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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN DWAYNE BROWN, Defendant and Appellant.	B270677 (Los Angeles County Super. Ct. No. BA425401)

APPEAL from a judgment of the Los Angeles County Superior Court, Laura L. Laesecke, Tomson T. Ong, Judges. Affirmed.

Waldemar D. Halka, 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, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Steven Brown (defendant) admitted he fatally stabbed his children's grandmother, Kellye Taylor. Indicted and tried for first degree murder with use of a deadly weapon (Pen. Code, §§ 187, subd. (a)[1]; 12022, subd. (b)), he testified and presented evidence of self defense and mental illness. The jury convicted him. In a separate bench trial, the court found he had two prior serious felony convictions (§§ 667, subds. (a) & (d); 1170.12, subd. (b)). Defendant was sentenced to state prison for a term of 86 years to life.

On appeal, defendant contends reversal is required based on multiple *Faretta,*[2] *Marsden*[3] and instructional errors, the refusal to appoint advisory counsel, prosecutorial misconduct, the removal of one juror, and the failure to remove another. We affirm.

PROCEDURAL BACKGROUND

On October 16, 2013, five days after the stabbing, the district attorney filed a felony complaint charging defendant with a special circumstance murder (lying in wait) with personal use of a deadly weapon. The public defender was appointed to represent him.

The public defender's office declared a conflict in March 2014. Defendant signed a *Faretta* waiver and the court granted his motion to represent himself. Two months later, after

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1 All statutory references are to the Penal Code.

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

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

defendant refused to be transported to court, the trial court revoked his pro per status and appointed the alternate public defender to represent him. Almost immediately, defendant filed a *Marsden* motion seeking to have the alternate public defender removed. The motion was denied.

Dr. David Rad, a forensic psychiatrist, was appointed by the court to evaluate defendant's competency to stand trial. In August 2014, Dr. Rad attempted to interview defendant in the jail, but defendant declined to participate. During the brief time Dr. Rad was with defendant, defendant did not exhibit any grossly abnormal behaviors or movements or obvious indications of a serious psychiatric disorder.

In September 2014, defendant signed another *Faretta* waiver form and his pro per status was reinstated. The trial court also appointed standby counsel.

Defendant remained in pro per through the March 17, 2015 filing of the felony indictment. With the new pleading and case number, defendant executed a new *Faretta* waiver and was permitted to continue to represent himself with standby counsel. The following month, the matter was assigned to a new trial department (Hon. Tomson T. Ong), and defendant executed yet another *Faretta* waiver. He remained in pro per with standby counsel. Trial was scheduled for October 13, 2015.

On the October 13, 2015 trial date, defendant waived the right to represent himself; standby counsel was appointed to represent him. To accommodate counsel's schedule and with an express time waiver from defendant, the trial was continued to December 7, 2015. On December 7, 2015, the trial was continued again to January 11, 2016.

Another judge (Hon. Laura L. Laesecke) assumed the calendar, and defendant appeared before her on December 23, 2015. When the matter was called, defendant immediately made an oral request to represent himself. Judge Laesecke recessed, reviewed the files under both case numbers, and denied the motion: "I'm making a finding, based on my review of the file, that the defendant has become an obstructionist. That this is not a genuine request to exercise his *Faretta* rights, but simply a delay tactic . . . to become an obstructionist with respect to getting this trial done." After the trial court ruled, it permitted defendant to lodge his objection. He did so on the basis "there is a conflict between myself and the court" and referred to arrest warrants and a plea bargain he entered into in 2010, years before Taylor's killing. The January 11, 2016 trial date remained.

On January 11, 2016, and again on January 13, 2016, the trial court denied defendant's *Faretta* and *Marsden* motions. Trial commenced January 13, 2016.

The jury rendered its verdict on January 27, 2016. Defendant waived a jury for the trial on his prior convictions. That trial and sentencing were scheduled for March 4, 2016. On that date, the trial court denied defendant's final *Faretta* and *Marsden* motions, found the prior convictions to be true, and sentenced defendant to a prison term of 86 years to life.

TRIAL EVIDENCE

I. The Prosecution's Case

Defendant and Tia Taylor (Tia) were in an on-and-off relationship for 10 years. They had four children together. On October 11, 2013, the children had been living with Taylor, Tia's mother, for approximately seven months. Defendant loved his

children and was "very upset" the juvenile court had removed them from his care.

Before the knife attack, the relationship between defendant and Taylor was "hostile." On more than one occasion when defendant was angry, Tia heard defendant say he "wished" or "wanted" Taylor dead. But Tia never heard defendant say he wanted to kill Taylor. In early 2011, defendant told Tia he feared Kendrick Smith, the boyfriend of one of Tia's cousins, was going to kill him at Taylor's behest. Tia never heard Taylor say she was going to kill defendant.

Taylor was one of three teachers at a Long Beach school. The teachers often took their students across the street to Orizaba Park. They were there after the noon hour on October 11, 2013. The teachers sat in different locations in a casual semicircle so they could watch the children.

As was his custom, Luvy Basquez was also in Orizaba Park on October 11, 2013. He typically spent four to six hours in the park each day, feeding birds, reading, and people watching. Basquez saw defendant lying on his stomach in tall grass behind a tree. Basquez thought it was odd defendant would be lying in the grass as the morning dew had not yet dried. Basquez could see defendant, but did not believe anyone else in the park could. Every once in a while, defendant would look around the tree in the direction of the swing sets and play area and lie back down.

Eventually, Basquez saw defendant get up "nonchalantly" and walk toward the play area. Defendant approached a woman who was sitting in a chair watching some children. Defendant seemed to know her, gave her a hug, had what looked like a brief conversation, and then suddenly threw her to the ground.

Defendant walked back the way he had come, only a "little bit faster."

Basquez yelled, "What did you do?" and watched as defendant walked down Orizaba Avenue. Defendant threw trash or something on the ground near a car.

One of the other teachers saw defendant as he slowly approached Taylor. She "saw a flash of silver and it looked like it was being drawn out." She yelled for everybody to run and gathered up the children, taking them back to the school.

In a police interview, the other teacher reported a man walked up behind Taylor "and [did] a fast motion towards her neck with his hand." Taylor "grabbed towards her neck," she and the man struggled for a few seconds, and the man walked away. The teacher told the officer Taylor immediately made a phone call and said, "Steven stabbed me. Call 911."

Taylor suffered a deep, two-inch long gash to her neck that cut into the jugular vein. She died at the hospital.

The police did not recover Taylor's purse from the park. One of the teachers said they typically did not bring purses to the park, but she could not say for sure what Taylor did the day she died. A family member recovered Taylor's white cell phone from the park and turned it over to the police several days later.

Long Beach Police Department Officer Eric Barich apprehended defendant in a store parking lot about a quarter of a mile from Orizaba Park. Taylor's blood was found on defendant's pants, shirt, and one of his work boots.

Responding to information received from an anonymous caller, Officer Barich found a knife wrapped in a shirt under a car on Orizaba Avenue, about 200 feet from the park. Taylor's blood was found on the serrated edge of the knife and on the shirt in

which the knife had been wrapped. Defendant's blood was found on the knife's handle.

II. The Defense Case

A. Self-Defense Evidence

Defendant chose to testify in his own behalf. He understood his testimony was his opportunity to tell his side of the story.

Although defendant and Tia were not married, he considered her his wife. Initially, defendant's relationship with Taylor was fine. That changed when he and Tia had a second child. He believed Tia's family did not like him because "I guess they felt I just wanted to make her have babies."

In March 2013, the children were removed from their home after Tia was arrested for attacking defendant and defendant was arrested for violating a restraining order. Anglia Lusk, one of social workers assigned to the children's case, recounted numerous complaints defendant made concerning Taylor's care of his children. She investigated each complaint referred to her and determined each was unfounded. Defendant told her he wanted the children in foster care rather than with their grandmother.

Defendant's relationship with Taylor "turned real bad" due to his treatment of Kellen Taylor (Kellen), Tia's son from another relationship. Kellen lived with defendant and Tia and defendant admittedly favored his own children over Kellen. Defendant did not want Kellen to live with them, causing friction between defendant and Tia's family.

