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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. SHAWN ALLAN FLETCHER, Defendant and Appellant.	B280914 Los Angeles County Super. Ct. No. BA446196

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Judgment conditionally reversed; remanded with directions.

Mona D. Miller, 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, Assistant Attorney General, Margaret E. Maxwell and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Shawn Allan Fletcher appeals from a conviction on one count of attempted robbery (Pen. Code, §§ 211, 664).[1] While a Metro bus was stopped at a bus stop, defendant removed a bicycle from the rack on the front of the bus and rode away on it while being chased, and ultimately caught, by the bicycle's owner. At trial, defendant claimed he purchased the bicycle for $74 from an unknown man who got off the bus and offered to sell the bicycle to the people standing at and around the bus stop.

Defendant contends the court made numerous errors during the trial which were individually and cumulatively prejudicial. First, defendant contends the court erred in denying his request to represent himself after the conclusion of the defense case.[2] We agree the court erred in denying the request solely because it was untimely. And because the court did not undertake the review prescribed by the Supreme Court in *People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*), we are unable to assess whether the error was prejudicial. We therefore conditionally reverse the judgment and remand the matter to allow the trial court to conduct the proper inquiry and reconsider its ruling on defendant's *Faretta* motion.

With respect to defendant's other arguments, we are not persuaded. Although defendant contends the court erroneously excluded his testimony regarding statements he purportedly made at the scene asserting ownership over the bicycle, those

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[1] All undesignated statutory references are to the Penal Code.

[2] In *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the United States Supreme Court held the Sixth Amendment guarantees a criminal defendant the right to self-representation.

statements were properly excluded as hearsay. We also reject defendant's contention that the court erred in admitting an audio recording and a transcript of a 911 call made by an unidentified bystander who was witnessing the confrontation between defendant and the bicycle's owner. The caller's statements were admissible under an exception to the hearsay rule. Finally, we see no evidence of prosecutorial misconduct during closing arguments.

FACTUAL BACKGROUND

On the afternoon of April 26, 2016, defendant was standing near the intersection of Fifth Street and San Pedro Street in downtown Los Angeles. At around 5:30 p.m., a bus pulled up to the stop there, where it stayed for a couple of minutes. A bicycle was on the rack on the front of the bus.

While the bus was stopped, defendant took the bicycle from the rack and rode it away. When the owner of the bicycle (the victim) saw this, he got off the bus and ran after defendant, yelling for help (in Spanish) while doing so. When defendant stopped riding and got off the bicycle to adjust the seat, the victim caught up to him. The victim tried to take his bicycle back, saying "my bike, my bike," but defendant resisted. Defendant was yelling but the victim did not understand what defendant was saying.[3] As the two men struggled over the bicycle, defendant began hitting the victim and then kicked him in the face. At that point, a man who worked at a food catering business nearby came out to the street, took the bicycle into his business, and told the victim to come inside as well.

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[3] Defendant does not speak Spanish and the victim does not speak English.

A witness who saw the altercation from a nearby car testified at trial and recalled that he saw a black man[4] chasing the victim and flexing his muscles as if he was trying to intimidate the victim. An unidentified bystander called 911 to report the incident and stated a black man was "beating up" an Asian man and robbing him of his bicycle.

Two police officers arrived at the scene. The officers apprehended defendant after onlookers identified him as the potential suspect and detained him pending a robbery investigation. Officers also spoke with the victim, who was frightened, and observed his face was swollen and marked with a shoe print.

Defendant testified on his own behalf and offered a different version of the events. According to defendant, a black man in a white hoodie got off the bus when it stopped at the corner where he was standing and asked if anyone wanted to buy a bicycle. Defendant liked the look of the bicycle he saw on the front of the bus and bought the bicycle for $74 from the man. Defendant removed the bicycle from the bus, hopped on, and slowly rode away through traffic. After a short distance, he stopped, straddled the bicycle, and tried to adjust the bicycle's seat. The victim ran up to the bicycle, grabbed the rear tire, and said "my bike, my bike." Defendant then let go of the bicycle, which caused the victim, who was pulling on the rear tire, to fall. The men then grabbed each other and tussled in the street. Defendant explained that throughout the confrontation, he was trying to figure out why the victim was trying to take the bicycle. When a man from a local food catering business came over to the

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[4] Defendant is black.

two men, defendant walked away to try to get his money back from the man who had sold him the bicycle. Defendant claimed he told the police officers at the scene that he purchased the bicycle for $74, but the officer who wrote the report did not recall that defendant made such a statement. Further, the officer indicated if defendant had made such a statement, it would have been in her report—and the report made no mention of it.

PROCEDURAL BACKGROUND

By amended information, defendant was charged with one count of attempted second-degree robbery. (§§ 211, 664.) The information alleged defendant suffered a prior robbery conviction (§ 211), which was alleged as a strike prior (§ 1170.12) and a serious felony prior (§ 667, subd. (d)). The information further alleged defendant suffered two prior convictions for possession of a controlled substance (Health & Saf. Code, § 11350), two prior convictions for sale of a controlled substance (Health & Saf. Code, § 11352), and one prior conviction for carrying a concealed dirk or dagger under former section 12020 (repealed by Stats. 2010, ch. 711, § 4 (S.B. 1080)), all of which were alleged as prison priors (§ 667.5, subd. (b)). Defendant entered a plea of not guilty and the cause proceeded to a jury trial.

