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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ABEL GOMEZ, Defendant and Appellant.	B225356 (Los Angeles County Super. Ct. No. BA357198)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Fisher, Judge. Affirmed.

California Appellate Project and Suzan E. Hier, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lawrence M. Daniels and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Jose Abel Gomez appeals from the judgment entered following his plea of no contest to four counts of committing a lewd act upon a child (Pen. Code, § 288, subds. (a), (c)(1)). Pursuant to a negotiated disposition, Gomez was sentenced to five years in prison. He contends the trial court violated his Sixth Amendment rights by denying his requests to represent himself. We affirm.

PROCEDURAL BACKGROUND

1. *Charges, plea, and appeal.*

An information filed on November 19, 2009, charged Gomez with one count of continuous sexual abuse of a child under the age of 14 years (§ 288.5, subd. (a)) and seven counts of committing a lewd act upon a child (§ 288, subds. (a), (c)(1)).[1] On May 28, 2010, pursuant to a plea agreement, Gomez pleaded no contest to four counts of committing a lewd act, and the remaining counts were dismissed. The trial court sentenced Gomez to five years in prison. It imposed a restitution fine, a suspended parole restitution fine, court security assessments, criminal conviction assessments, and a sex offender fine.

As discussed in more detail *post*, between July 2009 and May 28, 2010 Gomez made five *Marsden* requests[2] to replace his court appointed counsel and two purported *Faretta* requests[3] to represent himself, which were denied. After his plea and conviction he filed a notice of appeal contending, among other things, that the trial court erred by denying his *Faretta* motions. The trial court granted a certificate of probable cause.

2. *Marsden and Faretta requests below.*

On July 9, 2009, prior to the preliminary hearing, the trial court held a *Marsden* hearing after Gomez's counsel informed the court that Gomez so desired. Gomez

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1 Because the facts relating to the charged crimes are not relevant to the issues presented on appeal, we do not recite them here. (*People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.)

2 *People v. Marsden* (1970) 2 Cal.3d 118.

3 *Faretta v. California* (1975) 422 U.S. 806.

complained that his attorney had waived time for the preliminary hearing contrary to his wishes. He opined that his attorney was not acting "in the best interest for my case to help me." He also complained that he did not like the way in which counsel interacted with him. The trial court observed that it had found good cause for a continuance of the preliminary hearing and that counsel was working diligently on Gomez's case. After discussing the issues with Gomez and counsel, the trial court denied the motion.

On September 21, 2009, the trial court entertained a second *Marsden* motion. Among other things, Gomez complained that he did not believe counsel was acting in his best interests; the case was not moving forward at a suitable pace; and counsel had not provided him with transcripts of all court proceedings, to which he believed he was entitled. The trial court explained that transcripts were not available without justification, which Gomez had not provided. After discussing the matters raised with counsel, the court denied the motion. The court advised Gomez that he had the right to retain a private lawyer. Gomez said he would do so.

On October 7, 2010, the trial court heard a third *Marsden* motion. Gomez stated, "I wanted to replace my lawyer if I get a state-[ap]pointed lawyer. Since the first day we started we've been in disagreement with everything. We always have arguments over the video conferences every time we meet there's always something we're in disagreement with. And I know he's not in my best interest in my case . . . ." After discussing the issues raised with counsel and Gomez, the trial court opined that counsel's investigation of the case and strategy sounded "more than reasonable." The court observed that Gomez did not "have to like your lawyer but you should listen to him." It then denied the motion. Gomez then stated, "Thank you. Sir, could I say one thing? I want to go pro per. I want to relieve him of his duties." The court responded, "I understand that you're upset. This is the second time you've made this motion." Gomez interjected, "Not for pro per." The court continued, "And just because of the fact that you're upset is not reason enough to allow you to represent yourself. I'm finding that because of your emotional state and because of the fact that you don't like my ruling you're now

mak[ing] this motion, it's not good enough cause to represent yourself [and] your motion to represent yourself is denied."

Subsequent to the preliminary hearing, the court held another *Marsden* hearing on March 16, 2010. Gomez stated, "I tried to get rid of [counsel] twice already. I don't know if you're aware of that. I did two *Marsdens* twice." Gomez explained, "The reason why is that everything I ask him or we talk about, we argue [about] everything. We never come to an agreement. [¶] And there's a conflict of interest, Your Honor, between me and [counsel] and I no longer recognize him as my attorney." When the court queried what Gomez and counsel disagreed about, Gomez complained that at his last video conference with counsel, the video screen had gone blank in the middle of the conference. Gomez complained that counsel was "[p]laying games like that." Counsel explained that he had accidentally pushed the wrong button on the video system. Gomez stated, "If he doesn't take my life serious then I don't want this guy defending me. I no longer recognize him as my attorney." Gomez did not request self-representation. After addressing the issues raised with counsel and Gomez, the trial court denied the motion.