In July 2011, when defendant and Tia were arguing, he had a confrontation with Kellen, Taylor, and Smith, whom defendant described as a Rolling 60's gang member. Kellen said,

"'My grandma—my grandma [is] going to have you taken care of, huh, Ken.'" Smith looked at defendant and said, "'Yeah, he says it's about time for you to go.'" Taylor said to Smith, "'Kill that [expletive].'"[4] Defendant believed from that day forward Taylor wanted to kill him. Shortly after Taylor told Smith to kill defendant, Smith broke defendant's arm in three places.

Defendant and Tia visited with their children at Orizaba Park. On October 11, 2013, defendant arrived at the park between 12:15 and 12:30 p.m., early for a visit with his children. He brought a knife with a 7.5 inch blade to the park to prepare food for his children during the visit.[5] Defendant was tired, so he slept next to a pepper tree where he and his family had picnics. He was awakened by Basquez's singing. Concerned Basquez or someone might take the knife, defendant put the knife in his pants pocket.

Defendant saw Taylor sitting with the other two teachers. He walked over to complain to Taylor about her smoking while his children were in her car and other things—"[i]t's like it all had built up to that day," "[i]t was just all of the stuff the children were telling" him. Defendant was angry about how Taylor was treating his children, but he was not planning to stab or kill her.

Defendant walked up to Taylor in a non-threatening way. Taylor stood up. They looked at each other and Taylor had a "mean look" on her face. She reached into her purse and grabbed something black. Defendant thought it was a gun and feared for

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[4] The trial court admitted the hearsay testimony not for its truth, but to show defendant's state of mind.

[5] No food was found at the park or on defendant's person when he was arrested.

his life. Although defendant had never seen Taylor with a gun before, he thought she was armed that day because she previously made statements about having him killed and Taylor's niece often told him Taylor was going to shoot him or get somebody to shoot him.

As Taylor reached into her purse, defendant removed the knife from his pocket. He "jabbed" Taylor "real fast" with the knife to prevent her from pulling out the gun and to protect himself. Taylor grabbed defendant's hand and the knife and pulled him forward. They fell to the ground with defendant falling on top of Taylor. Taylor said, "Steven," and would not let go of the knife. Eventually defendant was able to wrest the knife from her. He then got up and walked away. Defendant did not intend to kill Taylor.

Defendant looked back as he walked away. Taylor was sitting up and did not appear to be hurt. Defendant looked at the knife and saw only a drop of blood and thought he had just nicked the victim.

Defendant explained his thinking at the time: "'Well, I can't have this knife walking on me. I don't want the police to pull me over and catch me with a knife on me.'" So, defendant rolled the knife up in a shirt and put it under a car. He intended to retrieve the knife later.

B. Mental Illness Evidence

Bernie Varner, defendant's uncle, took care of defendant when defendant was young.[6] Between the ages of six and eight, defendant exhibited behavior that caused Varner to believe defendant was mentally ill. Defendant was irrational, during

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[6] Defendant was 52 years old at the time of trial.

conversations he appeared to be "[k]ind of looking off in space." He also stayed to himself.

As an adult, defendant lived with Varner between 1986 and 1990. Defendant "walked around with a suit and tie and a briefcase, but he was homeless." Defendant's behavior caused Varner to ask defendant to leave.

Karen Coffey, defendant's sister, was seven years older than he and they lived in the same home 11 years. During that time, defendant displayed behavior Coffey believed showed he was mentally ill. Defendant was a loner and created imaginary friends. Later, in his 20's, 30's, and 40's, defendant would say things that were not based on reality.

Defendant came to Coffey's house about one month before Taylor's death. Coffey would not allow defendant inside "based on his look. He had the look that he needed help. And I told him I was going to call the PET [Psychiatric Emergency Team] team, because, in my opinion, it looked like he needed to be hospitalized." She went back inside her home and made the call; by the time the PET arrived, defendant was gone.

Dr. Rad, appointed earlier by the court to assess defendant's competency, was unable to render an evaluation of defendant's mental health. Instead, Dr. Rad prepared a report for the court in which he reviewed forensic evaluations of defendant by Dr. Rebecca Crandall from 1998 and a progress report on defendant from Patton State Hospital, a stated-run psychiatric hospital, also prepared in 1998.

In the initial report, in the "context of a different charge," Dr. Crandall "noted" defendant may have had some paranoid ideations. In a follow-up report two months later, Dr. Crandall reported defendant declined to speak with her. In her report, Dr.

Crandall reviewed letters and complaint forms defendant mailed to her and opined those letters and complaint forms "reflected a disorganized and paranoid thinking."

In 1998, defendant was committed to Patton State Hospital for three months on the same case for which Dr. Crandall evaluated him. The hospital's report rendered three diagnoses. First, schizoaffective disorder, which is a mixture of schizophrenia and mood disorder. The disorder includes delusions, which are beliefs about the world or one's self not based in realty. Second, substance abuse disorder, which is the use of an illicit drug in a maladaptive pattern. And third, histrionic personality traits, which are maladaptive attention-seeking behaviors.

In his report, Dr. Rad opined the available data suggested or contained significant evidence to support a mental disorder. Dr. Rad did not diagnose defendant, however, because the evidence was not conclusive.

DISCUSSION

I. Advisory Counsel

When defendant regained his pro per status in September 2014, the trial court also appointed standby counsel.[7] In May 2015 and again in July 2015, the trial court denied defendant's requests for appointment of advisory counsel. Defendant contends the first denial requires a per se reversal of the

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[7] On October 13, 2015, defendant waived his right to self-representation (see discussion *post*). The trial court appointed standby counsel as defendant's attorney. That attorney represented defendant through trial and sentencing.

judgment and actual prejudice as a result of the second denial provides an additional, independent basis for reversal.

On the first occasion, the trial court stated, "No, I don't assign advisory counsel, that's denied." "You want to lawyer up, tell me. If you give up your pro per status, I'll appoint a lawyer for [you]. If you don't want a lawyer, you do it on your own."

Two months later, the trial court acknowledged its discretion to appoint advisory counsel, but declined to do so: "[Defendant] makes a motion for appointment of an advisory counsel. By writing many voluminous motions, the defendant is able and capable to represent himself. He reads the same law as the court and opposing counsel. He knows the facts better than the court. The court, in exercising its discretion, denies this request. There is no good cause or basis for such an appointment."

A defendant does not have the constitutional right to either standby or advisory counsel. (*People v. Debouver* (2016) 1 Cal.App.5th 972, 976 (*Debouver*); see also *People v. Blair* (2005) 36 Cal.4th 686, 723, overruled on another aground in *People v. Black* (2014) 58 Cal.4th 912, 919.) A trial court must exercise its discretion in ruling on a motion for advisory counsel; a failure to do so constitutes error. (*People v. Bigelow* (1984) 37 Cal.3d 731, 743.) To determine whether the error requires per se reversal or is harmless, the reviewing court analyzes the error as if the trial court exercised its discretion. (*Id.* at p. 744; *People v. Crandell* (1988) 46 Cal.3d 833, 864, abrogated on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364.) If the refusal to appoint advisory counsel would have been an abuse of discretion, the rule of per se reversal applies (*People v. Bigelow, supra,* 37 Cal.3d at p. 744); if it would not have been an abuse of discretion, the error

is reviewed under the harmless error standard (*People v. Crandell, supra,* 46 Cal.3d at pp. 864-865).

The trial court erred in May 2015 by failing to expressly acknowledge its discretion to grant defendant's motion for the appointment of advisory counsel. However, had the trial court exercised its discretion in May 2015 to deny the motion, it would not have abused its discretion. Defendant has not shown the probability of a more favorable outcome had advisory counsel been appointed then. The error was harmless.

The trial court did exercise its discretion two months later when it denied the motion again. We do not find that denial to be arbitrary or capricious. (*Debouver, supra,* 1 Cal.App.5th at p. 976.)

