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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

OLIVER DOMINGUEZ,

Defendant and Appellant.

B280068

Los Angeles County  
Super. Ct. No. VA140209

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Robert J. Higa, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,  
Chief Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Jonathan J. Kline and Stephanie C. Santoro,  
Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant and appellant Oliver Dominguez of seven counts of aggravated sexual assault on a child as well as continuous sexual abuse and lewd act on a child. The victim was Dominguez's girlfriend's daughter, who was 11 years old when the abuse started and 15 when she finally told a nurse about it. Dominguez's sole contention on appeal is that the trial court dissuaded him from exercising his constitutional right to represent himself at trial by emphasizing too emphatically the risks and dangers of self-representation. We find no error and therefore affirm.

### **BACKGROUND**

#### **1. *Dominguez's sexual abuse of the minor victim***

Because Dominguez does not challenge the evidence supporting his conviction, we summarize it briefly.

On September 29, 2015, Marcela G. became worried when her 15-year-old daughter, E.,<sup>1</sup> did not come home from school. Finally, after 7:00 p.m., Marcela found E. on their street, walking home. Crying, E. told her mother that someone had drugged and raped her. Marcela called police; paramedics arrived and took E. to the hospital. Marcela also went to the hospital, along with her boyfriend, defendant Oliver Dominguez. After E. spoke with a therapist at the hospital, she told her mother that Dominguez had "[done] something to her," "had sexually abused her," when "she was 11, 12 years old." South Gate police investigated.

According to E., Dominguez began "grab[bing]" her and touching her vagina when she was 11 and visited her mother—who was living with Dominguez—in Maywood. Dominguez also touched E.'s "breasts" and "butt" when she was 11 and Marcela was at work. When Dominguez did this, E. felt

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<sup>1</sup> To protect their privacy, we refer to the victim's mother by her first name and to the victim by the initial of her first name.

“scared” and “lonely.” Dominguez told E. that, if she told her mother what he was doing, “bad things would happen” to her mother.

When E. was 12 and they were home alone, Dominguez “hug[ged]” her, than “had [her] lie down on the bed” and “started taking off . . . half [her] clothes.” Dominguez “started pulling down [E.’s] shorts”; she was “holding [her] clothes tight so he couldn’t take them off” but he succeeded in removing her “bottoms.” Dominguez pinned E. down on the bed and put his penis into her vagina. E. was not able to move. After Dominguez was done, E. saw blood and “got scared.” Dominguez told her that meant she was “not a virgin anymore,” that he had “[taken] it away from [her].” Dominguez told E. “not to tell anybody and not to tell [her] mom”—“[i]t was just a thing between us.” Dominguez told E. that if she “open[ed] [her] mouth” “he would have major big problems” and then what would she and her mother do for “support.”

When E. was 13, Dominguez put his penis in her vagina three times a week. When E. was 13 or 14, Dominguez also put his mouth on her vagina about once a week. On about four occasions, Dominguez tried to put his penis into E.’s anus.

When questioned by a detective, Dominguez said E. initiated the sexual conduct and he never forced her to do anything. Dominguez told the detective “[e]verything began as a game” but “went out of control.” Dominguez said he and E. had last had sex two weeks earlier. Dominguez asked the detective how many years he might get, apparently referring to prison. Dominguez acknowledged he “was the adult that had to think things through,” “[t]he one [who] could have stopped everything . . . from the beginning.” Dominguez added that Marcela “must hate [him].” Dominguez said, “I am the guilty one here” and asked the detective to ask Marcela to forgive him. Dominguez

then dictated a letter of apology to Marcela for the detective to write for him.

**2. *The charges and Dominguez's Marsden and Faretta motions***

The People charged Dominguez with five counts of aggravated sexual assault of a child (rape), five counts of aggravated sexual assault of a child (oral copulation), five counts of aggravated sexual assault of a child (sodomy), and one count each of lewd act on a child and continuous sexual abuse.<sup>2</sup> The court appointed deputy public defender Mark DiSabatino to represent Dominguez. Dominguez was arraigned on the information on May 18, 2016, and on the amended information on October 4, 2016.

After a number of pretrial conferences, on October 4, 2016 the parties announced ready for trial. The next day, the case was transferred to Judge Robert J. Higa for trial. A Spanish language interpreter assisted Dominguez throughout the proceedings. When the court called the case, defense counsel told the judge, “My client . . . insists on giving you something.” The court urged Dominguez to show the document to his lawyer before giving it to the court. The “something” turned out to be a one-page handwritten statement in English. In the statement Dominguez complained his counsel had “made a half-hearted effort to contact or subpoena [*sic*] any witnesses.” DiSabatino then said, “You

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<sup>2</sup> At the conclusion of the People's case at trial, on October 6, 2016, the court dismissed three of the oral copulation counts and three of the sodomy counts on defense counsel's motion. Ultimately, the jurors were unable to reach a verdict on the two remaining sodomy counts and the court dismissed them.

know what[:] he wants to do a *Marsden*.”<sup>3</sup> The court had the prosecutor leave the courtroom.