The jury found defendant guilty of attempted second-degree robbery (§§ 211, 664). Defendant admitted his 1992 prior strike conviction under section 211. Defendant further admitted to four of the prison priors. Defendant's motion to dismiss the strike prior was denied.

The trial court sentenced defendant to the mid-term of two years, doubled to four years due to his prior strike, plus five years in accordance with section 667, subdivision (a)(1), for a total of nine years in state prison. The court did not impose a one year

term for each of the prison priors; the sentence for the priors was stayed. The court imposed various fines and fees and awarded presentence custody credits. Defendant timely appeals.

DISCUSSION

1. The trial court erred in denying defendant's motion to represent himself.

Defendant contends the trial court violated his Sixth Amendment right to self-representation by summarily denying his *Faretta* motion as untimely, without evaluating the factors required under *Windham*. We agree.

1.1. The court erred in denying defendant's mid-trial request to represent himself solely because it was untimely.

A right to self-representation is implied in the Sixth Amendment to the United States Constitution. (*Faretta, supra,* 422 U.S. at p. 819.) "[I]n order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*Windham, supra,* 19 Cal.3d at pp. 127–128, fn. omitted.) This right is absolute and unconditional if the motion is timely made and if the defendant is competent to waive counsel. (*People v. Valdez* (2004) 32 Cal.4th 73, 97–98 (*Valdez*).)

A defendant's right to self-representation, however, is absolute only if he or she invokes that constitutional right a reasonable time prior to the start of trial. (*Windham, supra,* 19 Cal.3d at pp. 127–128; accord, *People v. Lynch* (2010) 50 Cal.4th 693, 721.) Otherwise, requests for self-representation are

addressed to the trial court's sound discretion. (*Windham,* at pp. 127–129; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353.)

Here, the court correctly determined that defendant's *Faretta* motion was untimely, as it was made during trial. As a result, the court had discretion in deciding whether or not to grant the motion. But given the importance of the right to self-representation, a trial court may not simply deny an untimely motion for self-representation. Rather, "trial courts confronted with nonconstitutionally based motions for self-representation [must] inquire *sua sponte* into the reasons behind the request" (*Windham, supra,* 19 Cal.3d at p. 129, fn. 6) and exercise their sound discretion after considering several factors, including "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." (*Id.* at p. 128; see *People v. Wilkins* (1990) 225 Cal.App.3d 299, 303 [grant or denial of request made on the eve of trial "is within the sound discretion of the trial court after it has inquired sua sponte into the specific factors underlying the request"].) The court's discretion should be exercised whenever it is necessary "to prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice." (*People v. Burton* (1989) 48 Cal.3d 843, 852.)

Here, defendant argues reversal is required because the court failed to inquire into the reasons behind his request to represent himself. But a trial court's failure to make an explicit inquiry into the *Windham* factors is not necessarily fatal. The Supreme Court in *Windham* "decline[d] to mandate a rule that a

trial court must, in all cases, state the reasons underlying a decision to deny a motion for self-representation which is based on nonconstitutional grounds." (*Windham, supra,* 19 Cal.3d at p. 129, fn. 6.) A number of courts have therefore affirmed the court's exercise of discretion in denying an untimely motion if substantial evidence in the record supports the inference the court had those factors in mind when it ruled. (See, e.g., *People v. Scott* (2001) 91 Cal.App.4th 1197, 1206 (*Scott*).) The Supreme Court has endorsed this approach and stated the issue slightly differently. In *People v. Dent* (2003) 30 Cal.4th 213, the trial court denied a request for self-representation solely because it was a death penalty case, an improper reason, and without a sua sponte inquiry into the reasons for the defendant's request. The Supreme Court stated, "Even though the trial court denied the request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling." (*Id.* at p. 218.)

For example, in *People v. Perez* (1992) 4 Cal.App.4th 893 (*Perez*), the court denied an untimely *Faretta* motion without considering the *Windham* factors. The court of appeal, upon review of the record, concluded:

> "[T]here were sufficient reasons on the record for the court to exercise its discretion to deny the request. As to the first *Windham* factor, the court was aware of the quality of counsel's representation based upon Judge Revak's denial of Perez's *Marsden*[5] motion the day before the trial. The court was also presumably

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

> aware of Perez's 'prior proclivity to substitute counsel' given his three previous *Marsden* motions. Additionally, though a jury had not yet been impaneled, trial was about to commence. Thus, the court's granting Perez's motion would have required a continuance (see fn. 10), thereby causing substantial disruption and delay in the proceedings. Finally, as the court noted, Perez's failure to assert the motion the day before when the court denied his *Marsden* motion justified the court's implied finding Perez's request was merely a device to disrupt the proceedings and to continue the trial. (See fn. 10.) Such circumstances establish sufficient reason for the court to exercise its discretion to deny Perez's untimely motion."