On May 28, 2010, day "zero of 12," the court heard another *Marsden* motion. Gomez gave the court a letter that apparently detailed his concerns, which the court sealed. The following discussion transpired:

"The Court: . . . Anything further verbally you'd like to say?

"[Gomez]: Yes. That if you don't grant me this I'm going into this case and it's ready to go to trial. I understand that. [¶] But I really would like somebody else to come in and evaluate my case, another lawyer that I know will have a better outlook than [existing counsel] has. And I know he can help me and maybe—

"The Court: Do you have another lawyer in mind that you're going to hire?

"[Gomez]: No, sir. I would like the court to appoint me one.

"The Court: I see.

"[Gomez]: If possible, Your Honor, please. He would look at it in a different way . . . that would be more helpful to me than what [counsel] has been. [¶] And he won't push me to be taking deals, you know, forcing me to taking deals and misleading

me . . . . [¶] And if you don't grant it, Your Honor, I want to exercise my *Faretta* rights and go pro per and take this case and this deal that I'm about to take on my own, not with [current] counsel. [¶] And I'd also like to ask the court that you—if you can please give me paperwork so I can appeal this case because I know I have grounds to appeal for due process being violated and also for my pro per status being violated in Judge Mavis's court as pro per the second time and it was denied. So that's another grounds. [¶] And I have other grounds that—that I know I can appeal this case, Your Honor, after I take the deal, sir.

"The Court: Okay.

"[Gomez]: So if you please could arrange that for me?"

The trial court denied the *Marsden* motion. It also denied Gomez's self-representation request "as untimely and not unequivocal."

The court and parties then turned to the question of a plea agreement. The prosecutor indicated that the "last and final offer" was five years, which had been substantially reduced from earlier offers. The court asked Gomez, "Do you want that or not?" Gomez replied affirmatively but indicated he wished "to appeal it." The court agreed to issue a certificate of probable cause. Gomez then pleaded no contest as detailed *ante.*

DISCUSSION

The trial court did not err by denying Gomez's self-representation requests.

A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution. (*People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Tena* (2007) 156 Cal.App.4th 598, 604.) The right to counsel may be waived by a criminal defendant who elects to represent himself at trial. (*Faretta v. California, supra*, 422 U.S. at pp. 807, 834-835; *People v. Doolin, supra*, at p. 453.) "The right of self-representation is absolute, but only if a request to do so is knowingly and voluntarily made and if asserted a reasonable time before trial begins. Otherwise, requests for self-representation are addressed to the trial court's sound discretion." (*People v. Doolin, supra*, at p. 453; *People v. Lynch* (2010) 50 Cal.4th 693, 721-723; *People v. Windham* (1977) 19 Cal.3d

121, 128-129; *People v. Tena, supra,* at p. 604.) "Moreover, whether timely or untimely, a request for self-representation must be unequivocal." (*People v. Doolin, supra,* at p. 453; *People v. Marshall* (1997) 15 Cal.4th 1, 22-23.) A motion made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied. (*People v. Marshall, supra,* at p. 23.) Courts "must indulge every reasonable inference against waiver of the right to counsel." (*Id*. at p. 20; *People v. Tena, supra,* at p. 604.)

On review, we independently examine the entire record to determine whether a defendant knowingly and intelligently invoked his or her right to self-representation. (*People v. Doolin, supra,* 45 Cal.4th at p. 453; *People v. Stanley* (2006) 39 Cal.4th 913, 932.) The erroneous denial of a timely, unequivocal *Faretta* motion made by a competent defendant is constitutional error and requires reversal per se. (*People v. Nicholson* (1994) 24 Cal.App.4th 584, 594.)

a. *Neither self-representation request was unequivocal.*

Both Gomez's *Faretta* requests were properly denied because, considering the totality of the circumstances, neither was unequivocal. " ' " '[T]he right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se.*' " ' " (*People v. Stanley, supra,* 39 Cal.4th at p. 932.) When determining whether a *Faretta* request is unequivocal, "courts must determine 'whether the defendant truly desires to represent himself or herself.' [Citation.] Thus, 'an insincere request or one made under the cloud of emotion may be denied.' [Citation.]" (*People v. Tena, supra,* 156 Cal.App.4th at p. 607; *People v. Marshall, supra,* 15 Cal.4th at pp. 21, 23.) "Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation[.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002.) "[T]he court's duty goes beyond determining that some of [the] defendant's words amount to a motion for self-representation. The court should evaluate all of a defendant's words and conduct to decide whether he or she truly wishes to give up the right to counsel and represent himself or herself and unequivocally has made that clear." (*People v. Marshall,*

supra, at pp. 25-26; *People v. Tena, supra,* at p. 607.) "Applying these principles, courts have concluded that under some circumstances, remarks facially resembling requests for self-representation were equivocal, insincere, or the transitory product of emotion." (*People v. Tena, supra,* at p. 607.)

