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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHN EARL GUIDRY, Defendant and Appellant.	B286009 (Los Angeles County Super. Ct. No. VA145153)

APPEAL from a judgment of the Superior Court of Los Angeles County. Debra Cole-Hall, Judge. Affirmed.

William Hassler, 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, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant was acquitted in a court trial of two counts of robbery and convicted of the lesser included offense of petty theft. He was sentenced to 189 days in jail, with credit for time served, and ordered to pay statutory fees and fines. On appeal, defendant, who represented himself at trial, contends the trial court failed to provide adequate advisements before accepting his waiver of the right to a jury trial. He asserts the error is structural and reversible per se. Employing the "totality of the circumstances" test, we find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant visited a Best Buy store in Los Angeles County on May 6, 2017. An employee saw him take cash from a register, put it into his pockets, and walk quickly toward the entry doors. That employee alerted other store personnel, and two employees approached defendant. As defendant pulled a hammer from his pocket, they tackled him inside the store and wrestled him to the floor. Four hundred and ten dollars in cash, the amount missing from the register, spilled out of defendant's pockets.

Responding officers retrieved the cash and the hammer. They returned the cash to store personnel. The hammer was produced at trial, but not received into evidence.

The information charged defendant with two counts of second degree robbery (Pen. Code, § 211)[1] with personal use of a dangerous weapon, the hammer (§ 12022, subd. (b)(1)).[2] On

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

[2] The information alleged defendant was previously convicted of residential robbery, a serious and/or violent felony; possessing a gun on school property, second degree burglary,

July 17, 2017, before the preliminary hearing began, the trial court considered defendant's request to represent himself. Defendant completed the superior court's *Faretta*[3] waiver form, checking all the boxes, including the one that provided, "**Right to a Speedy and Public Jury Trial** — I understand that I have a right to a speedy and public trial by a jury of twelve citizens drawn from the community." In a colloquy with the trial court, he advised he had completed his education as a microbiology major through the senior year of college, but was arrested in this case before final examinations and did not have a university degree. He had an AA degree from Cypress College in social behavioral sciences. He also told the trial court he had "been studying law as a matter of protection since [he] was a child," including five years while incarcerated for an earlier offense, and even before that "as a hobby."

Defendant represented himself in three previous criminal matters. One was resolved by way of a negotiated plea that defendant said was reversed, and the other two resulted in guilty verdicts. Defendant said he understood the risks and disadvantages the trial court outlined and was ready to proceed. The trial court accepted his waiver of the right to counsel.

Defendant actively represented himself in the preliminary hearing. He was held to answer on the Best Buy charges.

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receiving stolen property, and being a felon in possession of a concealable weapon.

Defendant was also charged with two misdemeanor counts of petty theft arising out of separate incidents at two Los Angeles County Sears stores; those charges were dismissed before trial.

[3] *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525].

Defendant returned to court August 29, 2017, for a pretrial hearing and rulings on a number of motions he filed. The trial court denied defendants' motion to dismiss the charges based on prosecutorial misconduct. The trial court then discussed the various upcoming dates and defendant's requests for discovery and investigation. After defendant noted he did not "have access to a phone" and also had an "issue with pencils and showers," the trial court asked if he wanted a lawyer reappointed. Defendant did not: "No, I know how to do voir dire jury selection, [peremptory] challenge, from memory. Don't play with me. Closing arguments, I'm good at that. Opening arguments, I'm good at that."

Defendant's section 995 motion was heard and denied on September 22, 2017. His section 1538.5 motion was heard on the scheduled trial date, September 28, 2017. Defendant testified. That motion, too, was denied.

Unprompted, defendant then "move[d] to have a court trial. It [will] save a lot of the court's time and resources." Defendant added, "I don't think a jury will be required, plus the *Estes*[4] robbery is so technical, I don't feel safe with a jury, because I know you know the law. You know reasonable doubt, you know what it means, I don't have to explain it to you."

The following exchange then occurred:

> The court: Mr. Guidry, sir, you have a right to have a jury trial. Do you waive and give up that right so that you can have a court trial in front of me?
>
> The defendant: Yes, your Honor.

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[4] *People v. Estes* (1983) 147 Cal.App.3d 23.

The court: All right. And do the People waive their right to have a jury trial?

[The prosecutor]: Yes . . . .

The court: All right. Now, Mr. Guidry, besides that waiver, as to the charges, there are allegations that are also alleged. So when you are waiving your right and want this court to hear your trial, that's relating to the counts as well as the allegations; is that correct?

The defendant: Yes, your Honor. I understand.