(*Perez,* at pp. 904–905, fns. omitted.)

Here, like *Perez*, the trial court made no sua sponte inquiry into defendant's reasons for wanting to represent himself. After defendant concluded his testimony, the court asked defense counsel whether the defense wanted to present any additional witnesses. Counsel declined, at which point the court inquired whether the prosecution would be presenting any rebuttal witnesses. The prosecutor indicated she would do so. At that point, the following exchange took place in front of the jury:

> "Defendant: Your Honor. Excuse me.
>
> "Court: Please confer with your attorney.
>
> "Defendant: I don't think it's necessary. At this point I'd like to go pro per.
>
> "Court: That is an untimely request. That request is denied."

The court immediately moved on to other business relating to the prosecution's rebuttal witness, giving defendant no opportunity to explain why he wished to represent himself.

The court plainly erred by failing to make the inquiry required under *Windham*. We examine the record as a whole to determine if the court's denial of defendant's *Faretta* motion is supportable on some other basis.

The record contains some evidence regarding the reasons defendant wished to represent himself. At the sentencing hearing, defendant again asked to represent himself and this time the court conducted the proper *Windham* inquiry. As pertinent here, defendant explained he did not think his attorney had enough time to handle his case, "[a]nd he showed in the past where there has been a conflict as to the witnesses being brought, as to the defense of my case and especially the mental health records and psych evaluation that was never done on either of those issues, and I'd like to have, especially the video footage that could have been obtained, which is exculpatory." With respect to the medical records, psychological evaluation, and video footage referenced by defendant, the record indicates those materials either did not exist or were not in the possession of defendant or his counsel at the time of the sentencing hearing. Accordingly, some delay—perhaps a significant delay—in the proceedings would have been caused by allowing defendant to obtain that evidence and present it to the jury. It is well established that a court does not abuse its discretion by denying a midtrial *Faretta* request because it will delay ongoing trial proceedings. (*Valdez*, *supra*, 32 Cal.4th at p. 103; *People v. Clark* (1992) 3 Cal.4th 41, 110.)

The conflict between defendant and his counsel over the selection of witnesses, however, presents a more difficult issue.[6] Several cases have indicated that it would be an abuse of discretion for a court to deny an untimely *Faretta* motion when the *Windham* factors are not present—and particularly when it is clear that granting the defendant's request to represent himself would not result in any delay in the proceedings. (See, e.g., *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 (*Rogers*) [" 'where self-representation is requested for a legitimate reason, where there is no request for a continuance and where there is no reason to believe there would be any delay or disruption, the trial court's denial of a *Faretta* motion is an abuse of discretion' "]; accord, *People v. Nicholson* (1994) 24 Cal.App.4th 584, 593 (*Nicholson*); *People v. Herrera* (1980) 104 Cal.App.3d 167 (*Herrera*); *People v. Tyner* (1977) 76 Cal.App.3d 352, 355 (*Tyner*).) Disruption should not be presumed from the mere fact that a defendant will be representing himself. (See *Moon v. Superior Court* (2005) 134 Cal.App.4th 1521, 1530.)

Defendant contends he wanted to present additional witnesses at trial and was prepared to proceed without delay. The limited record before us supports his position. Just a few minutes before defendant asked to represent himself, the

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[6] The People suggest a disagreement over trial tactics is an insufficient reason to grant an untimely *Faretta* request, citing dicta in *Scott*, *supra*, 91 Cal.App.4th at p. 1206. It appears, however, that the court conflated the standards applicable to *Marsden* motions (where a conflict over trial tactics is insufficient to justify a request for new counsel) and *Faretta* motions (where the focus is on the defendant's right to represent himself and, in the case of an untimely motion, the orderly administration of justice).

following exchange took place between the prosecutor (P), defense counsel (D), and the court (Ct) outside the presence of the jury:

> "P. Your honor, I would like to raise something outside of the presence of the jury since we are here. [¶] I noticed when I was outside the court that [defense counsel] subpoenaed a number of police officers, two of which are the individuals who provided translation for [the victim] when he spoke with the officers. [¶] My understanding is that he plans to call them to impeach [the victim]'s testimony. Instead of waiting for the jury to come in, I wanted to preemptively object to that as improper impeachment. [¶] At no point during [defense counsel]'s cross-examination of [the victim] did he inquire about any prior statements made to the police officers when he spoke to them and when they interviewed him about the incident that had occurred, so there have been no inconsistent statements.
>
> "Ct. I have no idea what [defense counsel]'s reasons for calling these officers are. I appreciate you outlining your concerns to the court.
>
> "D. Your honor, just briefly, on the court's indicated at this point, on [defendant]'s behalf I would ask if the court would consider allowing me to recall [the victim] as a witness.
>
> "Ct. If he's here, you may."