The court conducted a hearing at which both Dominguez (through the interpreter) and DiSabatino spoke. At the conclusion of the hearing, the court denied Dominguez’s *Marsden* motion. Dominguez then apparently indicated he wanted to represent himself. The court asked him, “You want to represent yourself[:] is that what you[] want?” The court asked Dominguez if he was ready to start trial. Dominguez responded, “I need time.” The court noted Dominguez’s request to continue the case was untimely. Dominguez said, “You’re denying me my rights.” The court stated it would let Dominguez think during the lunch recess about what he wanted to do. The court added, “But you are making a mistake if you want to get rid of Mr. DiSabatino.” The court then brought in the prospective jurors and ordered them to return after the lunch recess.

When court resumed after lunch, the judge asked Dominguez, “[W]hat is your pleasure?” Dominguez responded, “What I said just a while ago.” The court asked, “Do you wish to represent yourself?” Dominguez said, “I don’t have another choice.” The court then said it would have Dominguez fill out the *Faretta* advisement and waiver form.<sup>4</sup>

The interpreter said she would read the form to Dominguez in Spanish. The court then addressed Dominguez:

“Mr. Dominguez, are you sure you want to represent yourself because if you are reading that form, you understand that you are going to be treated just like any other lawyer. . . . [J]ust because you are going

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<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

<sup>4</sup> *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

pro. per. you don't get any favors because of that. I want you to understand that. It is a very serious offense. You are looking at life. . . . Very serious and you are uneducated. You don't know any of the rules of evidence. It is very, very dangerous for you. I'm saying that because I kind of, I hate to see anyone go pro. per. in serious cases like this. It is not a misdemeanor. . . . This is very serious. It will affect your whole life. So I don't know what you maybe talked to other people and heard about it. This is a very complicated type of offense. I know you got a right to go pro. per. but[,] like I said[,] I [have] never seen anyone successful[ly] representing themselves on these cases, the big cases. I just want you to understand the seriousness of it. You have 15 counts of very serious offenses."

Defense counsel then confirmed Dominguez faced multiple life counts, and the prosecutor noted the life sentences would be mandatory. The court continued,

"That is the reason I'm sitting here talking to you like this; otherwise I wouldn't waste my time. I feel for you. I just want to make sure you understand what you are getting into and nobody else can—you know all of these other people can talk and give you all of this advice. But they are not going to, if you lose they are not going to suffer the consequences. Okay. So it is easy for them to tell you what to do. So I just want you to go ahead and she will explain it. I want you to know how I feel. I don't think it is what you should do. *But it is up to you and she will go ahead and translate the form for you if that is what you want to do.* Then we will do it." (Italics added.)

Dominguez said, “Actually my life is destroyed. . . . Since I have been here. It has been destroyed. I need to represent myself.” Dominguez added, “No one wants to represent me.” The court responded, “I’m not here . . . to just chitchat with you. I’m telling you the seriousness of it and you have to make a decision right now.” Dominguez said, “I’m making it.”

Dominguez then conferred with DiSabatino and completed and submitted the *Faretta* form. Dominguez confirmed he had initialed each box and signed the form. Dominguez stated on the form he had attended but not graduated from high school. In response to the questions on the form asking if the defendant had any “additional formal education” beyond high school or any legal education, and whether the defendant ever had been granted the right to self-representation in a criminal case, Dominguez wrote, “No.” To the questions whether he knew what facts had to be proved before he could be found guilty or what the legal defenses were to the charged crimes, Dominguez checked the “No” boxes.

The court addressed Dominguez: “And I take it that each place where you have initialed you understood what you were initialing; is that correct?” Dominguez answered, “Not all of it.” The court asked, “Well, what didn’t you understand?” Dominguez responded, “On the last page.”—apparently referring to the last page of substance, page three of four. The court reviewed the third page of the form, which contains a section entitled, “Court’s Advice and Recommendation.” The court told Dominguez, “[T]hese are the court’s advice and recommendations. This is what we discussed earlier.” The court then read aloud to Dominguez the advisements on the form: “‘I understand that it is the advice and recommendation of this court’—that’s me—that I do not represent myself and that I accept court appointed counsel.’; ‘I understand if I accept court appointed counsel, an experienced trial attorney will be assigned to try my case.’;

'I understand the lawyer will be able to investigate my case and file pretrial motions and advise me of what to do.' ” The court asked Dominguez, “Do you understand what that says? You have a right to have this lawyer, a very experienced lawyer represent you through this trial. I have already told you that. I think it is not wise for you to do this. So you understand that now?”