People v. Scott (2001) 91 Cal.App.4th 1197 and *People v. Tena, supra,* 156 Cal.App.4th 598, are instructive. In *Scott,* the defendant made a *Marsden* motion before trial. When it was denied, he stated, " 'If that's the case, I hereby move the court to let me go pro se.' " (*People v. Scott, supra,* at pp. 1204-1205 & fn. 3.) When the trial court queried whether the defendant was sure he wished to represent himself, the defendant replied, " 'Yes. I do, judge. I don't want [appointed defense counsel] to represent me.' " (*Id.* at p. 1205.) He further stated that if he could not obtain a new appointed attorney, he would represent himself. He reiterated that he did not want his currently appointed attorney representing him. (*Id.* at p. 1205.) *Scott* concluded that these remarks, viewed in context, were too equivocal to constitute a *Faretta* request, and were made out of frustration at the denial of the *Marsden* motion. (*Id.* at p. 1205.)

In *People v. Tena, supra,* 156 Cal.App.4th 598, the defendant complained that his court-appointed attorney had failed to subpoena witnesses for the preliminary hearing, and asked to " 'go pro per.' " (*Id.* at p. 605.) The court denied his request without further explanation. Approximately one month later the trial court conducted a *Marsden* hearing, during which the defendant stated he wished to "fire" his court appointed attorney and hire a private attorney to represent him. (*Id.* at pp. 605-606.) When the trial court denied the *Marsden* motion and indicated the defendant could hire a private attorney only after the preliminary hearing transpired, the defendant became agitated. The defendant then requested self-representation, a request the court denied. (*Id.* at p. 606.) The defendant did not renew his request to proceed in propria persona thereafter. (*Ibid.*) *Tena* concluded the defendant's self-representation requests were equivocal. (*Id.* at pp. 607-609.) The defendant did not make a self-representation request at his next court appearance. (*Id.* at p. 609; see also *People v. Marshall, supra,* 15 Cal.4th at pp. 15-19, 25, 27 [*Faretta* request was not sincere where the defendant represented himself during

certain pretrial proceedings, then requested and received a court-appointed attorney, and subsequently sought self-representation; request was an emotional response to his attorney's conduct and an insincere ploy to disrupt the proceedings]; *People v. Danks* (2004) 32 Cal.4th 269, 295-297 [defendant's statements that he wanted to defend himself were "born primarily of frustration" about counsel's requests for continuances and a desire to avoid further psychiatric analysis].)

Much as in the foregoing cases, Gomez's requests came only upon the heels of the court's denial of his *Marsden* motions. (See *People v. Tena, supra,* 156 Cal.App.4th at p. 609 [where *Faretta* requests were made only after denial of *Marsden* motions, and remarks appeared to stem solely from defendant's frustrated desire for representation by private counsel, denial was proper].) His comments to the court readily revealed that his real goal was not self-representation, but appointment of a different attorney. His request, in both instances, was an emotional response made out of frustration at the denial of his *Marsden* requests. (See *People v. Tena, supra*, at p. 608 [defendant's requests "were impulsive reactions to his frustrated attempts to secure an attorney" who would conduct the defense as he wished]; *People v. Scott, supra,* 91 Cal.App.4th at p. 1206; *People v. Valdez* (2004) 32 Cal.4th 73, 98-99.) Gomez also indicated to the court at the September 21, 2009 hearing that he intended to hire private counsel, further suggesting his desire was not genuinely for self-representation but for a different attorney. His repeated switching between requests for self-representation and a new attorney indicates, on the facts here, that the *Faretta* requests were equivocal. (See *People v. Lewis and Oliver, supra,* 39 Cal.4th at p. 1002.) We recognize, of course, that the mere fact a defendant requests self-representation after a *Marsden* denial does not demonstrate the request is necessarily equivocal. (See *People v. Michaels* (2002) 28 Cal.4th 486, 524 ["Defendant confuses an 'equivocal' request with a 'conditional' request. There is nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself"].) Reviewing the record in its totality, however, we conclude Gomez's requests were manifestations of his frustration and anger, not genuine, unequivocal expressions of a desire for self-representation.