In short, it appears several witnesses were present at the courthouse and were available to be called by the defense. And

defendant asserts "[d]efense counsel's failure to call them to the stand was one reason [defendant] wanted to represent himself … ." The timing of defendant's *Faretta* request—immediately after defense counsel indicated he would not be presenting any further witnesses—supports defendant's position. Defendant also urges that "[he] knew the facts of this case better than his counsel" and "could have questioned those officers without delay."[7]

Additionally, the record does not indicate that any of the other *Windham* factors would have supported a denial of defendant's motion. Defendant had no history of disrupting or attempting to delay the proceedings and had not previously attempted to obtain new appointed counsel. And we see no indication in the record that defendant's request to represent himself was based on an improper motivation, such as causing a delay in the proceedings.

In light of this evidence—particularly the fact that witnesses were in the courthouse and under subpoena by the defense—we cannot conclude that the record as a whole supports the court's denial of the *Faretta* motion.

1.2. On this record, we cannot conclude the error was harmless.

"The erroneous denial of an untimely *Faretta* motion is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836." (*Rogers*, *supra*, (1995) 37 Cal.App.4th at p.

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[7] Of course, because defendant did not have the opportunity to make an offer of proof or otherwise explain his plan, we cannot know exactly what would have transpired if defendant had been given the opportunity to take over his defense.

1058; *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050–1051 (*Rivers*).) Thus, we are required to determine whether it is reasonably probable defendant would have obtained a better result—in this case, an acquittal or a hung jury—in the absence of the error. This is an impossible task, given the limited record.

In some cases, where no *Windham* inquiry is made, the courts of appeal have been able to glean sufficient facts from the record as a whole to assess the potential prejudice of an erroneous *Faretta* ruling. In *Rogers,* for example, the trial court improperly denied the defendant's untimely *Faretta* motion. Through defense counsel's representation, the defendant was acquitted on two of the charged counts and convicted of a lesser included offense on the third count. (*Rogers, supra*, 37 Cal.App.4th at p. 1058.) The court of appeal concluded the error was harmless because there was strong evidence of the defendant's guilt, including his admission of the acts at issue, and there was no possibility the defendant could have obtained a better result if had represented himself. (*Ibid.*) Similarly, in *Rivers,* the court of appeal concluded the court's erroneous denial of the defendant's *Faretta* motion, made at the end of the trial, was harmless in part because the court sentenced the defendant to the applicable mid-term sentence even though sufficient evidence would have justified the imposition of the upper term. (*Rivers*, *supra*, 20 Cal.App.4th at p. 1052.) On the facts of the case, the lower term was not a possibility. (*Ibid.*) On that basis, the court concluded the defendant could not have achieved a better result if he had represented himself. (*Id.* at pp. 1052–1053.)

Unlike *Rogers* and *Rivers*, we cannot measure the impact of the court's error here. To determine whether the court's error was

harmless, we must consider whether it is reasonably probable that at least one juror would have had a reasonable doubt about defendant's guilt if he or she heard the additional evidence defendant would have presented.[8] But as a result of the court's failure to address the *Windham* factors, defendant had no opportunity to make an offer of proof concerning the evidence he would have presented if he had been allowed to represent himself. Because we do not have the benefit of the record the Supreme Court envisioned in *Windham*, it would be entirely speculative for us draw any conclusions about the impact of whatever testimony or other evidence defendant would have presented had he been allowed to do so. (See also *People v. Hernandez* (1985) 163 Cal.App.3d 645, 651 (*Hernandez*) ["Thus it is apparent from the record the trial court failed to conduct the type of inquiry mandated by *Windham*. Such a failure made it impossible for this court to adequately review the appropriateness of the trial court's denial of the appellant's motion"]; *Herrera, supra*, 104 Cal.App.3d at p. 174 ["Without such a record we can only speculate that a consideration of [the *Windham*] factors may well have demonstrated to the trial judge reasons to exercise his discretion to allow Herrera to proceed in propria persona"].)

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[8] Defendant suggests he could have elicited testimony from one of the police officers to the effect that defendant stated at the scene that he had just purchased the bicycle. While such a statement could be inadmissible hearsay, on this record we cannot determine if the statement would have been admissible under an exception to the hearsay rule, or whether the prosecutor would have objected to defendant's questions to the police officers.

We reject the People's contention that any error in defendant's *Faretta* motion was necessarily harmless. First, the People assert defendant would only have been able to represent himself during cross-examination of the People's rebuttal witness and closing argument which could hardly have made a difference in the outcome of the case. This argument ignores the fact that the court had the discretion to allow defendant to reopen his case. (§ 1094; *People v. Marshall* (1996) 13 Cal.4th 799, 836.) Second, the People argue defendant "offers nothing concrete as to how he would have approached his defense" and fails to explain "what any potential witness(es) would have said." But as we have already indicated, the lack of evidence on that issue is the result of the court's failure to inquire as required under *Windham*.[9] Third, the People urge us to apply the oft-cited mantra that " 'a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel.' " That may frequently be true as a practical matter. But if we used that platitude to find the court's error harmless in this case, then the denial of an untimely *Faretta* motion would never be prejudicial. Plainly, that is not the rule. Finally, the People urge that "while [defendant] was unable to represent himself at the point he initially desired, he did represent himself for sentencing. … Accordingly, there is no reasonable likelihood that

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[9] Essentially, the People assert defendant failed to establish prejudicial error. Were we to agree, we would adopt a rule that effectively renders unreviewable the denial of a *Faretta* request unaccompanied by consideration of the *Windham* factors as it will often be the case that a defendant cannot establish prejudicial error when the court fails to conduct the inquiry that would provide a sufficient basis to demonstrate prejudice.