The court: So you do still have the right to subpoena witnesses, to cross-examine, everything else, you're just not going to have a jury. You're just going to have me making the determination. And you're in agreement with that?

The defendant: I want to have closure and save court time on something that shouldn't have even happened. And I would like to make a motion to bifurcate the priors.

The court: You don't need to because it's just me. If you were in front of a jury, that would be okay, but they do still have to prove it.[5]

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5 At the conclusion of the prosecution's case, the trial court did bifurcate the prior, noting it would "not have to deal with the issue of whether or not [defendant had] a prior unless the court [found him] guilty of a felony."

Defendant was not asked to sign a written waiver of the right to a jury trial. He was eager to start the bench trial "right this minute, if [the court] want[s] to" and asked whether "jeopardy attaches right now." When the trial court stated the prosecutor planned to select the jury that afternoon rather than begin with testimony, defendant suggested "we can do arguments [*sic*] and 402's [this afternoon]." The trial court and prosecutor agreed.

The court trial was conducted over the course of five days. The Best Buy employee who saw defendant take cash from the register and the two employees who tackled him testified, as did two police officers. At the close of the prosecution case, defendant advised the court, "I don't need to put on a defense." He then successfully moved several exhibits into evidence and rested.

The trial court found defendant not guilty of the two robbery counts, but convicted him "of a lesser-included offense, Penal Code section 484[, subdivision (a)] as a misdemeanor." Defendant agreed to be sentenced immediately. The court imposed a jail sentence equal to the time defendant had already served and ordered him to pay the required fees and fines.

DISCUSSION

Relying primarily on the California Supreme Court's decision in *People v. Daniels* (2017) 3 Cal.5th 961 (lead opn. of Cuéllar, J.) (*Daniels*), defendant asserts the "patent inadequacy" of the trial court's advisement constituted structural error and was, therefore, reversible per se.

Daniels, supra, 3 Cal.5th 961 (lead opn. of Cuéllar, J.) was filed two days after the trial court accepted defendant's waiver of his right to a jury trial. Daniels pleaded guilty to a number of offenses and was then convicted in a court trial of two murders

and a host of other crimes. He was sentenced to death. Daniels waived his right to a jury for the guilt, special circumstances, and penalty phases of trial. The Supreme Court affirmed "the judgment of guilt as to all counts tried, the true findings of special circumstances, and all convictions entered by way of guilty plea," but reversed the judgment of death based on an invalid waiver of the defendant's right to a jury trial for the penalty phase. (*Id.* at p. 967.)

There is no majority opinion in *Daniels*, however; and for that reason, it has no precedential value. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918 ["reasoning . . . embodied in a plurality opinion . . . [¶] . . . lacks authority as precedent"].) Moreover, and contrary to defendant's assertion, the lead opinion in *Daniels* did not attempt to establish any "standard," "clarif[y] the scope of the information trial courts are required to provide to defendants who seek to waive their right to a trial by a jury," or state that " 'four "basic mechanics of a jury trial" ' . . . must be conveyed" in order for a trial court's advisement to be deemed adequate.

Instead, the *Daniels* plurality reaffirmed the Supreme Court's "persistent[] [refusal] to mandate any specific admonitions describing aspects of the jury trial right . . . [and announced it would] continue to eschew any rigid rubric for trial courts to follow in order to decide whether to accept a defendant's relinquishment of this right." (*Daniels, supra,* 3 Cal.5th at pp. 992-993 (lead opn. of Cuéllar, J.).) The plurality then "offer[ed] some exemplars of advisements and colloquy elements that may be helpful in establishing that a waiver was knowing and intelligent . . . [but did] not seek to require that trial courts provide any particular advisements." (*Id.* at p. 993.)

Although *Daniels* does not establish precedent, *People v. Sivongxxay* (2017) 3 Cal.5th 151 (*Sivongxxay*) does. *Sivongxxay* was filed several months before *Daniels*. It, too, was a death penalty case that involved the defendant's waivers of the right to a jury at all three trial phases—guilt, special circumstances, and penalty. Unlike Daniels, however, five justices agreed to affirm Sivongxxay's death sentence. (*Sivongxxay, supra,* at p. 199.) A sixth justice, although he would have reversed the special circumstances finding and the judgment of death, agreed with the majority that Sivongxxay's guilt phase jury trial waiver was valid. (*Id.* at p. 215.)