On appeal, defendant does not explain why he sought advisory counsel in the first place. He speculates that had advisory counsel been appointed when requested, subsequent events might have been different. But defendant does not go so far as to assert the reasonable probability of a more favorable outcome had advisory counsel been appointed. Moreover, unlike the defendant in *Debouver*, *supra,* 1 Cal.App.5th 972, defendant did not represent himself at trial.

II. Defendant's October 13, 2015 Waiver of His Right to Self-Representation[8]

A. Background

Defendant had been representing himself with the assistance of standby counsel since September 2014. On October 13, 2015, the first scheduled trial date, with defendant and standby counsel present, the court continued the trial to December 7, 2015. After a recess, defendant engaged in the following exchange with the court:

"The Court: . . . [Standby counsel] has advised me that you are willing to accept him as your lawyer, is that right?

"The Defendant: There were some conditions with it.

"The Court: You are willing to accept him as your lawyer, that's my first question.

"The Defendant: That's correct.

"[¶] . . . [¶]

"The Defendant: I think the issue was I would still be able to attend the law library.

"The Court: You can have the law library privileges any other [inmate] in county jail is entitled to and you are entitled to library privilege like everything else. More importantly, if you don't have library access you now have a lawyer, you can ask him the legal questions as well and he will do the research for you.

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[8] In his supplemental opening brief, defendant contends the trial court also violated his right to self-representation on May 8, 2014 when it revoked his pro per status because "[h]is request to be his own lawyer is equivocal." As defendant acknowledges, because the trial court granted his subsequent request to represent himself, any error in the trial court's May 8, 2014 ruling was harmless. Accordingly, we do not address the claimed error further.

You will have library privileges. I don't run the county jail. You won't have pro per privileges." (Italics added.)

"The Defendant: . . . . Could you possibly just for the sake of argument issue an order to the legal unit *not for pro per* but a court order saying that [I am] able to use the library. [Italics added.]

"The Court: That will be fine. [Standby counsel] draft that order for my signature. You ask your lawyer to do that.

"The Defendant: All right.

"The Court: Are you giving up your pro per status?

"The Defendant: Yes, your Honor.

"The Court: I'll accept that. Mr. Brown[,] I'm going to appoint [your former standby counsel] to serve as your lawyer. [¶] . . . And also bring paperwork saying that Mr. Brown can have access to the library."

Trial was then continued from December 7, 2015, to January 11, 2016.

As noted, defendant and his attorney returned to court on December 23, 2015, but did not broach the library privileges issue. Defendant raised the issue for the first time on January 11, 2016, the third trial date, in the context of his renewed *Faretta* motion.

B. Analysis

Our Supreme Court recognizes a criminal defendant has two "mutually exclusive" constitutional rights. One is to be represented by "counsel at all critical stages of a criminal prosecution" and the other is to represent himself. (*People v. Marshall* (1997) 15 Cal.4th 1, 20.)

A defendant who has asserted the right to self-representation may later relinquish the right. (*People v. Trujeque* (2015) 61 Cal.4th 227, 262.) Because a defendant's waiver of the right to counsel may be conditional and is not effective unless the condition is accepted by the court, the Supreme Court concluded the same analysis applies when a defendant waives the right to self-representation. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 284 (*D'Arcy*).) But even without a defendant's express waiver of the right to represent himself, "a waiver or abandonment of the *Faretta* right to self-representation may be inferred from a defendant's conduct." (*Id.* at p. 285.)

Citing *McKaskle v. Wiggins* (1984) 465 U.S. 168 and *People v. Blair, supra,* 36 Cal.4th 686, defendant asserts his October 13, 2015 waiver of the right to represent himself was not knowing, intelligent or voluntary because he did not receive the "benefit of his bargain," i.e., continued library privileges in return for relinquishing the right to represent himself. He also contends reversal is required because the trial court failed to advise him "of the disadvantages and dangers of counsel-representation including, but not limited to, counsel would be investigating, selecting and conducting the defense, all trial strategies and tactics would be made by counsel, counsel would decide how and when to investigate, and counsel would be solely responsible for selecting witnesses, except for defendant if defendant chose to testify. Finally, defendant was not advised there is either self-representation or representation by counsel."

Defendant has not cited, nor are we aware of, any authority for the assertion the trial court must advise a criminal defendant

of "the disadvantages and dangers of" being represented by an attorney. The argument is unavailing.[9]

Turning to library privileges, defendant maintains he "was aware he would lose his jail law library privileges with termination of *Faretta* status, absent judicial intervention, and he attempted to guarantee judicial intervention and retain those library privileges by conditioning his waiver on the trial judge ordering the jail to retain defendant's library privileges. The judge agreed to this condition . . . . But . . . the 'library order' was not what defendant bargained for, because the order only required the jail to follow its ordinary library procedures which, in effect, guaranteed defendant would not receive any library privileges." We disagree.

When defendant waived his right to self-representation on October 13, 2015, the trial court explained he would receive the same library privileges as other inmates, but would not be entitled to pro per privileges. Defendant acknowledged as much: "Could you possibly just for the sake of argument issue an order to the legal unit *not for pro per* but a court order saying that [I am] able to use the library." (Italics added.) The court then asked defendant again if he still wished to give up his pro per status. Defendant unconditionally responded, "Yes, your Honor."

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[9] We note, however, that when defendant relinquished his pro per status on October 13, 2015, and standby counsel was appointed to represent him, Judge Ong started to explain some of the changes that would come with counsel's representation. After the judge noted the attorney would retain "an investigator of his choice," defendant interrupted and only wanted to discuss library privileges: "I think the issue was [would I] still be able to attend the law library."

The record does not support defendant's argument that the waiver of the right to represent himself was conditioned on the trial court's guaranteeing, or his retaining, pro per law library privileges. He asked the court to issue an order, but "'not for pro per'" privileges. Apparently that was the order the trial court issued.[10]

Additionally, defendant waited three months before raising the issue in the trial court. And then he did so orally on the heels of a *Marsden* motion on the third trial date. Defendant was in court on December 23, 2015, but did not broach the issue. We may properly look to this conduct to infer he abandoned the right to represent himself. (*D'Arcy, supra,* 48 Cal.4th at p. 285.)

III. Defendant's Final Three Pretrial *Faretta* Motions

Defendant contends the trial court erred in denying his December 23, 2015, January 11, 2016, January 13, 2016, and March 4, 2016 *Faretta* motions to represent himself. We disagree.

A competent criminal defendant's unequivocal, voluntary, knowing, and intelligent request to represent himself generally must be granted if made a reasonable time before trial. (*People v. Lynch* (2010) 50 Cal.4th 693, 721-722, abrogated on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610.) The request 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.'" (*Ibid.*)

The requirement that this right must be asserted "within a reasonable time prior to trial . . . serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to

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[10] The order is not part of the appellate record.

obstruct the orderly administration of justice. [Citation.] If the motion is untimely—i.e., not asserted within a reasonable time prior to trial—the defendant has the burden of justifying the delay." (*People v. Horton* (1995) 11 Cal.4th 1068, 1110 [motion made on the day of trial was scheduled to start was untimely]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 ["'it is now settled that a trial court may *deny* a request for self-representation made on the very eve of trial, on the ground that granting the motion would involve a continuance for preparation'"].)

We review the court's ruling for abuse of discretion. (*People v. Williams* (2013) 56 Cal.4th 165, 193-194.) "In exercising this discretion, the trial court should consider factors such as '"the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion."'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.)

All three motions were made after the first and second trial dates had been continued. The December 23, 2015 motion was made 11 court days before the third scheduled trial date. The January 11, 2016 motion was made on what should have been the first day of trial. The January 13, 2016 motion was made on the actual first day of trial. Both January 2016 motions were untimely, as arguably was the December 23, 2015 motion. (See, e.g., *People v. Horton, supra,* 11 Cal.4th at p. 1110; *People v. Hill, supra,* 148 Cal.App.3d at p. 756.) But all the motions were appropriately denied in light of the procedural history of the case, of which the trial judge was well aware.

