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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. RANDALL WILSON, Defendant and Appellant.	B271311 Los Angeles County Super. Ct. No. TA137185

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed.

Ahrony, Graham, Zucker and Bruce Alan Zucker, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Joseph P. Lee, and Ilana Herscovitz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Randall Wilson was convicted of assaulting the mother of his child with a knife and driving a family friend's car without consent. On appeal, he contends the court erred in denying his motion to represent himself at trial and violated his Confrontation Clause rights by allowing a law enforcement officer to testify that the car owner had reported the car stolen. We affirm.

PROCEDURAL BACKGROUND

By information filed November 23, 2015, defendant was charged with one count of attempted murder (Pen. Code,[1] § 664/187, subd. (a); count 1), one count of assault with a deadly weapon (§ 245, subd. (a)(1); count 2), and one count of carjacking (§ 215, subd. (a); count 3). As to count 1, the information alleged that defendant personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)).[2] The information also alleged one prison prior (§ 667.5, subd. (b)), one serious-felony prior (§ 667, subd. (a)), and one strike prior (§ 667, subds. (b)–(j); § 1170.12, subds. (a)–(d)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which he testified on his own behalf, the jury convicted defendant of count 2 and its related enhancement. The jury acquitted defendant of count 3 but convicted him of the lesser-related offense of taking or driving a

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

[2] After the jury was instructed and over defense objection, the People amended the information by interlineation to add the enhancement to count 2.

vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)). The jury could not reach a verdict on count 1. The court declared a mistrial on that count and later dismissed it under section 1385. Defendant admitted the prior-conviction allegations.

The court sentenced defendant to an aggregate term of 20 years, four months in state prison. The court selected count 2 (§ 245, subd. (a)(1)) as the base term and imposed 13 years—the upper term of four years, doubled for the prior strike (§ 667, subds. (b)–(j); § 1170.12, subds. (a)–(d)), plus the upper term of five years for the domestic violence enhancement (§ 12022.7, subd. (e)). The court imposed 16 months for the lesser-related offense (Veh. Code, § 10851) to count 3—one-third the mid-term of two years, doubled for the prior strike—to run consecutively. Finally, the court imposed five years for the serious-felony prior (§ 667, subd. (a)) and one year for the prison prior (§ 667.5, subd. (b)), to run consecutively.

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

On April 9, 2015, defendant drove a family friend's car without consent. On May 13, 2015, defendant repeatedly stabbed the mother of his child, causing great bodily injury. As the facts of the stabbing are not relevant to defendant's claims on appeal, we limit our factual discussion to the driving offense.

On April 9, 2015, Jamin Toles called 911 to report that defendant hit him and "jacked" his car, a green 2004 Nissan Ultima. Later that day, Toles called 911 again to say he saw defendant driving the car. Toles told the 911 operator defendant beat him up and took the car; Toles did not loan the car to defendant. Toles did not testify at trial.

Los Angeles Police Department Officer Daisuke Bunden responded to the call and met with Toles. Bunden then canvassed the area to search for defendant. He noticed a green Nissan Ultima that matched the description and license plate number Toles had provided. Defendant was driving. After defendant pulled into a driveway, Bunden conducted a high-risk felony stop. Defendant and the passenger, Arena Thompson, got out of the car, and defendant was arrested. Bunden later confirmed the car was registered to Toles.

Defendant testified that he had known Toles since childhood and considered him an uncle. On April 9, 2015, they got into a "minor altercation" when defendant thought Toles had smacked Thompson's behind. After they reconciled, defendant asked to borrow Toles's car to take Thompson to the DMV. Defendant borrowed the car "all the time." He denied punching Toles in the head before taking the car.

Although defendant testified that Toles allowed him to borrow the Nissan to drive Thompson to the DMV, defendant admitted that while he was using the car, Toles called to ask for it back. Defendant was nearly there, however, so he kept driving. He brought Thompson to the DMV and waited for her while she got an identification card. Toles continued to call defendant to ask for the car back. Defendant estimated that he used the car for two or three hours. Meanwhile, Toles had called the police.