Insofar as defendant's arguments are concerned, *Sivongxxay* did not break new ground. *Sivongxxay* reaffirmed that reviewing courts "examine the totality of the circumstances" (*Sivongxxay, supra,* 3 Cal.5th at p. 167) to determine whether defendant's waiver of his right to a jury trial was knowing, intelligent, and "the product of a free and deliberate choice" (*id.* at p. 166, internal quotation marks omitted). The Supreme Court noted it has "never insisted that a jury waiver colloquy invariably must discuss juror impartiality [or] the unanimity requirement . . . . [And] under the totality of the circumstances standard, the presence or absence of a reference in a colloquy to [either] is not necessarily determinative of whether a waiver meets constitutional standards." (*Id.* at p. 168.)

Sivongxxay did provide "general guidance [for trial courts] . . . [g]oing forward."[6] (*Sivongxxay, supra,* 3 Cal.5th at

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[6] "Going forward, we recommend that trial courts advise a defendant of the basic mechanics of a jury trial in a waiver colloquy, including but not necessarily limited to the facts that (1) a jury is made up of 12 members of the community; (2) a

p. 169.) While the guidance is in the form of bullet points trial courts may cover with a defendant who contemplates waiving the right to a jury trial, the Supreme Court was careful to "emphasize [this] guidance is not intended to limit trial courts to a narrow or rigid colloquy" and observed, "[u]ltimately, a court must consider the defendant's individual circumstances and exercise judgment in deciding how best to ensure that a particular defendant who purports to waive a jury trial does so knowingly and intelligently." (*Id.* at p. 170.)

Among the circumstances *Sivongxxay* considered in concluding the defendant's waiver was voluntary, knowing and intelligent were the defendant's initiation of the request for a court trial and his previous "experience with the criminal justice system." (*Sivongxxay, supra,* 3 Cal.5th at p. 167.) Those factors are present in this case, and we begin our analysis with them.

The trial court was in the process of explaining the courtroom procedures it would follow once prospective jurors arrived when defendant requested a court trial instead. We have thoroughly reviewed all the reporter's transcripts in the appellate

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defendant through his or her counsel may participate in jury selection; (3) all 12 jurors must unanimously agree in order to render a verdict; and (4) if a defendant waives the right to a jury trial, a judge alone will decide his or her guilt or innocence. We also recommend that the trial judge take additional steps as appropriate to ensure, on the record, that the defendant comprehends what the jury trial right entails. A trial judge may do so in any number of ways—among them . . . by asking the defendant directly if he or she understands or has any questions about the right being waived." (*Sivongxxay, supra,* 3 Cal.5th at pp. 169-170.)

record, and they indisputably demonstrate defendant's request was voluntary.

We also conclude defendant's waiver of the right to a jury was knowing and intelligent. By the time the trial court gave the advisement concerning a potential waiver of the right to a jury trial, it already knew—based on discussions six weeks earlier when it accepted defendant's *Faretta* waiver—that defendant was an educated individual and self-described student of the law who had represented himself in three previous criminal matters. During that period, the trial court presided over various hearings and motions, both in and outside the prosecutor's presence, and observed defendant's familiarity with the law and courtroom procedures. It had reviewed and evaluated defendant's written submissions. Additionally, the *Faretta* waiver defendant signed advised he had the "right to a speedy and public trial by a jury of twelve citizens drawn from the community." The month before trial, at the pretrial hearing, defendant told the trial court he "[knew] how to do voir dire jury selection, [peremptory] challenge, from memory." The only reasonable inference from this statement is that defendant understood his right to participate in the selection of a jury.

Finally, defendant articulated a logical (and prescient) basis for desiring a bench trial in a case that involved—in his own words—a "technical" *Estes* robbery. He told the trial court he did not "feel safe with a jury" and wanted to try the case before a judge who "know[s] the law [and] know[s] reasonable doubt."

The totality of the circumstances demonstrates defendant's waiver of the right to a jury trial was voluntary, knowing and

intelligent.[7] As *Sivongxxay* recognized when it quoted *U.S. v. Rodriguez* (7th Cir. 1989) 888 F.2d 519, 527, while a robust advisement of a jury trial waiver is always preferable, " '[l]esser (even no) warnings do not call into question the sufficiency of the waiver so far as the Constitution is concerned.' " (*Sivongxxay, supra,* 3 Cal.5th at p. 170.)

DISPOSITION

The judgment is affirmed.

DUNNING, J.*

We concur:

RUBIN, Acting P. J. GRIMES, J.

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[7] The well-developed record in this case contrasts sharply with the "sparse record" in *People v. Jones* (2018) 26 Cal.App.5th 420, 435. There, our colleagues in Division Seven, after evaluating the totality of the circumstances, concluded the defendant's waiver of her right to a jury trial was not knowing, intelligent or voluntary. Unlike defendant, Jones had no previous experience with the criminal justice system; and the record reflected only "her bare acknowledgement that she understood her right to a jury trial." (*Id.* at p. 436.)

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