The December 23, 2015 appearance was the first time the newly assigned trial judge presided over a hearing in the case. She denied defendant's request for self-representation only after taking a recess and reviewing the voluminous case files. Back on the record, she detailed the procedural history of the case, with emphasis on the *Faretta* aspects. Defendant was initially represented by the public defender's office. He made and then withdrew his first *Faretta* motion while a public defender client. Several months later, defendant renewed the request for self-representation. It was granted in March 2014, but revoked in May 2014, after defendant refused to leave the jail for a court appearance. The alternate public defender was then appointed to represent him.

The trial judge further noted that after defendant's *Marsden* motion to relieve the alternate public defender was denied, defendant's third *Faretta* motion was granted in September 2014. While in pro per, "he filed voluminous motions. . . . And when I say voluminous, I'm not saying that it is negative in that he files motions, I'm saying that the nature of the motions required the Attorney General to come in." She concluded the recap by observing that two months before the current hearing, defendant waived his right to represent himself and former standby counsel was appointed to represent him.

After reciting the history, the trial judge made "a finding, based on [her] review of the file, that the defendant has become an obstructionist. That this is not a genuine request to exercise his *Faretta* rights, but simply a delay tactic or a tactic to become an obstructionist with respect to getting this trial done."

The trial court relied on the same reasoning to deny the *Faretta* motions argued January 11, 2016 and January 13, 2016.

It is apparent from the record the trial judge considered the factors described in *People v. Jenkins, supra,* 22 Cal.4th at page 959. She acknowledged the quality of counsel's representation, defendant's more than three-year history of going back and forth concerning representation, the late stage of the proceedings, and defendant's history of disrupting proceedings. No more was required. There was no abuse of discretion.

IV. Defendant's Pretrial *Marsden* Motions

The trial court denied defendant's January 11, 2016 and January 13, 2016 motions to relieve appointed counsel under *Marsden, supra,* 2 Cal.3d 118. A *Marsden* motion should be granted "if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citation.] A trial court should grant a defendant's *Marsden* motion only when the defendant has made a substantial showing that failure to order substitution [of counsel] is likely to result in constitutionally inadequate representation." (*People v. Streeter* (2012) 54 Cal.4th 205, 230 (*Streeter*), internal quotation marks omitted.)

Defendant's trial had been continued to January 11, 2016. On that date, defendant made a *Marsden* motion and complained defense counsel failed to act on his requests to interview witness Smith and defendant's sons. Defendant sought another continuance so counsel could further prepare for trial.

Defense counsel had very little information concerning Smith, except that he was married to Tia's cousin, who was a member of a gang. The defense team was "making a due

diligence effort to find him." As for defendant's sons, defense counsel explained he had read the police interviews with the boys and did not intend to call the children to testify because it would only help the prosecution's case.

The trial court denied defendant's *Marsden* motion, finding defendant and his counsel were communicating, but it would not "delve into [defense counsel's] reasoning as to the witnesses that he [was] planning to call or not call . . . ."

Two days later, on January 13, 2016, defendant made another *Marsden* motion. This was the day trial actually commenced. Defendant reiterated he did not believe defense counsel was ready. He thought defense counsel was a good attorney and did not oppose defense counsel representing him if the trial court granted a continuance to allow defense counsel to investigate issues defendant deemed important and if defense counsel listened to him and "follow[ed] at least some of the things [defendant] said."

Defendant raised different complaints concerning his attorney than he had two days earlier. According to defendant, his attorney did not investigate defendant's theory that Taylor died in the emergency room as the result of medical negligence, did not have Taylor's cell phone, and had not satisfactorily explained a defense theory. Defendant thought his attorney was mad at him because defendant could not repay the $82 counsel placed in defendant's jail account. Defendant performed a Lexis search of his counsel and "his name comes up with three other criminal defendants who were convicted, who are making this same allegation that I am making now." Defendant was concerned because his attorney failed to file any motions in

limine and disagreed with the trial court when it advised his attorney had filed a motion to suppress.

Defense counsel told the court defendant's children and Taylor's colleagues declined defense requests for interviews; but the teachers were on the prosecution's witness list, in any event. There was no evidence the attempted life-saving measures in the emergency room contributed to Taylor's death. He provided some details concerning federal habeas proceedings involving former clients. The attorney advised he had no reason to ask the court for another trial continuance.

With respect to Taylor's cell phone, defense counsel stated he had filed a motion to suppress the contents of Taylor's phone call to a friend after she was stabbed. The police downloaded the cell phone's contents and the prosecution gave defense counsel a list of all of the calls Taylor made or received. Defense counsel believed the cell phone's contents were relevant, but not the cell phone itself. The individual Taylor phoned after the attack was on the prosecution's witness list. Although defendant maintained the cell phone was relevant because it looked like a gun, that position was undermined because defendant described seeing a black gun and Taylor's cell phone was white. Defense counsel responded he was ready for trial. The trial court denied defendant's *Marsden* motion.

On appeal, defendant asserts the trial court "failed to recognize the significance of the statements of defendant and counsel which tended to reflect a conflict of interest" and failed to inquire about that conflict. Our review of the record does not persuade us that defendant or defense counsel made any statements at the *Marsden* hearing suggesting embroilment "in such an irreconcilable conflict that ineffective representation is

likely to result." (*Streeter, supra,* 54 Cal.4th at p. 230, internal quotation marks omitted.)

We are similarly not persuaded that defense counsel's representation amounted to ineffective assistance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) Some witnesses chose not to speak with defense counsel. Some of defendant's theories did not bear scrutiny, and counsel's decision to focus his efforts on more plausible evidence and theories was reasonable. Accordingly, he has not shown the trial court abused its discretion in denying this *Marsden* motion. (*Streeter, supra,* 54 Cal.4th at p. 230.)

At most, defendant's claims revealed tactical disagreements and a level of distrust flowing from defendant to his attorney. Standing alone, strategic differences are insufficient under *Marsden*: "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.'" (*People v. Welch* (1999) 20 Cal.4th 701, 728-729; see also *People v. Clark* (2011) 52 Cal.4th 856, 912 [strategic differences alone typically do not "portend a complete breakdown in the attorney-client relationship"].) To the contrary, during the hearing defendant stated he thought defense counsel was a good attorney and did not oppose defense counsel representing him if his complaints could be resolved. A lack of trust also provides an insufficient basis to grant a *Marsden* motion. (*People v. Taylor* (2010) 48 Cal.4th 574, 600.)

V. Defendant's Right to Testify and Decide the Defenses Presented to the Jury

Our Supreme Court recognizes "the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury." (*People v. Robles* (1970) 2 Cal.3d 205, 215.) From this right, defendant asserts a defendant who chooses to testify is also entitled to wrest all tactical control of the defense from counsel: "[T]he defendant's decision to testify is 'often steeped in tactical considerations' [citation] . . . . Consequently, when the defendant chooses to testify the defendant controls the defenses which will be presented to the jury and, absent defendant's express consent, defense counsel may not present any defense or defenses other than those selected by the defendant. Otherwise, the fundamental right to testify and the defendant's testimony will be shut down, overridden, or diluted by defense counsel." We disagree.

A criminal defendant who "chooses professional representation, . . . waives tactical control; *counsel* is at all times in charge of the case and bears the responsibility for providing constitutionally effective assistance. . . ." (*D'Arcy, supra,* 48 Cal.4th at p. 282; see also *People v. Valdez* (2004) 32 Cal.4th 73, 95.) There is no exception for the testifying defendant.

Defendant further asserts his "testimony and his defense of unreasonable self-defense [were] undercut and undermined when counsel introduced evidence of mental illness in support of counsel's defense of mental-illness unreasonable self-defense and argued *his* defense, instead of defendant's defense, to the jury." He provides no examples to support the contention, and our

independent review of defense counsel's closing argument has not located any. Defendant testified in support of an unreasonable self-defense theory,[11] and the mental illness evidence complemented it. In closing argument defense counsel explained why defendant might actually, but unreasonably, believe in the need to defend himself against Taylor.