[defendant] would have received a better result at trial had his *Faretta* request been granted." Because it appears defendant wanted to present additional evidence to the jury, the fact that he represented himself at sentencing is irrelevant to our analysis.

1.3. On remand, the court should reconsider defendant's request to represent himself.

We are faced with a difficult choice regarding the appropriate remedy in this case. Relatively few published decisions address this issue. And the present case presents a very specific situation in which a defendant who wished to represent himself had witnesses in the courthouse available to testify immediately and he was prepared to proceed without delay.

In *Nicholson,* the court concluded, under circumstances very similar to the present case, that a reversal and remand for a new trial was required because the court was unable, on the record before it, to conclude the erroneous denial of the *Faretta* motions was harmless. (*Nicholson*, *supra*, 24 Cal.App.4th at p. 595.) The court acknowledged the impact of its choice of remedy: "This reversal and retrial (and the expense to the taxpayers) could probably have been avoided" had the trial court simply conducted the *Windham* inquiry. (*Id*. at p. 594.) But it concluded, "[l]ike it or not, *Faretta* is the law of the land and when a trial court is unable to persuade a defendant to accept representation by a lawyer, the defendant is constitutionally entitled to represent himself." (*Ibid*.) The problem with the court's analysis is that when a defendant makes an untimely *Faretta* request, the constitutional guarantee of self-representation no longer exists. Instead, at that point, the right of self-representation is subject to the court's discretion. (*Windham, supra*, 19 Cal.3d at p. 128.) Further, in *Nicholson*, the

court indicated it "found only two reported decisions in which trial courts have denied *Faretta* motions when the defendants were ready to proceed without a continuance, [citations]. In both cases, the denials resulted in reversals." (*Nicholson*, at p. 593.) But in the two cited cases, *Herrera* and *Tyner,* the courts concluded the *Faretta* request was *timely*—and therefore the error was structural and reversible per se. We are therefore unpersuaded, based on the reasoning used in *Nicholson*, that a reversal and remand for a new trial is the necessary and appropriate remedy where a trial court's failure to conduct an inquiry under *Windham* precludes the court of appeal from determining whether that error was harmless.

We also note that the Supreme Court has said " '[t]he *Windham* factors primarily facilitate efficient administration of justice, not protection of defendant's rights.' [Citation.]" (*People v. Williams* (2013) 56 Cal.4th 165, 193–194, abrogated on another point by *People v. Elizalde* (2015) 61 Cal.4th 523; see also *Windham, supra*, 19 Cal.3d at p. 129 [noting that requiring a defendant to request self-representation a "reasonable time" prior to the commencement of trial reflects the view that "a defendant should not be allowed to misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice"].) The *Windham* factors themselves focus on the sort of evidence that would reveal whether a defendant is manipulating the system by seeking to delay the proceedings. Given that one stated purpose of the *Windham* inquiry is to protect the limited resources of the courts (as well as jurors and taxpayers), it seems a perverse result to treat the failure to make that inquiry as an error that requires a new trial in every case.

We are aware of one court that took a different approach under circumstances similar to the present case. In *Hernandez*, the defendant requested to represent himself on the first day of trial. The court made no inquiry as required under *Windham* and refused to allow the defendant to explain the reasons underlying his request. (*Hernandez*, *supra*, 163 Cal.App.3d at pp. 648–649.) The court of appeal observed, as we have in the present case, that the failure to conduct the *Windham* inquiry made it impossible to review the lower court's ruling. (*Id*. at p. 651.) The court also recognized it was "in essence forced to speculate about the factors" underlying the request for self-representation—which was exactly the situation *Windham* sought to avoid. (*Ibid*.) But rather than reversing the judgment, the court of appeal appointed a judge of the Superior Court to act as a referee and conduct an inquiry into the factors underlying the defendant's request to represent himself. (*Id*. at p. 653.) The court of appeal then used that information to assess whether the error was prejudicial. Notably, although *Hernandez* has not been expressly overruled, we have found no other published decision in which a court of appeal has appointed a referee to develop an adequate record in these circumstances.

Nevertheless, we see significant value in conducting a *Windham* inquiry retrospectively.[10] Avoiding an automatic retrial

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[10] We envision a procedure similar to a retrospective *Pitchess* hearing. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) Where an appellate court concludes the denial of a defendant's request for a *Pitchess* hearing was erroneous, the court will conditionally reverse the judgment and remand to the trial court. On remand: (1) the trial court must conduct an in camera inspection of the requested personnel records for relevance; (2) if the trial court's inspection on remand reveals no relevant information, the trial court must reinstate the

is plainly in the interest of judicial economy. And a criminal defendant's rights will be protected, inasmuch as he or she would have an opportunity to explain the request for self-representation.