Dominguez answered, “Yes.”

The court continued, “And knowing, the last question is[,] knowing all this and everything I said and everything on this form, you do still wish to proceed in pro. per.; is that correct?” Dominguez responded, “Well, that is where my doubt is. If the court doesn't assign me another attorney, I would have to represent myself.” The court said, “Well, I'm not assigning you another attorney. You have an attorney assigned to you. So are you representing yourself?” Dominguez said, “Do I have to answer that question now?” The court answered, “Yes. I gave you over lunch. I told you instead of ruling on it before lunch, I told you to think about it.” The prosecutor interjected she had calculated Dominguez's maximum exposure at 233 years to life.

The court asked, “All right. Knowing all that[,] you still wish to represent yourself, right?” Dominguez said, “If the court doesn't want to give me another attorney[,] one that helps me, someone that fights for my case. Someone who really investigates things. Someone who fights for my life. It is my life.” The court told Dominguez, “All right. You know this lawyer, Mr. DiSabatino, is experienced and he is here to fight for you. He is ready to go to trial. All right. It is either yes or no? Do you want to represent yourself or not? . . . If you do want to represent yourself, you have that right and I'll grant that wish. Just tell me yes or no. That is all I want to know. Don't give me a speech. What do you want to do?” Dominguez asked, “Was my petition denied?” The court answered, “No. I'm going to grant



your petition if that is what you want to do. I'll grant it.” Dominguez asked, “Was my petition of getting another attorney denied?” The court responded, “That was denied, yes.” Dominguez then said, “Okay. I'll accept him staying.” The court asked, “All right. You will have Mr. DiSabatino represent you; is that correct?” Dominguez answered, “Yes.” The court said, “Okay. That is a wise decision.” The court then brought in the jurors and the trial went forward.

### DISCUSSION

Dominguez contends his “decision [to proceed with appointed counsel was] railroaded by the trial court.” The trial court, according to Dominguez, “engaged in what amounted to an extended and heavy-handed reproach of [his] assertion of [his] right [to self-representation], repeatedly questioning the decision to proceed, and the wisdom of that decision, and repeatedly hammering home . . . not only that [he] was looking at a ‘very serious,’ ‘very complicated’ case, carrying ‘multiple’ mandatory life terms, but, more to the point, that [Dominguez] had *no* chance of winning if he were to go pro[.] per.”

In *Faretta, supra*, 422 U.S. 806, the United States Supreme Court held that under the Sixth Amendment to the United States Constitution, a defendant in a criminal case “has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.” (*Id.* at p. 807, italics omitted.) “A trial court must grant a defendant’s request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently.” (*People v. Lynch* (2010) 50 Cal.4th 693, 721.) “Unlike the right to representation by counsel, the ‘right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*.’ ” (*People v. Danks* (2004) 32 Cal.4th 269, 295

(*Danks*).) “[T]he court should draw every reasonable inference against waiver of the right to counsel.” (*People v. Marshall* (1997) 15 Cal.4th 1, 23 (*Marshall*); see also *Brewer v. Williams* (1977) 430 U.S. 387, 391, 404 [“courts indulge in every reasonable presumption against waiver” of the postarraignment right to counsel].) “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 (*Dent*).)

“*Faretta*’s emphasis ‘on the defendant’s knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion may be denied.’” (*Danks, supra*, 32 Cal.4th at p. 295.) “[A] motion made out of a temporary whim, or out of annoyance or frustration, is not unequivocal—even if the defendant has said he or she seeks self-representation.” (*Marshall, supra*, 15 Cal.4th at p. 21; see also *Jackson v. Ylst* (9th Cir. 1990) 921 F.2d 882, 888 [self-representation request deemed an equivocal, emotional reaction to the trial court’s denial of a motion for substitute counsel]; cf. *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205 (*Scott*) [defendant “made his *Faretta* motion immediately after the trial court denied his *Marsden* motion, and [his] subsequent comments suggest he made the *Faretta* motion only because he wanted to rid himself of appointed counsel” (italics omitted)].)