Defendant also cites *Rock v. Arkansas* (1987) 483 U.S. 44 to support the contention that "[a]rbitrary and unreasonable limitations or restrictions on a defendant's testimony [violate] the right to testify." The issue in *Rock* was "whether a criminal defendant's right to testify may be restricted by a state rule that excludes her posthypnosis testimony." (*Id.* at p. 53.) That issue was not present here, and defendant does not demonstrate how his testimony was restricted.

VI. Jury Instructions

A. Lying-in-Wait Murder Instruction, CALJIC No. 8.25

Defendant contends the court erred in giving CALJIC No. 8.25.[12] Citing *People v. Atchley* (1959) 53 Cal.2d 160, 175, he

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[11] "Unreasonable self-defense is 'not a true defense; rather, it is a shorthand description of one form of voluntary manslaughter.' [Citation.]" (*People v. Elmore* (2014) 59 Cal.4th 121, 134.)

[12] CALJIC No. 8.25 provided:

"Murder which is immediately preceded by lying in wait is murder of the first degree.

"The term 'lying in wait' is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise. The lying in wait need not continue for any particular period of time provided that its duration be

argues the instruction omitted "the essential lying-in-wait *mens rea* element of an 'intention of inflicting bodily injury upon such person or of killing such person.'"

Atchley, a death penalty case, is not applicable. As our Supreme Court explained in *People v. Stevens* (2007) 41 Cal.4th 182, 204, there is a distinction "between the lying-in-wait special circumstance and lying-in-wait murder because the former requires an intent to kill, while the latter does not."

People v. Russell (2010) 50 Cal.4th 1228 is dispositive. There, our Supreme Court listed the three elements for [l]ying-in-wait murder: "(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . ." (*Id.* at p. 1244, fn. and internal quotation marks omitted.) The Supreme Court then added, "We have repeatedly held that CALJIC No. 8.25 adequately conveys to a jury the elements of lying-in-wait murder." (*Ibid.*)

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substantial, that is, an amount of time that shows the killer had a state of mind equivalent to premeditation or deliberation.

"The word 'deliberation' relates to how a person thinks, and means formed or arrived at or determined upon as a result of careful thought and weighing of consideration for and against the proposed course of action.

"The word 'premeditation,' which relates to when a person thinks, means considered beforehand. One premeditates by deliberating before taking action."

B. Modifying CALJIC No. 3.32 to Address the Elements of Lying-in-Wait

Section 28, subdivision (a) provides in part that evidence of a defendant's mental illness is "admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." Accordingly, the court gave CALJIC Nos. 3.32[13] without modification. Defendant contends the standard version of CALJIC No. 3.32 failed to tell the jury mental illness evidence could be considered in deciding whether he was lying in wait with the specific intent to injure or kill the victim. As lying-in-wait murder does not require the specific intent to kill or injure, the trial court properly did not modify CALJIC No. 3.32 to address such an element.

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[13] CALJIC No. 3.32 provided:

"You have received evidence regarding a mental disease of defendant at the time of the commission of the crime charged in Count 1, murder. You should consider this evidence solely for the purpose of determining whether defendant actually premeditated, deliberated or harbored malice aforethought, which is an element of the crime charged in Count 1, first degree murder, and the lesser of second degree murder."

CALJIC No. CALJIC No. 2.09 was also given:

"Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

C. Modifying CALJIC No. 3.32 to Address Credibility

At one point defendant told an investigating officer, "Anglia Lusk did it." Lusk was the social worker to whom defendant made a number of baseless complaints concerning Taylor's treatment of his children. She testified at trial. Citing *People v. McGehee* (2016) 246 Cal.App.4th 1190 (*McGehee*), defendant contends the trial court erred in failing to modify CALJIC No. 3.32 to instruct the jury it could consider evidence of his mental illness to assess not only whether he formed the specific intent to injury or kill Taylor, but also to assess his credibility. *McGehee* is distinguishable.

In *McGehee,* the trial court instructed the jury on consciousness of guilt (CALCRIM No. 362) and on the limited use of evidence of mental illness or impairment (CALCRIM No. 3428). CALCRIM No. 362 told the jury it could consider any knowingly false or misleading statement by the defendant as consciousness of guilt, but such a statement could not "prove guilt by itself." (*McGehee, supra,* 246 Cal.App.4th at pp. 1203-1204.) CALCRIM No. 3428 told the jury, "'You have heard evidence that the defendant suffered from a mental disease or defect or disorder. You may consider this evidence *only for the limited purpose of deciding whether at the time of the charged crime, the defendant acted with the intent or mental state required for that crime. . . .*" (*McGehee, supra,* 246 Cal.App.4th at p. 1204.)

The Court of Appeal agreed with the defendant that the trial court should have modified the mental illness instruction to allow the jury to consider evidence of his mental disturbance in deciding whether false statements he made following the murder were knowingly false and thus evidence of consciousness of guilt. (*McGehee, supra,* 246 Cal.App.4th at p. 1204.) The Court of

Appeal reasoned, "mental illness or impairment has obvious relevance to the question of ability to perceive or recall events." (*Id.* at pp. 1204-1205.) But the Court of Appeal also found the error to be harmless and affirmed. (*Id.* at p. 1207.)

The pivotal distinction here is the prosecution did not argue, and the trial court did not instruct on, consciousness of guilt. The context for the prosecutor's closing argument concerning Lusk was as follows: "[S]aying Anglia Lusk did it was symbolic. It was symbolic of what caused him to do it. You heard the conversation that he had with Tia on the bus. He was aggravated because Anglia wasn't helping to get the children back. [¶] . . . [¶] So when the defendant said Anglia Lusk did it, it wasn't some delusional thought or some hallucination or some problem with his mental health." There was no error in refusing to modify CALJIC No. 3.32.

D. Involuntary Manslaughter, CALJIC No. 8.45

"A trial court must instruct the jury on a lesser included offense, whether or not the defendant so requests, whenever evidence that the defendant is guilty of only the lesser offense is substantial enough to merit consideration by the jury. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 . . . .) Substantial evidence in this context is that which a reasonable jury could find persuasive." (*People v. Halvorsen* (2007) 42 Cal.4th 397, 414.)

Defense counsel requested the standard involuntary manslaughter instruction, CALJIC No. 8.45. Finding no evidence to support the instruction, the trial court refused. On appeal, defendant asserts he was entitled to the involuntary manslaughter instruction based on diminished actuality and unreasonable self defense.

A defendant is entitled to an involuntary manslaughter instruction on a diminished actuality theory when evidence demonstrates he suffered from a mental illness at the time of the crime and, because of that mental illness, did not have the mental state of malice and did not intend to kill. (*People v. Nelson* (2016) 1Cal.5th 513, 555-556.) Dr. Rad testified defendant had been diagnosed with mental illness in 1998. But defendant refused to cooperate with Dr. Rad's evaluation in this case, and the expert did not offer an opinion as to defendant's mental health at the time he stabbed Taylor. Similarly, the anecdotal evidence from family members suggesting defendant had mental health issues throughout his life did not address defendant's mental health status when the crime was committed. Insufficient evidence supported instructing the jury on involuntary manslaughter based on a diminished actuality theory. (*People v. Cruz* (2008) 44 Cal.4th 636, 664; *People v. Halvorsen, supra,* 42 Cal.4th at p. 414; *People v. Breverman, supra,* 19 Cal.4th at pp. 154-155.)

Defendant's alternative claim based on an unreasonable self-defense without due caution and circumspection fails as well. Defendant's briefs are devoid of references to specific trial evidence that would support the involuntary manslaughter instruction. Instead, the reply brief simply relies on his "entire testimony." This is insufficient to demonstrate error. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 ["Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error"]; see *People v. Stanley* (1995) 10 Cal.4th 765, 793 [a defendant claiming the evidence is insufficient to support a verdict must

specify how the evidence is insufficient and not merely refer the reviewing court to the statement of facts in the defendant's opening brief and assume the court will construct a theory supporting his claim].)