DISCUSSION

Defendant contends the court erred in denying his request to represent himself at trial. He also contends the court violated his Confrontation Clause rights by allowing Bunden to testify "in essence, that Jamin Toles reported his vehicle stolen and that appellant was later discovered to be driving it."

1. The court properly denied defendant's motion to represent himself at trial.

The Sixth Amendment guarantees a criminal defendant two mutually exclusive rights to counsel. (U.S. Const., 6th Amend.; U.S. Const., 14th Amend.) A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. (*United States v. Wade* (1967) 388 U.S. 218, 223–227; *Gideon v. Wainwright* (1963) 372 U.S. 335, 339–345.) At the same time, a defendant has the right to "proceed *without* counsel when" he "voluntarily and intelligently elects to do so." (*Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*).)

"A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*), abrogated on another ground by *People v. Blakeley* (2000) 23 Cal.4th 82, 90.)

Even if a defendant meets these requirements, "a *Faretta* motion may be denied if the defendant … is disruptive in the courtroom or engages in misconduct outside the courtroom that 'seriously threatens the core integrity of the trial' [citations], or the motion is made for purpose of delay [citation]." (*People v. Lynch* (2010) 50 Cal.4th 693, 721–722, abrogated on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610.) "This rule is obviously critical to the viable functioning of the courtroom. A constantly disruptive defendant who represents himself, and who therefore cannot be removed from the trial proceedings as a

sanction against disruption, would have the capacity to bring his trial to a standstill." (*Welch*, *supra*, 20 Cal.4th at p. 734.)

"In determining on appeal whether the defendant invoked the right to self-representation, we examine the entire record de novo." (*People v. Dent* (2003) 30 Cal.4th 213, 218.) We review the denial of a *Faretta* motion predicated on a defendant's obstructive conduct for abuse of discretion. (See *People v. Carson* (2005) 35 Cal.4th 1, 12 (*Carson*) [reviewing court must "accord due deference to the trial court's assessment of the defendant's motives and sincerity as well as the nature and context of his misconduct and its impact on the integrity of the trial ... [and the] fairness of the proceedings"]; accord *Welch*, *supra*, 20 Cal.4th at p. 735.)

Defendant contends the court erred by denying his motion to represent himself, made on the fourth day of jury selection. We conclude the court properly denied the motion on the basis of defendant's obstreperous conduct.

1.1. Defendant invoked his *Faretta* rights knowingly, intelligently, and unequivocally.

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. [Citations.] Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' [Citation.]" (*Faretta*, *supra*, 422

U.S. at p. 835.) For the same reasons, the defendant must also assert the right unequivocally. (*People v. Marshall* (1997) 15 Cal.4th 1, 23–27 (*Marshall*) [defendant did not unequivocally and sincerely invoke *Faretta* right where motion was made to delay rather than in a sincere effort to secure self-representation].)

In evaluating whether a defendant has met these requirements, "the court should draw every reasonable inference against waiver of the right to counsel." (*Marshall*, *supra*, 15 Cal.4th at p. 23.) Here, the court advised defendant that he would not have time to prepare, but defendant responded that he knew his case "better than anyone else," was ready to "go from right here," and did not need time to review anything. Defendant admitted he "may have outbursts," but indicated he was intelligent and able to proceed on his own. The court gave him the *Faretta* waiver form and advised him of the risks of self-representation. Accordingly, it appears defendant's request was knowing and intelligent. Though there is some question about whether the motion was unequivocal, the People do not address that question, and we accept their concession.

Even where the defendant meets these requirements, the trial court may nevertheless deny a *Faretta* motion if the defendant "suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*People v. Johnson* (2012) 53 Cal.4th 519, 530; *Indiana v. Edwards* (2008) 554 U.S. 164, 175–176, 178.) "Trial courts must apply this standard cautiously. … A court may not deny self-representation merely because it believes the matter could be tried more efficiently, or even more fairly, with attorneys on both sides." (*Johnson*, at p. 531.)