We will therefore conditionally reverse the judgment and remand this matter to the trial court with instructions for the court to conduct a hearing on the *Faretta* motion and to consider the *Windham* factors based as closely as possible on the circumstances existing at the time of defendant's original motion. Defendant should be allowed to make an offer of proof regarding the evidence and testimony he was prepared to present at the time of his prior motion.[11] If the court determines, on the basis of defendant's explanation and after consideration of the *Windham* factors, it should have allowed defendant to represent himself, the court should order a new trial. But if the court finds it would have denied the *Faretta* request in any event, it should reinstate the judgment.

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judgment of conviction; and (3) if the inspection reveals relevant information, the trial court must order disclosure to defendant, allow defendant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. (See, e.g., *People v. Johnson* (2004) 118 Cal.App.4th 292, 296.)

[11] As we explained *ante*, it would not have been an abuse of discretion for the court to deny defendant's *Faretta* request if defendant had requested a continuance. Therefore, the defendant may only proffer, and the court should only consider, evidence or testimony that was immediately available to defendant at the time he made his request, i.e., documents or other evidence in his possession, and testimony from the witnesses under subpoena by the defense and who were present in the courthouse.

2. The court did not abuse its discretion in excluding defendant's proffered hearsay statements.

Defendant contends the court erred in sustaining the prosecution's hearsay objections to evidence proffered by the defense. We review the court's rulings for an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007–1008.)

Evidence Code section 1200, subdivision (a), defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b); see, e.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 674.)

Defendant cites numerous instances in the record in which the court sustained hearsay objections during his testimony. Mainly, defendant wanted to attest to the statements he made during the confrontation with the victim to the effect that he believed the bicycle was his because he purchased it from someone else moments earlier. Defendant testified that during his encounter with the victim, the victim was saying "my bike, my bike," and defendant responded, "no, it's not your bike." The prosecutor's objection on hearsay grounds was sustained. The prosecutor also objected to defendant's testimony that he told the victim "[H]old on, man. I bought this bicycle. What are you talking about?" which testimony was stricken. On multiple other occasions, defendant attempted to tell the jury that he told the victim he bought the bike, but the prosecutor's objections on hearsay grounds were consistently sustained. The court sustained similar objections when defendant attempted to testify that he told Officer Bolor he bought the bicycle.

Defendant asserts these statements are not hearsay because they were not offered for their truth. More particularly, defendant argues "[t]he issue *was* not whether in fact [defendant] had bought the bicycle, but whether he reasonably could have believed that he bought the bicycle and was its rightful owner." Defendant attempts, and fails, to walk an impossibly thin line between the truth of the statement and his state of mind. We agree that the primary issue the jury needed to decide was whether defendant knew the bicycle belonged to someone else when he took it. (CALCRIM No. 1600 [requiring the People to prove "[t]he defendant took property that was not his own"].) And the defense's theory of the case rested entirely on that point. Defendant claimed he didn't have the intent to steal the bicycle; rather, defendant thought he owned the bicycle because he bought it from someone else. Therefore, his statements to the victim asserting ownership (e.g., "I bought this bicycle") are plainly offered for their truth, as defendant would have no reasonable basis to assert he owned the bicycle unless it was true that he purchased it from someone else. And his bare statements that he thought the bicycle was his ("no, it's not your bike") only make sense if offered for their truth—i.e., that defendant did, in fact, pay someone else for the bicycle and therefore reasonably believed it belonged to him.

Defendant asserts in passing, and without citation to any supporting case law, that even if the proffered statements were hearsay, they were admissible under Evidence Code section 1250, as evidence of his "state of mind," or under Evidence Code section 1241, as evidence of the parties' conduct. Because defendant has failed to present any legal analysis on these points, we pass them without further discussion.

We pause to address defendant's assertion that the court permitted the prosecutor to introduce the same sort of hearsay evidence that the court excluded when offered by defendant. The unstated premise appears to be that the court was somehow biased in favor of the prosecution. But it is well settled that an out-of-court statement made by a defendant may fall into an exception to the hearsay rule if offered by the prosecution (as, for example, an admission of a party opponent) but would be inadmissible if offered by the defendant. In any event, based upon our review of the record, we see no indication of judicial bias. "Moreover, a trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1112.)

3. The court did not err in admitting an audio recording and a transcription of a 911 call placed by an anonymous bystander.

Defendant contends he was significantly prejudiced by the court's erroneous admission of an audio recording and transcript of a 911 call made by an unknown bystander who witnessed a portion of the struggle between defendant and the victim. The court did not err.

During trial, the People requested that the audio recording of a 911 call be introduced into evidence. The caller, whose identity is unknown, reported that a black man, who was shirtless and wearing blue jeans, was robbing an Asian man of his bicycle. He also indicated the black man was beating up the Asian man. The 911 operator could be heard relaying that information to the police.

Defense counsel timely objected to the introduction of the audio tape. Counsel argued that because the caller was not called to court, playing the tape violated defendant's rights under the Confrontation Clause; Evidence Code section 352 prohibited admission of the recording because it was cumulative; and the caller could not have seen what he claimed from his vantage point (evidenced, for example, by the caller's mislabeling the victim as Asian). These arguments were rejected and the court admitted the recording and transcript under the spontaneous statement exception to the hearsay rule (Evid. Code, § 1240).