In any event, if we accepted defendant's argument that sufficient evidence warranted an involuntary manslaughter instruction, any error was harmless. "[A]n erroneous failure to instruct the jury on a lesser included offense is subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 827 . . . , and . . . evidence sufficient to warrant an instruction on a lesser included offense does not necessarily amount to evidence sufficient to create a reasonable probability of a different outcome had the instruction been given." (*People v. Banks* (2014) 59 Cal.4th 1113, 1161, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363.) That is the case here—the strength of the evidence and the implausibility of the defense precludes a reasonable probability of a more favorable outcome.

E. Mistake of Fact, CALJIC No. 4.35

The trial court gave CALJIC No. 4.35 at defense counsel's request. It advised the jury defendant was not guilty of any crime if he acted "under an actual belief in the existence of certain facts and circumstances which, if true, would make the act . . . lawful." On appeal, defendant claims CALJIC No. 4.35 is inconsistent with CALJIC No. 5.17 and could only have confused and misled the jury. CALJIC No. 5.17 told jurors defendant's "actual but unreasonable belief in the need to defend himself, would negate the malice necessary for murder, but was not a defense to voluntary manslaughter."

Defense counsel addressed the issue of mistake of fact in closing argument and erroneously argued defendant was not guilty of any crime if it found he mistakenly believed Taylor pulled a gun on him and he stabbed her in self-defense. Accordingly, any error in requesting and giving CALJIC No. 4.35 was harmless because CALJIC No. 4.35 could only have benefitted defendant. If the jury accepted defendant's testimony that he believed Taylor reached into her purse and grabbed a gun before defendant wielded the knife, but also believed defendant was mistaken, the result based on CALJIC No. 4.35 would have been an acquittal.

VII. Alleged Prosecutorial Misconduct

Defendant argues the prosecutor committed misconduct when she displayed photographs of Charles Manson for the jury in closing argument. There was no misconduct.

The prosecutor addressed defendant's mental illness claims in her rebuttal argument: "Based on the defense theory, [defendant] will never be held accountable for his actions, because after all, he will always be mentally ill based on his 17-year-old report. [¶] So he can get up and lie and say whatever he wants to say and you should absolve him. Does that make sense? No, because that's not what the law is. [¶] I'm going to show you someone. See if you know who that is." The prosecutor then displayed two photographs of Charles Manson. Defense counsel objected.

At sidebar, the prosecutor argued she was entitled to use well-known cases to illustrate the point that someone who was perceived to be "crazy" still could form the specific intent to premeditate, deliberate or harbor malice aforethought to commit

murder. Defense counsel responded the Manson case was unlike this case and the display of the photographs was inflammatory and inappropriate.

The trial court disagreed: "I think this is something that people are aware of. [¶] If you said Charles Manson, everybody is aware of who Charles Manson is, and I don't think the picture changes that."

Resuming her rebuttal argument, the prosecutor argued: "Everybody knows who that is? Charles Manson, right? You have seen him. Everybody recognizes those eyes? What they refer to as mad eyes, crazy eyes. They automatically look at him and say, 'Oh, my gosh, he's crazy,' right? [¶] And then you see this picture of him in a more current state. Again, everybody looks at him and thinks crazy. But where is he? He's sitting behind bars. [¶] Just because you're crazy, just because people think what you do is crazy, doesn't mean you're not able to form the specific intent to kill. . . ."

A prosecutor's closing argument may include "matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature." (*People v. Ward* (2005) 36 Cal.4th 186, 215, internal quotation marks omitted.) Although a prosecutor should not compare a defendant to a historical or fictional villain, a prosecutor may use such figures to illustrate a broader point about a defense argument. (*People v. Jablonski* (2006) 37 Cal.4th 774, 836-837 (*Jablonski*.) For example, in *Jablonski*, our Supreme Court approved the prosecutor's references to Lorena Bobbitt and the Menendez brothers "to illustrate a larger point about defenses based on shifting moral culpability for crimes away from a defendant"

when done without comparing the defendant to Bobbitt or the Menendez brothers. (*Id.* at p. 837)

Our Supreme Court has also held "the prosecutor's references to notorious murderers did not constitute misconduct. It was proper for the prosecutor to use as examples notorious murderers who committed heinous crimes for irrational purposes but apparently were legally sane. The prosecutor did not suggest that the offenses charged against defendant were as heinous as those committed by Hitler, Manson, and Chase. [Citation.] . . . In the present case, it was proper for the prosecutor to use these well-known examples of irrational murders to illustrate his point regarding the limits of the defense of insanity." (*People v. Jones* (1997) 15 Cal.4th 119, 180, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Here, too, the prosecutor did not compare defendant to Manson or suggest the offense charged against defendant was so heinous as those Manson committed. Instead, she used the photographs to illustrate the broader concept that a defendant's apparent mental illness may not prevent him from forming the requisite intent to commit murder. The use of the photographs for this limited purpose was not misconduct. (*Jablonski, supra,* 37 Cal.4th at pp. 836-837; *People v. Jones, supra,* 15 Cal.4th at p. 180.)

VIII. Alleged Juror Misconduct

Defendant argues the trial court abused its discretion when it removed Juror No. 1, but retained Juror No. 3 and Alternate Juror No. 1. We find no abuse of discretion as to Juror No.1 or Alternate No. 1; defendant forfeited any argument concerning Juror No. 3 by failing to ask the trial court to dismiss her.

A. Background

After defense counsel's closing argument, the trial court informed the parties it received information that Juror No. 1 was seen and heard discussing the case with Juror No. 3 in the hallway. The trial court examined Juror No. 1:

"The Court: Okay. So we brought you in here today because . . . [¶] [an] attorney has informed this court, vis-à-vis another individual, that you were discussing the case [and] saying certain things to . . . Juror No. 3. [¶] Did that happen?"

"Juror No. 1: . . . [¶] We were discussing not so much directly the case. Nothing with details pertaining to the case. [¶] There was some, I would say, hearsay or just a couple of comments about how long things were taking and the duration, or—I don't know how to say it. How quick things are moving along. That was more along the lines of our conversation. [¶] Not so much the details or opinions or anything about what is going on with the case.

"The Court: The comments that [have] been reported to me [are] more specific than that. You have given me a summary. [¶] Anything else more specific?

"Juror No. 1: Not to my recollection. [¶] Again, just more so the topic of the conversation was the pace of court and, you know, maybe a timeline of when we were going to close or how long we thought it was going to take to get to where we deliberated. [¶] Nothing specifically, again, to my recollection, of opinions or feelings towards any type of verdicts.

"The Court: Did you make the statement that the prosecution is going to have an uphill battle?

"Juror No. 1: No, I did not. No, I did not use the term uphill battle.

"The Court: Did you use any term about the prosecution, about the strength of the case, about what your opinion was in terms of presentation? Anything about that?

"Juror No. 1: Nothing to my recollection of a conversation along those lines at all.

"The Court: Would there be anything you can think of that would make that attorney believe that you were having a conversation like that?

"Juror No. 1: Not to my recollection at all. [¶] Again, what I remember of the conversation was very detailed around the pace of the court and how long it is taking. [¶] I can tell some of the jurors, including myself, are becoming concerned with the time that it is taking and how quickly things are moving along. [¶] Again, nothing in regards to a verdict or any type of opinions how people feel or anything like that, or whether they feel or believe that it is harder for one or the other."

The trial court excused Juror No. 1 from the courtroom and brought in Juror No. 3. The trial court explained it was investigating information concerning a conversation she might have had with Juror No. 1:

"The Court: . . . [¶] . . . [¶] When you were out in the hallway, did you have a conversation with any juror about the substance of this trial?

"Juror No. 3: The substance of the trial? No.

"The Court: Okay. What did you talk about?

"Juror No. 3: [Juror No. 1] said to me that the two attorneys, one seemed more experienced than the other.

"The Court: Okay.

"Juror No. 3: And I said that I liked [defense counsel].

"The Court: Okay. Anything else?

"Juror No. 3. That was it. That was it.