Here, the court indicated it had "serious concerns" about whether defendant could and should represent himself, and the court indicated it might need to appoint a doctor to evaluate his competency to do so. Defense counsel noted that in August 2015, defendant's former public defender had raised a doubt about his competency. After a hearing on October 6, 2015, defendant was found competent. The prosecutor agreed that no "psychological or psychiatric professional … said he was incompetent." Rather, "the report [they] received back when there was a doubt declared" indicated defendant "was malingering." On this record, there is insufficient evidence to support the denial of the *Faretta* motion on the basis of incompetence. (*People v. Johnson*, *supra*, 53 Cal.4th at pp. 530–531 ["To minimize the risk of improperly denying self-representation to a competent defendant, 'trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation …' "].)

1.2. The court did not abuse its discretion in denying the motion based on defendant's behavior.

When determining whether to deny or terminate self-representation based on a defendant's misconduct, the "trial court must … decid[e] whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*Welch*, *supra*, 20 Cal.4th at p. 735; *McKaskle v. Wiggins* (1984) 465 U.S. 168, 173 [defendant must be "able and willing to abide by rules of procedure and courtroom protocol."].) In making this determination, the court should consider "the nature of the misconduct and its impact on the trial proceedings," "the availability and suitability of alternative sanctions," "whether the

defendant has been warned that particular misconduct will result in termination of in propria persona status," and whether the defendant "has 'intentionally sought to disrupt and delay his trial.' [Citation.]" (*Carson*, *supra*, 35 Cal.4th at pp. 9–10.)

Generally, a defendant's right to self-representation will only be denied or terminated for misconduct if the defendant has engaged in a pattern of obstreperous behavior. For example, in *Welch*, the California Supreme Court affirmed the trial court's decision to deny self-representation where "a review of the record of pretrial proceedings prior to deciding the *Faretta* motion ... reveal[ed] a number of instances in which defendant engaged in disruptive behavior." (*Welch*, *supra*, 20 Cal.4th at p. 735.) Specifically, the record showed defendant had "belligerently denied awareness of a calendar date that was set in his presence; he turned his back on the trial court when addressing it; he interrupted the trial court several times to argue what the court had declared to be a nonmeritorious point; he accused the court of misleading him; he refused to allow the court to speak and he refused several times to follow the court's admonishment of silence." (*Ibid.*) The Court explained, "while no single one of the above incidents may have been sufficient by itself to warrant a denial of the right of self-representation, taken together they amount to a reasonable basis for the trial court's conclusion that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol." (*Ibid.*)

Here, as in *Welch*, before the court denied defendant's *Faretta* motion, defendant had repeatedly engaged in disruptive courtroom behavior. He frequently interrupted when the court was speaking; he continued to interrupt and curse despite the

court's many warnings to stop;[3] he directed expletives at the court, his attorney, and the investigating officer;[4] he yelled at and threatened violence against his attorney; and he accused the court of racism and of conspiring against him with the prosecutor. Indeed, defendant's "shouting and yelling" in lockup and "threatening statements" against his defense attorney ultimately caused the court to "call[ ] for backup because [it] was seriously concerned about the safety of everybody in lockup because of what [it] heard coming out of there." The court's "concern[ ] about [defense counsel's] well-being" and safety led it to order defendant to wear a waist restraint during trial "and have [defense counsel] sit far away from" him. (See *Carson*, *supra*, 35 Cal.4th at pp. 6, 10 [court may consider out-of-court behavior].)

Defendant insists the fact that he "apparently used colorful metaphors or otherwise showed disrespect for the court at times during the proceedings is not in and of itself a reason to conclude that he will disrupt the proceedings if he is allowed to represent himself, much less deny appellant's constitutional right to self-representation." And, he contends, "there is no compelling evidence in this case that appellant's choice of vernacular or lack

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[3] The first time the court warned defendant not to use profanity, he replied, "You have to kill me, then. Straight up. Get that on the record."

[4] For example, the seventh time the court warned defendant not to interrupt, defendant interrupted by saying, "fuck you." The court asked, "Did you just say, 'fuck you' to me?" Defendant answered, "Yes, I did." At that point, the court ordered defendant excused from the courtroom. His response? "Fucken chink. The D.A. got elected. Fuck this court. Fuck Compton court. Fuck you too, stupid ass bitch."

of optimal courtroom decor [*sic*] would amount to 'serious and obstructionist misconduct.' [Citation.]" We disagree.