Although defendant objected to the admission of the recording on several grounds at trial, on appeal he argues only that the court erred in admitting the statement under Evidence Code section 1240.[12] That section permits the admission of a hearsay statement if the statement is a "spontaneous utterance," i.e., a statement that "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant" and "[w]as made spontaneously while the declarant was under the stress of excitement caused by such perception."(Evid. Code, § 1240.) "[T]he basis for the circumstantial trustworthiness of

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[12] The opening brief's heading for this section asserts the court's ruling also violated defendant's rights under the Confrontation Clause. No substantive argument on that point is presented in the body of the brief, however. Although defendant raises the issue in his appellant's reply brief, we may treat the point as forfeited. (*People v. Clayburg* (2012) 211 Cal.App.4th 86, 93.) In any event, were we to consider the argument on the merits, we would reject it for the reasons stated in *People v. Cage* (2007) 40 Cal.4th 965, 980–984 [discussing *Davis v. Washington* (2006) 547 U.S. 813, which held admission of 911 call describing events occurring contemporaneously does not offend the Confrontation Clause].)

spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief. [¶] The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is ... not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the product of deliberation, but it does not ipso facto deprive the statement of spontaneity." (*People v. Farmer* (1989) 47 Cal.3d 888, 903–904 disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

We review the court's decision to admit evidence under Evidence Code section 1240 for an abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 237; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1588.)

Defendant asserts correctly that "spontaneous utterances" are admissible because they are made without reflection and are therefore likely to be truthful. Defendant's further argument, however, is unclear: "Here, the caller was not a target of any crime, walked away during the conversation with the 911 operator, and was angry enough to express his hope that the black male be caught and put in jail for 100 years.[13] This does

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[13] Defense counsel asked the court to exclude the caller's statements, "I hope you catch him. I hope he gets put in jail for 100 years." Counsel argued these statements should be excluded under Evidence Code

not qualify the anonymous caller's statement[s], clearly hearsay, as a 'spontaneous utterance.' " It is not immediately obvious why the facts cited by defendant are relevant to our inquiry and he has not cited any cases suggesting, for example, that a declarant must be the target of a crime in order for his statement about contemporaneous events to be admissible as a spontaneous utterance.

In any event, we have reviewed the audio tape and agree the caller's statements were properly admitted under Evidence Code section 1240 because the caller was describing an event he was witnessing at the time he made the call. As the court noted, the caller used the present tense ("He doesn't have his shirt on, uh, he is robbing an Asian guy of his bike") and said at one point, "It's happening right now." And during that portion of the call, the caller's voice sounded agitated. The court's decision to admit the audio recording and transcript of the bystander's 911 call was not an abuse of discretion. (See, e.g., *People v. Roybal* (1998) 19 Cal.4th 481, 516 [admission of 911 call under Evid. Code § 1240 proper where "[t]he statements in the tapes clearly purport to describe a condition perceived by the declarant" shortly before he placed the 911 call].)

4. The prosecutor did not commit misconduct.

Defendant contends the prosecutor's closing arguments were replete with misconduct, consisting of emotional appeals to the jury, misstatements of the law which had the effect of lowering the People's burden of proof, and commentary on the

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sections 350 and 352 because they were not probative of any relevant issue and were plainly prejudicial. The court agreed and those statements were not played for the jury or included in the transcript.

absence of evidence the prosecutor successfully excluded. By failing to object below, defendant has forfeited his claim of error. And in any case, his arguments lack merit.

As to the issue of forfeiture, "[i]t is well settled that making a timely and specific objection at trial, and requesting the jury be admonished (if jury is not waived), is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal. [Citations.] 'The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.' [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328; *People v. Rangel* (2016) 62 Cal.4th 1192, 1219 [same].) Only when an admonition would not have cured the harm is the claim of prosecutorial misconduct preserved for appellate review. (*People v. Thompson* (2010) 49 Cal.4th 79, 120–121.) Defendant failed to object to the statements about which he now complains and, as he fails to acknowledge the forfeiture issue, he has not shown that an admonition would have been ineffective to cure any harm from the statements he cites. Accordingly, defendant has forfeited this claim. (*People v. Osband* (1996) 13 Cal.4th 622, 696.) Moreover, as defendant does not contend his counsel's failure to object during closing arguments denied him the effective assistance of counsel, it is arguably unnecessary for us to address his contentions on the merits. (Cf. *People v. Wader* (1993) 5 Cal.4th 610, 636 [concluding objection to prosecutor's closing argument forfeited but addressing alleged misconduct as related to ineffective assistance].)