"The Court: Did you talk about the timing of this case, in term of how long it has been taking? It if went past the ten-day window or anything like that?

"Juror No. 3: The ten-day window, no. There is nothing about ten-day window.

"[¶] . . . [¶]

"The Court: . . . [¶] Was there any conversation or statements made in your presence or by you that the prosecution has an uphill battle in this case?

"Juror No. 3: No. No, I did not hear anything like that.

"The Court: Have you been a witness to any other conversations that were occurring out in the hallway by other jurors, not you, that are talking about anything relating to the sum or substance of what is happening as I have talked about here in this courtroom?

"Juror No. 3: No. I can't say that I have. I'm trying to keep aloof a little from everything and not really participating in the conversation. [¶] So no, I can't say that it has happened or that it has not happened."

The trial court asked the prosecutor if she had any questions, at which point Juror No. 3 said, "I like you too." The prosecutor then inquired of Juror No. 3:

"[The Prosecutor]: Did Juror No. 1 say that the prosecution is going to have a tough time or anything like that to you?

"Juror No. 3: I don't want to misquote him, but—I didn't take it that way. I really did not take it that way. And I really was not totally paying attention to him.

"The Court: Take what that way?

"Juror No. 3: What she just said. Did he say anything about the prosecution at all? And I don't recall that he said anything.

"[The Prosecutor]: Do you recall him saying that the prosecutor is going to have a tough job?

"Juror No. 3: He might have said the prosecutor has had a tough job. I'm sorry. I wasn't on record mode.

"[The Prosecutor]: And [do] your feelings about [defense counsel], liking him better or feeling like he is more experienced or whatever, is that going to get in your way of being fair to the prosecution and listening to the evidence fairly?

"Juror No. 3: I don't believe that to be true at all. No, I don't think so.

"The Court: Anything about anything that . . . Juror No. 1 . . . said to you that makes you feel like you can't be fair and impartial to both sides?

"Juror No. 3: No. No.

"The Court: Was there anybody else standing in your immediate presence? Any of the other jurors standing in your immediate presence?

"Juror No. 3: Yes. When I walked out, him and the alternate—I think it's the alternate—were sitting there. And then I walked out to the window, and they were talking, and that's when we talked about you guys."

Juror No. 3 left the courtroom, and the trial court brought in Alternate Juror No. 1:

"The Court: [¶] . . . [¶] So what I am curious about is during the most recent recess when you were outside, did anybody in your presence talk about what has been happening inside of the courtroom, their feelings about the prosecution,

about the defense, about the progress of the trial, anything like that?

"Alternate Juror No. 1: No, not like details. [¶] Just like—I don't know how to explain it. Like they just mentioned something but not in detail.

"The Court: What did they mention?

"Alternate Juror No. 1: Just a view on how they spoke, but that's it.

"The Court: I know it sounds like I'm being really technical, but I need you to remember the best you can. Actually use the language the other person said. Like try to quote that person for me.

"Alternate Juror No. 1: I don't really remember because I was texting so—

"The Court: The best that you can. Was it about specifically the prosecution?

"Alternate Juror No. 1: No. Just what they thought about, like how they presented it, but that's about it.

"The Court: So how they were presenting it? Meaning their performance in terms of the arguments?

"Alternate Juror No 1: Yes.

"The Court: Did they mention anything about, let's say, the prosecution has a tough job?

"Alternate Juror No. 1: Yes. Something like that.

"The Trial Court: . . . [I]f you can point to and tell me what seat that person who said that sits in the jury box?

"Alternate Juror No. 1: No. 1.

"[¶] . . . [¶]

"The Court: Okay. So when No. 1 was present, you thought that he said something like 'The prosecutor has a tough job'?

"Alternate Juror No. 1: Yes.

"The Court: Did he mention anything with respect to the . . . defense attorney has a tough job, or did a good job or anything like that?

"Alternate Juror No. 1: No, not that I recall.

"The Court: Okay. Was it anything more than the prosecutor has a tough job? Did he go on and say other things, like, give an example, or anything like that?

"Alternate Juror No. 1: No.

"[¶] . . . [¶]

"The Court: Did you hear Juror No. 3 say anything in response to what Juror No. 1 said?

"Alternate Juror No. 1: No. She just said—kind of like nod her head, like she was listening, but not that I recall.

"The Court: Did you say anything in response to what Juror No. 1 said?

"Alternate Juror No. 1: I was just like—I just said, yeah, but—

"The Court: Does what Juror No. 1 said have any effect on your ability—and you haven't been asked to make a decision yet, but just in case you are—does it affect your ability to be fair to both sides in this court?

"Alternate Juror No. 1: Yes, it doesn't affect me.

"The Court: So it doesn't affect you, right?

"Alternate Juror No. 1: Yes. It doesn't.

"The Court: To your knowledge, [have] there been any other conversations either during this break or any other, either

by Juror No. 1 or anybody else, regarding what is happening in the courtroom?

"Alternate Juror No. 1: No, not that I know of."

The prosecutor then inquired of Alternate Juror No. 1 as follows:

"[The Prosecutor]: When you responded 'yeah,' what were you responding 'yeah' for?

"Alternate Juror No. 1: Just saying 'yeah,' like what he said.

"[The Prosecutor]: Which is?

"Alternate Juror No. 1: That I guess it was tougher.

"[The Prosecutor]: Tougher. What do you mean by that?

"Alternate Juror No. 1: What he said. But I wasn't really paying attention to him.

"[The Prosecutor]: So you're saying that it was tougher for the prosecution or that the defense has made their case and—

"Alternate Juror No. 1: No, not like that. Just very—not in detail, but just—I don't know how to explain it.

"The Court: . . . [¶] When you say, 'yeah,' what were you saying yes to? Was it that—what did you think he was telling you? When you said, 'yeah,' what were you responding to?

"Alternate Juror No. 1: Like the prosecutor's job is tough to prove, but it wasn't in judgment of the case.

"[¶] . . . [¶]

"[The Prosecutor]: Are you referring to the prosecutor's job in general or specifically in this case? [¶] Did you think he was referring to this case?

"Alternate Juror No. 1: No, just in general. Not specifically in this case."

"The Court: Sir you may step out. [¶] Please don't talk to anybody outside about any of the questions that you have been asked inside or any of your answers that you have been given."

The trial court then discussed her concern with counsel: "Juror No. 1 seemed to minimize what he said. Both Juror No. 3 and Alternate No. 1 confirmed what we originally heard was the statement, and so I'm feeling like Juror No. 1 was not honest with this court." Defense counsel agreed, but added that if the trial court dismissed Juror No. 1, it should also dismiss the alternate as the latter's comments "certainly" expressed "a biased opinion against the prosecution."

The trial court responded its concern was Juror No. 1's lack of candor with the court: "If he is not being candid with the court, I don't know what else he hasn't been candid about. [¶] Alternate No. 1 was candid with the court. So I'm a little bit less concerned with Alternate No. 1. He was candid with what was said. [¶] It's Juror No. 1 that I'm most concerned about. [¶] Juror No. 3 was candid with the court, I believe. So in my opinion a limiting instruction only works when someone is being honest and forthright, and I'm concerned about that with Juror No. 1."

The prosecutor asked that Juror No. 1 be dismissed and replaced with Alternate Juror No. 1. Defense counsel objected, arguing the trial court could simply admonish Juror No. 1. The trial court stated, "I looked squarely at him and asked him if he said something close to that and he said, 'No,' and two other jurors said 'Yes.' I find that to be too difficult for this court to overcome." The trial court removed Juror No.1 and replaced him with Alternate Juror No. 1.

The following day, the prosecutors informed the trial court one of them overheard Alternate Juror No. 1 say something about being questioned by the court: "I believe it was a female juror. I'm not sure because I didn't look. I just remember seeing the alternate when I was here yesterday. I didn't pay attention to the other jurors. [¶] It was a female, and [Alternate Juror No. 1] said something about questions, and that was within seconds that I overheard, and then I went into the parking lot. So I don't know what it was about or anything like that. I had no context. All I heard was questions, and that is what stuck with me. Something about asking questions."