Contrary to Gomez's argument, the trial court's finding that he made his first *Faretta* request out of frustration and anger was not tantamount to imposition of a "good cause" requirement for the grant of the motion. It is clear that the court simply concluded, as a factual matter, that Gomez's request was not born of a sincere desire to represent himself, but was merely an impulsive comment made due to his anger and frustration about the court's denial of his *Marsden* motion. As noted, a court should draw every inference against waiver of the right to counsel, and a motion made out of passing anger or frustration is properly denied. (*People v. Stanley, supra,* 39 Cal.4th at p. 932; *People v. Marshall, supra,* 15 Cal.4th at pp. 22-23.)

b. *Gomez's second self-representation request was untimely and properly denied; any error was harmless.*

In addition, Gomez's second *Faretta* request was untimely. There is no bright line rule for determining when a motion is timely: "[T]he high court has never delineated when a motion may be denied as untimely. Nor has [the California Supreme Court] fixed any definitive time before trial at which a motion for self-representation is considered untimely, or articulated factors a trial court may consider in determining whether a self-representation motion was filed a reasonable time before trial." (*People v. Lynch, supra,* 50 Cal.4th at p. 722.) It has repeatedly been held that *Faretta* motions made on the eve of trial are untimely. (*People v Lynch, supra,* at pp. 722-723, and authorities cited therein.) Conversely, motions made months before trial have been considered timely. (*Id.* at p. 723.) "[O]utside these two extreme time periods, pertinent considerations may extend beyond a mere counting of the days between the motion and the scheduled trial date." (*Ibid*.) Thus, "timeliness 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.' " (*People v. Lynch, supra,* at p. 724.)

Here, trial was scheduled to begin within the 12 days following Gomez's second *Faretta* request. The parties agreed to return to court the following week on day "four or six of [ten]." The prosecutor had advised the court that the People were ready to proceed; defense counsel indicated he had subpoenaed witnesses. While the question is close, we conclude the trial court did not err by concluding Gomez's request was untimely. (See *People v. Clark* (1992) 3 Cal.4th 41, 99-100 [*Faretta* request untimely where the case had been continued day-to-day in the expectation motions would be concluded and jury selection would begin]; *People v. Burton* (1989) 48 Cal.3d 843, 852-853 [*Faretta* motion was untimely where it was made after the case had been called for trial, counsel had answered ready, and case had been transferred for pretrial motions and jury selection].)

A defendant has the burden of justifying an untimely motion, which is addressed to the sound discretion of the trial court. (*People v. Marshall* (1996*)* 13 Cal.4th 799, 827; *People v. Horton* (1995) 11 Cal.4th 1068, 1110; *People v. Lynch, supra,* 50 Cal.4th at p. 722; *People v. Windham, supra,* 19 Cal.3d at pp. 127-128.) In assessing an untimely self-representation motion, the trial court considers such factors as the quality of counsel's representation, 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 the motion. (*People v. Lynch, supra,* at p. 722, fn. 10; *People v. Windham, supra,* at p. 128.) Here the *Windham* factors, although not expressly discussed by the trial court, favored denial of the motion. (See *People v. Windham, supra,* at p. 129, fn. 6 [there is no requirement that a trial court must, in all cases, state the reasons underlying its denial of a self-representation motion]; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354-1355; *People v. Scott, supra,* 91 Cal.App.4th at p. 1206 [although trial court may not have explicitly considered each of the *Windham* factors, the record was sufficient to show an implicit consideration of the relevant factors]; *People v. Perez* (1992) 4 Cal.App.4th 893, 904.)

Gomez clearly had a proclivity to attempt to substitute counsel, as demonstrated by his repeated *Marsden* motions. (See *People v. Scott, supra,* 91 Cal.App.4th at p. 1206.) His complaints were either petty or involved trial tactics, an insufficient basis upon which to grant an untimely *Faretta* request. (*Ibid.*) The court's comments during the five *Marsden* motions indicated defense counsel was adequately representing Gomez. Contrary to Gomez's argument that he was "stuck with an attorney who was not 'representing' him as he desired," the record suggests counsel was doing a superior job. Further, the second *Faretta* motion was made during the period immediately preceding trial. Although Gomez did not move for a continuance, the trial was expected to involve expert testimony, medical evidence, and DNA evidence, among other things. Had the case proceeded to trial, it seems inevitable that Gomez would have required more time to prepare, resulting in a delay of trial. If Gomez intended to accept the plea offer, the reasons for his *Faretta* request were not compelling. Gomez offered no reason for his request except that he did not agree with his attorney. He indicated he intended to accept the People's plea offer, the same action he would have taken if represented by counsel. Under these circumstances, we cannot say the denial of the second *Faretta* request was an abuse of discretion.

Additionally, the denial of an *untimely Faretta* request is not automatically reversible, but is reviewed for harmless error under the *Watson* standard. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, Gomez informed the trial court that he intended to accept the People's plea offer "on [his] own." Given that he accepted the plea offer while represented by counsel—the same action he stated he wished to take if representing himself—the record reveals no possible prejudice flowing from the trial court's denial of the May 28, 2010 *Faretta* request.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.