe blanking out, but explained his

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5 He did not say "snap" decision. See footnote 2, *ante*.

state of mind during the struggle as "basically, just I'm going to get him before he gets me."

The provocative behavior by Whitaker may have provided some evidence of defendant's motive for attacking Whitaker 20 minutes later, but in light of defendant's deliberate actions and conscious decision to assault Whitaker, to use his bicycle to gain an advantage, and to "kick his ass," it was more probative of a desire for revenge than an absence of premeditation. We discern no reasonable probability that instructing the jury to consider provocation would have resulted in a different result.

II. Self-representation

Defendant contends that the trial court erred in granting his postverdict motion for self-representation before the bifurcated court trial on the prior conviction. He claims the court's error violated his federal constitutional rights to counsel and to due process.

The Sixth Amendment to the United States Constitution grants criminal defendants the right to counsel in all proceedings that may substantially affect their rights, but this right may be waived if the waiver is knowing and intelligent. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*); *People v. Bradford* (1997) 15 Cal.4th 1229, 1363.) So long as the defendant's request is made knowingly and voluntarily, and asserted within a reasonable time prior to trial, the right of self-representation is absolute. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) When the motion is untimely, the issue is left to the trial court's discretion. (*People v. Windham* (1977) 19 Cal.3d 121, 127-129 (*Windham*).) In exercising its discretion to grant or deny an untimely *Faretta* motion, the court should consider such factors as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the

disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Windham*, at p. 128.)

Defendant notes that his *Faretta* motion was untimely, as it was made prior to the bifurcated trial and before the motion for new trial. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048; *People v. Givan* (1992) 4 Cal.App.4th 1107, 1114.) Defendant contends that the trial court was thus required to exercise its discretion by considering the *Windham* factors, but failed to do so under the mistaken belief that the court had no discretion to deny the motion. To support his contention, defendant points to the court's comment to defendant that he need not explain his reasons and that self-representation, "[e]ven at this late stage, [it's] an absolute right that the court cannot interfere in as long as you qualify to represent yourself."

Defendant cites *People v. Welch* (1999) 20 Cal.4th 701, 735, as support for his position that an appellate court will review the trial court's grant of self-representation for abuse of discretion; and he relies on *People v. Hernandez* (1985) 163 Cal.App.3d 645, 652-653, to argue that an abuse of discretion in such a case is prejudicial per se. Neither case held as defendant contends, as they involved the review of a *denial* of self-representation. Defendant relies on equally inapplicable authorities to argue that the failure to exercise discretion either to grant or deny self-representation is an abuse of discretion per se. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848 [failure to exercise sentencing discretion]; *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 [failure to divide pension equitably].) Finally, defendant relies on inapplicable authority to argue that the failure to exercise discretion in this instance "'constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal. [Citations.]'

[Citation.]" (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392 [denial of discovery motion].)

Contrary to defendant's assertions, when a defendant contends, as here, that the court *granted* an untimely *Faretta* motion, but failed to exercise its "discretion or to inquire into the 'specific factors underlying the request,' as required by [*Windham*, *supra*, 19 Cal.3d at p.128], . . . any such error is invited." (*People v. Williams* (2013) 56 Cal.4th 165, 193 (*Williams*).) A *Windham* inquiry is intended to ensure a "record sufficient to 'evaluate alleged abuses of discretion *when motions for self-representation are denied*.'" (*Williams*, *supra*, at p. 194, citing *Windham*, *supra*, 19 Cal.3d at p. 129.) "Here, appellate review is not required" as defendant is not challenging the denial of his *Faretta* motion; and, "'[d]efendant may not be heard to argue on appeal that his own motion should not have been granted. [¶] Defendant is correct that the court has discretion to deny [an untimely] motion for self-representation. [Citation.] However, "[t]he *Windham* factors primarily facilitate efficient administration of justice, not protection of defendant's rights." [Citation.] Because the court granted defendant's motion for self-representation at his own insistence, he may not now complain of any error in the court's failure to weigh the *Windham* factors. [Citations.]' [Citation.]" (*Williams*, at p. 194 quoting *People v. Clark* (1992) 3 Cal.4th 41, 109.)

Moreover, defendant has not shown a reasonable likelihood that the trial court would have denied his *Faretta* motion if it had expressly considered the *Windham* factors. (*Windham*, *supra*, 19 Cal.3d at p. 128.) The trial court was able to observe the quality of counsel's representation over the course of the nearly two-week trial. Later, in considering defendant's motion for new trial based upon alleged ineffective assistance of counsel, the court expressed the opinion that given the state of the evidence, no

attorney could have done anything different. Defendant's one motion at the outset of the trial to substitute counsel does not show a proclivity to substitute counsel, and as the motion came after the verdict, the court understood very well the length and stage of the proceedings. Indeed, the trial court discussed the late stage of the proceedings with defendant when warning him of the dangers and disadvantages of self-representation. In addition, the court granted defendant a continuance of one month to prepare his motion for new trial, thus demonstrating a consideration of the delay which might reasonably be expected to follow the granting of a motion to self represent.

Defendant complains that the court refused defendant's offer to recount his reasons for his *Faretta* request, and posits that a consideration of this *Windham* factor might have revealed his dissatisfaction with trial counsel. Then, defendant argues, the appropriate action for the court to take would have been to appoint new counsel to investigate, do research, and professionally draft a motion for new trial. Defendant contends that prejudice is demonstrated by his pro. per. motion for new trial based upon alleged ineffective assistance of counsel, in which defendant failed to spot trial counsel's error in failing to propose a modified version of CALCRIM No. 522, and in making the ambiguous statement in closing argument.

A trial court may not discharge appointed counsel on its own motion, without defendant's request or consent, and the court is limited in its authority to do so even for misconduct or incompetence. (*People v. Martinez* (2009) 47 Cal.4th 399, 421.) However, assuming that defendant's scenario would have played out, there appears no reasonable likelihood that newly appointed counsel would have succeeded with the same unmeritorious contentions regarding effective assistance of counsel which we have rejected here.

In sum, we do not review the invited error of granting a *Faretta* motion, and find no reasonable probability of a different result had the trial court denied defendant's *Faretta* motion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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