The trial court asked the prosecutor and defense counsel, "Do we think we need to bring in the alternate to have a conversation about this? It doesn't strike me as something that is going to be a problem if he is just saying I was asked questions. [¶] My admonishment to him was do not discuss any of the questions or answers that you gave to any of the other jurors. Somehow being asked questions is probably a reasonable answer of what happened. 'I was asked some questions' I don't see it as being detrimental to either side or in violation of the court's order. [¶] Do you want me to bring him in and inquire?"

The prosecutor responded, "No, your Honor. [¶] I'm comfortable with the situation at this point." Defense counsel stated, "Likewise."

B. Analysis

A trial court has broad discretion to remove a juror no longer able to perform his or her duty. (*People v. Armstrong* (2016) 1 Cal.5th 432, 450 (*Armstrong*).) Our standard of review is abuse of discretion, but "a 'heightened [one that] more fully

reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.' [Citations.] Specifically, the juror's 'inability to perform' his or her duty 'must appear in the record as a demonstrable reality.'" (*Ibid.*)

"[T]he demonstrable reality standard . . . is more 'than simply determining whether any substantial evidence in the record supports the trial court's decision.' [Citation.] 'A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. . . . [¶] The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror is] established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' [Citation.]" (*Armstrong, supra,* 1 Cal.5th at pp. 450-451.)

There is a "rebuttable presumption of prejudice [when a juror commits misconduct], but . . . 'the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding

circumstances, indicates there is no reasonable probability of prejudice, i.e., no substantial likelihood that one or more jurors were actually biased against the defendant.'" (*In re Lucas* (2004) 33 Cal.4th 682, 696.)

At the beginning of the trial, Juror No. 1 pledged to "accurately and truthfully answer, under penalty of perjury, all questions propounded to [him] concerning [his] qualifications and competency to serve as a trial juror . . . ." The trial court removed Juror No. 1 because it found he was not truthful when asked about his conversation with Juror No. 3 and Alternate Juror No. 1. The trial court was in the best position to observe Juror No. 1's demeanor and assess his credibility. (*People v. Turner* (1994) 8 Cal.4th 137, 205.) His inability to perform his duty appears in the record as a demonstrable reality. (*Armstrong, supra,* 1 Cal.5th at p. 450.) Accordingly, the trial court did not abuse its discretion in removing Juror No. 1 from the jury.

On appeal, defendant challenges the retention of Juror No. 3. But defense counsel did not object in the trial court to Juror No. 3's continuing service, and defendant has forfeited this claim on appeal. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1308; *People v. Stanley* (2006) 39 Cal.4th 913, 950.)

Anticipating this result, defendant contends the issue was preserved for appeal because the trial judge expressly ruled she thought Juror No. 3 was being candid. The trial court did make that statement. But neither the prosecution nor the defense sought the dismissal of Juror No. 3, so the statement was not made in the context of retaining Juror No. 3.

Citing *People v. Hill, supra,* 17 Cal.4th at page 820, defendant alternatively argues it would have been futile to seek the removal of Juror No. 3 because the trial court retained

Alternate Juror No. 1 over his objection. We cannot conclude a defense objection would have been futile. Although the trial court found both Juror No. 3 and Alternate Juror No. 1 to have been candid, their statements to the trial court were different and the court may have been swayed if defendant objected to the retention of Juror No. 3. Moreover, even assuming defendant's claim is cognizable on review, there is no reasonable probability of prejudice, as nothing Juror No. 3 said indicated she was biased against defendant. (*In re Lucas, supra,* 33 Cal.4th at p. 696.)

As for Alternate Juror No. 1, even assuming the trial court abused its discretion in moving him into Juror No. 1's spot, we cannot find prejudice. Alternate Juror No. 1 explained his comment referring to the prosecutor's "tough" or "tougher" job referred to the prosecutor's role in general and not in this case. The nature of Alternate Juror No. 1's statement and his explanation indicate there is no substantial likelihood Alternate Juror No. 1 was actually biased against defendant. (*In re Lucas, supra,* 33 Cal.4th at p. 696.) Instead, as defense trial counsel observed, the statements indicated a biased opinion against the prosecution.

As for the post-examination conduct by Alternate Juror No. 1, the trial court gave counsel the opportunity to inquire further, but neither counsel asked to pursue the matter.

IX. Defendant's Posttrial *Faretta* and *Marsden* Motions

Defendant contends the trial court erred in denying his posttrial *Faretta* and *Marsden* motions.

Immediately after the jury was discharged, defense counsel asked to schedule the court trial on defendant's prior convictions and defendant made a *Faretta* motion. Defendant indicated he

would seek to file a motion for new trial based on ineffective assistance of counsel, creating a conflict of interest for current counsel. The trial judge indicated she would "probably the best word is punt. But I'm going to deny the motion. But I'll revisit it on March 4th [the date for the court trial on defendant's prior convictions]."

The matter was called on March 4, 2016, for the court trial on defendant's prior convictions, hearings on defendant's *Faretta* and *Marsden* motions, and sentencing. The court began by denying the *Faretta* motion: "[T]he court has found in the past and stands by the file, and I have reviewed the file, again, that both sides deserve that we find some closure and finality to this case, including the victims. [¶] And we had spent a lot of time going through motions with Mr. Brown, and in my opinion, just like it was when he originally asked me to go pro per, it became [disruptive] and it wasn't for the true reason that we have people go pro per. It was simply to obstruct and delay."

The courtroom was cleared, and defendant's *Marsden* motion was heard. Defendant first complained his attorney was currently in trial on a high profile matter and devoting all his attention to that client. He asserted his conviction was the result of ineffective assistance of counsel. Specifically, defendant contended a juvenile court order established Taylor "was appointed and the maternal auntie was the [children's] actual caretaker." He reiterated his disagreement with counsel's tactical decision to show defendant suffered from a mental illness and for not advancing defendant's preferred defenses of crime of passion and self-defense. He faulted counsel for failing to present testimony from his three oldest children in order to show "that some of the actions taken by the defendant were based on what

the children . . . told their father, which is me, during the visits"; for permitting the prosecutor to show photographs of Charles Manson; for not requiring the tape of his entire interview with an investigating officer to be played for the jury; and for not entering a plea of double jeopardy.

Defense counsel responded: Whether Taylor was the court-appointed caretaker for the children was irrelevant. The children told investigating officers defendant told them he wanted to kill their grandmother. The tape recorded interview was problematical because some of defendant's statements were made before he was given the *Miranda* advisement. Moreover, as defendant made the decision to testify, counsel needed to be careful not to allow the jury to hear portions of the tape that could lead to defendant's being impeached on the witness stand. Finally, an adjudication in the juvenile court that defendant killed Taylor did not constitute double jeopardy in the criminal matter.

Based on what she heard that morning, in addition to her "personal observations of the trial," the trial judge found defense counsel "performed valiantly" and denied the *Marsden* motion.

As our Supreme Court has held, "We stress . . . the trial court should appoint substitute counsel when a proper showing has been made at any stage. A defendant is entitled to competent representation at all times, including presentation of a new trial motion." (*People v. Smith* (1993) 6 Cal.4th 684, 695 (*Smith*).) Defendant, however, was not seeking to substitute counsel in order to file a motion for new trial; he sought to represent himself in that endeavor. In that regard, *Smith* is not apposite.

People v. Windham (1977) 19 Cal.3d 121 provides the framework for our analysis of both posttrial motions. "[O]nce a

defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound discretion of the court. When such a midtrial request for self-representation is presented the trial court shall inquire sua sponte into the specific factors underlying the request thereby ensuring a meaningful record in the event that appellate review is later required. Among other factors to be considered by the court in assessing such requests made after the commencement of trial are 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. Having established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." (*Id.* at pp. 128-129.) The trial court did precisely that here.

X. Cumulative Error

Defendant contends the cumulative prejudicial effect of the asserted errors requires reversal. There is no cumulative prejudicial effect requiring reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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