“‘A defendant seeking to represent himself “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.’”’” (*People v. Burgener* (2009) 46 Cal.4th 231, 241.) The court has a “duty altogether to ensure that [the] defendant [is] made aware ‘of the hazards ahead’ if he proceed[s] without the assistance of counsel” and should undertake a “searching or formal colloquy in

response to [a] defendant’s request to represent himself.” (*Id.* at p. 242.) To ensure a defendant’s waiver of his right to the assistance of counsel is knowing and intelligent, the court should “advise [the] defendant of the ‘possible pitfalls’ or ‘consequences’ of self-representation,” including the facts that “the district attorney would be both experienced and prepared” and that the defendant “would receive no special consideration or assistance from the court.” (*Id.* at pp. 241, 243.) “In addition, . . . the court should satisfy itself that the defendant understands the nature of the charges against him, though there is a split of authority in California as to whether the court must also specifically advise the defendant of the maximum penal consequences of conviction.” (*People v. Ruffin* (2017) 12 Cal.App.5th 536, 544.)

Here, even though Dominguez’s *Faretta* motion was untimely,<sup>5</sup> the trial court stated it would grant it. The court then proceeded to fulfill its duty of advising Dominguez of the hazards, pitfalls, and consequences of self-representation. The court engaged in a lengthy colloquy with Dominguez to ensure—as required—that Dominguez understood and appreciated these

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<sup>5</sup> As noted, Dominguez made his motion for self-representation on the morning of trial, after jurors had been assigned to the courtroom. When the court asked him if he was ready to proceed, Dominguez said he “need[ed] time.” Dominguez’s motion was untimely. (See, e.g., *People v. Valdez* (2004) 32 Cal.4th 73, 102 [motion made moments before jury selection was to begin]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [eve of trial]; *People v. Burton* (1989) 48 Cal.3d 843, 853-854 [day of trial]; *Scott, supra*, 91 Cal.App.4th at pp. 1204-1205 [four days before trial was to begin]; *People v. Howze* (2001) 85 Cal.App.4th 1380, 1396-1399 [request made two days before trial]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 624, 626 [day of trial]; *People v. Caird* (1998) 63 Cal.App.4th 578, 583-584 [one day before trial].)

dangers. Dominguez made his *Faretta* request for the first time immediately after the court denied his *Marsden* motion and jury selection was about to begin. Dominguez said several times that he “[didn’t] have another choice” and that he “need[ed] to represent [him]self” because his “life [had been] destroyed.” When, after going over the advisement and waiver form with him, the court asked Dominguez whether he “still wish[ed] to proceed in pro. per.” “knowing all this,” Dominguez did not say, “yes.” Instead, he said he had “doubt” and again asked the court to “assign [him] another attorney.” The prosecutor then advised the court and Dominguez of his maximum possible sentence. The court again asked Dominguez if he wanted to represent himself. Dominguez again complained about his court-appointed counsel and again asked if his *Marsden* motion had been denied. At that juncture—even though the trial court had stated, “I’m going to grant your petition if that is what you want to do. I’ll grant it.”—Dominguez chose to proceed with the lawyer he had.

Dominguez’s reliance on *Dent*, *supra*, 30 Cal.4th 213, is misplaced. *Dent* was a capital case. On the morning of trial, neither of Dent’s court-appointed lawyers showed up. Defense counsel repeatedly had requested continuances. The court told Dent it was “very concerned” about his representation. On its own motion, the court relieved Dent’s lawyers and continued the case. (*Id.* at pp. 215-216.) One of Dent’s lawyers finally appeared and told the court that Dent wished to proceed with him as counsel or, in the alternative, to proceed pro. per. The court interrupted: “I am not going to let him proceed pro. per. . . . Not in a death penalty murder trial.” (*Id.* at p. 217.) The court then relieved counsel and appointed new counsel. Dent never renewed his request for self-representation. (*Ibid.*)

The Supreme Court reversed Dent’s conviction. (*Dent*, *supra*, 30 Cal.4th at p. 215.) The court acknowledged that Dent’s

*Faretta* motion was “[a]rguably” “equivocal.” But, the court held, “whether or not [Dent’s] request was equivocal, the trial court’s response was not only legally erroneous but also unequivocal, and foreclosed any realistic possibility [Dent] would perceive self-representation as an available option.” (*Dent*, at p. 219.)

The trial court here did not flatly deny Dominguez’s *Faretta* request—far from it. The court gave Dominguez the advisement and waiver form, had the interpreter go over it with him in Spanish, and then engaged him in a colloquy about it. The court told Dominguez it would *grant* his motion if that was what he wanted. But after his demands for a new lawyer were rejected and the prosecutor told him he faced more than 230 years in prison if convicted, Dominguez decided to proceed with his court-appointed attorney. We find no error.

**DISPOSITION**

We affirm Oliver Dominguez's conviction.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EGERTON, J.

We concur:

EDMON, P. J.

GOODMAN, J.\*

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