Given defendant's disruptive, disrespectful conduct and his failure to heed the court's many warnings to cease interrupting and stop using profanity, it was apparent that defendant was unable or unwilling to abide by the rules of courtroom procedure and protocol.[5] (*Welch*, *supra*, 20 Cal.4th at p. 735.) The trial court, therefore, did not abuse its discretion in denying defendant's *Faretta* motion for self-representation.

2. Any Confrontation Clause error was harmless beyond a reasonable doubt.

The Confrontation Clause of the Sixth Amendment guarantees the "right [of a criminal defendant] … to be confronted with the witnesses against him." (U.S. Const., 6th Amend.; U.S. Const., 14th Amend.; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 316; see Cal. Const., art. I, § 15.) The Supreme Court has interpreted this clause as forbidding the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." (*Crawford v. Washington* (2004) 541 U.S. 36, 53–54.) A statement is testimonial if it is "made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those

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[5] We note that the court's view of the situation turned out to be correct, and defendant was ultimately removed from the courtroom for this behavior. For example, defendant would later refer to the court as a "stupid ass chink ass bitch," before telling the court, "Fuck you. Go back to your country, bitch. You don't belong out here."

whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*People v. Sanchez* (2016) 63 Cal.4th 665, 689.)

Defendant asserts that Bunden testified "Jamin Toles … told Bunden that he (Toles) did not give appellant permission to drive the car" and that this testimony violated defendant's Sixth Amendment rights. Though counsel does not direct this court to the portion of the record containing the asserted unconstitutional statement, he appears to be referring to Bunden's testimony that he "met with a victim Jamin Toles who we met with earlier in the day who reported his vehicle stolen." The People contend the Confrontation Clause does not apply because Bunden did not testify to an out-of-court statement—much less testimonial hearsay—and in any event, any error was forfeited by defendant's failure to object on Confrontation Clause grounds below. We need not resolve these issues, however, because the People have also established that any error was harmless beyond a reasonable doubt.

"We assess federal constitutional errors under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Under *Chapman*, we must reverse unless the People 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Ibid.*)" (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165–1166; *People v. Sanchez*, *supra*, 63 Cal.4th at p. 698 [Confrontation Clause errors assessed under *Chapman*].) Defendant insists that the "only way for the jury to know that appellant was in possession of a vehicle that he was not allowed to possess was premised upon Toles' hearsay statement, presented through Officer Bunden." Defendant is mistaken.

First, the jury heard two 911 recordings in which Toles reported his car stolen. In the first call, Toles told the operator that defendant hit Toles in the head and "jacked" his Nissan "about 10 seconds ago." In the second call, Toles told the operator, "I reported my car stolen earlier and I see the suspect driving my car." Toles said he had not loaned defendant the car. Rather, defendant "beat me up and took the car."

Second, *defendant* testified that he took Toles's car, and Toles revoked any consent he may have initially given.[6] Defendant explained, "[Toles] called my cell phone, hey, come back. I need to do something. Man, I'm already damn near on my way. I'll be back in a little while. I keep going. We get to the DMV. When we get to the DMV, he call the phone again. Man, you can't bring the car back. I already called the police." Defendant also confirmed that he "got a call from Mr. Toles to come back" but failed to comply with the request even though Toles "ke[pt] calling the phone."

Accordingly, even assuming Bunden testified to an out-of-court statement by Toles, the testimony was merely cumulative of other evidence presented at trial—evidence defendant does not challenge on appeal. (See *People v. Byron* (2009) 170 Cal.App.4th 657, 676 [any error in admitting cumulative evidence harmless under *Chapman*].) And, since the other evidence was more persuasive than the asserted hearsay, we conclude any error was harmless beyond a reasonable doubt.

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[6] Defendant does not argue, and our review of the record does not reveal, that defendant testified because he felt he needed to explain the erroneously admitted evidence. Instead, it appears that defendant had decided to testify before the court made the challenged ruling.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

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