Were we to address the purported prosecutorial errors, however, we would reject defendant's arguments. The standard

we apply is well established. "At closing argument[,] a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. [Citations.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.) A prosecutor's conduct only violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects " 'the trial with [such] unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Mendoza* (2007) 42 Cal.4th 686, 700.)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citations.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

Initially, we note that defendant's argument is somewhat difficult to follow, in that he recites numerous statements made by the prosecutor, one after the other, only occasionally interrupting the list of objectionable statements with blackletter

law citations which are generally unaccompanied by substantive legal analysis. We discern from defendant's briefing that he finds three general categories of statements by the prosecutor to be objectionable: emotional appeals to the jury, misstatements of the law which had the effect of lowering the People's burden of proof, and commentary on the absence of evidence the prosecutor successfully excluded. We briefly address each of these areas.

First, defendant argues the prosecutor improperly appealed to the emotions of the jurors. Defendant is correct that ordinarily " 'a prosecutor may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim.' " (See, e.g., *People v. Lopez* (2008) 42 Cal.4th 960, 969–970.) Thus, and by way of example, the Supreme Court found the prosecutor erred by arguing, in a case involving the cold-blooded killings of six persons: " 'Imagine in that last millisecond before the lights go out, when you hear the report of the gun, when you feel the wetness ... the small vapor of blood that is blown out the back or the side of their head and they fall to the floor, and in their last moment of consciousness, they think, I misjudged this man.' " (*People v. Leonard* (2007) 40 Cal.4th 1370, 1407, fn. 7.)

But that is not what the prosecutor did in this case. Here, the prosecutor simply referred to the bicycle's owner as "the victim." Defendant argues, however, that the prosecutor improperly referred to him as "susceptible victim" and a "vulnerable victim," recalled that he needs the bicycle for "his livelihood," and reminded the jury how he teared up during his testimony. In addition, she cited to the language barrier between the victim and defendant, saying the victim should not "suffer because he doesn't speak the language." None of these statements

rises to the level of an impermissible invitation to view the case through the victim's eyes.

Second, defendant contends the prosecutor misstated or misapplied the law during her closing arguments. For example, in her rebuttal argument, the prosecutor argued "[s]tealing is the same in every single language. It is not something that you can blame or defend by citing a miscommunication and a language barrier. When you take something that is not yours and belongs to someone else, it doesn't matter what language either of you speak[s]. It is a crime." Defendant contends this argument ignores the intent element of robbery by negating his story of buying the bicycle. We reject this claim because the prosecutor discussed the intent required to convict defendant at several other points during her closing and this isolated statement that did not reference intent would not have confused the jury.

Defendant also contends the prosecutor "purported to eliminate his 'claim of right' defense … ." We see no evidence of that in her closing arguments. The prosecutor properly told the jurors they could not allow sympathy or bias to influence their decision and then urged them not to consider that "maybe [defendant] was duped" by the person who allegedly sold him the bicycle, or "maybe he's very remorseful about what happened." These statements are not, as defendant contends, misleading or wrong. Nor do they lessen the People's burden to prove every element of the charged offense beyond a reasonable doubt.

Further, defendant argues the prosecutor misled the jury by referencing an analogy she used during voir dire to illustrate the concept of circumstantial evidence. She described her "nephew with his swim shorts on and the floaties, running out to the pool. He didn't say what he was thinking, but a number of

you said that you knew what he was thinking, that he wanted to go swimming, and I also told you that my nephew loves swimming. [¶] So all those things put together, it's circumstantial evidence ... . You can determine what someone is thinking based on their actions." She went on to argue this case "is the exact same thing, that based on Mr. Fletcher, the defendant's actions, he was intending to steal the bicycle … ." There was nothing improper in the prosecutor's analogy.

Finally, defendant argues the prosecutor improperly capitalized on the exclusion of defendant's testimony about statements he purportedly made at the scene. One theme of the prosecutor's closing argument was that defendant's conduct at the scene—particularly the fact that he walked away from the scene after the man from the food catering business put the bicycle inside his store—was totally inconsistent with his assertion that he had paid $74 for the bicycle just a few minutes before. For example, she argued: "But if you think about it, it doesn't make sense. If you buy a bike and some man takes it and puts it inside, why would you just walk away? … Why wouldn't you say, hey, man, I bought that bike. I just did a couple minutes ago. Took most of the money out of my wallet, but I bought it. [¶] Instead of just leaving it and walking away and then not telling the officer who arrives at the scene and who is investigating the case to try to clear everything up." Defendant claims the prosecutor's statement, "Why wouldn't you say, hey, man, I bought that bike," was improper because defendant tried to present precisely that testimony and the prosecutor successfully moved to exclude it. Viewed in context, the objected-to statement accurately characterizes the testimony of the Los Angeles Police Department officer who wrote the report, who testified she had

no recollection that defendant told her at the scene that he had just purchased the bicycle a few minutes before he encountered the victim.

In sum, we see no evidence of prosecutorial misconduct here.[14]

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[14] Because we have largely rejected defendant's claims of error, we need not address his claim of cumulative error.

DISPOSITION

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion. After considering the evidence defendant was prepared to present without delay at the time he made his original request to represent himself, as well as the *Windham* factors, the court shall determine whether it should have granted the *Faretta* request in the first instance. If so, the court shall order a new trial. If the court determines it properly denied the request it shall reinstate the judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.