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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ANDRE BERRY,

Defendant and Appellant.

B282547

(Los Angeles County
Super. Ct. No. BA413129)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Reversed and remanded.

Jean Matulis, 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, Noah. P. Hill and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Frank Berry appeals from the judgment entered by the court after its determination at a retrospective competency hearing that he was competent at the time of his 2014 trial. He contends that at the competency hearing the court erred in determining the time period and evidence relevant to its inquiry; that the record demonstrates that the court erred when it determined that he was competent throughout his trial and sentencing; that the matter should be remanded for consideration of mental health diversion under recently enacted Penal Code¹ section 1001.36; that the matter should also be remanded for resentencing in light of recent statutory amendments giving the trial court discretion in imposing sentence enhancements under section 667, subdivision (a); and that four one-year sentence enhancements under section 667.5, subdivision (b) are no longer applicable to him after recent statutory changes.

While this appeal was pending, the California Supreme Court, in *People v. Rodas* (2018) 6 Cal.5th 219 (*Rodas*), clarified the law concerning retrospective competency hearings. Noting that the circumstances in which a retrospective competency hearing is feasible are narrow, the Supreme Court discussed at length the difficulty of making a reliable retrospective competency finding, in the absence of contemporaneous psychiatric evaluations, for a defendant whose competence fluctuates and depends on his or her continued use of psychotropic medication. Applying the principles of *Rodas* here, we conclude that the determination that Berry was competent to stand trial is not supported by substantial evidence, and that the record demonstrates that a retrospective competency hearing is

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

not an adequate remedy for the failure to conduct competency proceedings at the time of Berry's trial. Accordingly, we reverse the judgment of conviction and remand the matter for retrial if Berry is competent to stand trial.

FACTUAL AND PROCEDURAL BACKGROUND

I. Prior Proceedings²

Berry was charged with kidnapping (§ 207, subd. (a)), with a special allegation that he had personally inflicted great bodily injury (§ 12022.7, subd. (a)); and battery causing great bodily injury (§ 243, subd. (d).) As to both offenses, it was alleged that Berry had suffered five prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)); that he had served seven prior prison terms for felonies (§ 667.5, subd. (b)); and that he had suffered three prior felony convictions within the meaning of section 667, subdivision (a)(1).

A. Declaration of Doubt

On October 11, 2013, the date that jury trial was set to begin, the trial court (Judge Charlene Olmedo) declared a doubt as to Berry's competence to stand trial. The court suspended criminal proceedings and appointed psychiatrist Kory J. Knapke to evaluate Berry's competence under section 1368.³ The court

² As requested by Berry, we ordered the record in the prior appeal in this matter, Case No. B254509, incorporated by reference in this matter.

³ Section 1368, subdivision (a) provides that if, during the pendency of an action and prior to judgment, a "a doubt arises in

also ordered Berry's counsel to select a psychiatrist to examine Berry.

Knapke examined Berry on November 4, 2013, and his report was submitted to the court on November 6, 2013. Knapke was not provided with any of Berry's previous psychiatric records, and Knapke noted that such records would have been helpful. Berry told Knapke that Knapke had previously examined him on several occasions while he was institutionalized as a mentally disordered offender and had even testified against him at previous mentally disordered offender hearings, but Knapke did not recognize Berry and did not locate any records pertaining to him. Knapke was also not provided with Berry's previous arrest record or the probation officer's report.

Knapke concluded that Berry suffered from a mental illness, most likely schizoaffective disorder, bipolar type. . Knapke opined that at the time of the examination Berry was competent to stand trial. However, Berry's "current competency is predicated on the notion that he continues to take his psychiatric medication on a daily basis in the jail facility." Knapke also stated that he "believe[d] the stress of his court proceedings could be a destabilizing factor in his overall mental status." Specifically, Knapke cautioned that with the passage of time before trial, Berry could decompensate.

On November 6, 2013, the parties appeared before Judge Norm Shapiro, who stated that he had received Knapke's report and asked defense counsel how he wished to proceed. Defense

the mind of the judge as to the mental competence of the defendant, he or she shall state that doubt in the record and inquire of the attorney for the defendant whether, in the opinion of the attorney, the defendant is mentally competent."

counsel requested that Berry be examined by a second psychiatrist, and explained that he had not yet selected a doctor to examine Berry because he wished to review Berry's medical records first. The prosecutor objected to any further continuance in the matter for the appointment of a second doctor, and the court stated that it, too, did not see any need for a second psychiatrist to be appointed.

Defense counsel argued to the court that a second examination was needed. He noted that Knapke had commented that Berry displayed heightened agitation, and counsel asserted that that this agitation made it difficult to communicate effectively and prepare for trial. Counsel argued that he had personal experience with the difficulties that representing Berry posed. Defense counsel urged, "I need to get these records. . . . I need time to get the records in order to get Mr. Berry properly evaluated." Knapke, defense counsel argued, had not been provided with sufficient documentation in advance of his examination: "I asked to speak with the District Attorney so that we could send the necessary information out to these doctors; he declined."

Defense counsel argued, "I want a doctor to evaluate Mr. Berry with at least the basic knowledge of a probation report which Dr. Knapke did not have. What I really need, what I feel this case needs[,] is a doctor who's reviewed Mr. Berry's medical history, can see that, and then talk to Mr. Berry and provide us with a thorough and correct and competent evaluation."

The court said, "I have a report from a doctor who's on our approved list of—not only is he—he's not only a psychiatrist, a medical doctor, but he certainly has the background, the training, and experience to render an opinion, and he knows what

materials it's necessary to look at. [¶] So I'm going to find that according to Dr. Knapke, the defendant here is competent to go forward." The court resumed the criminal proceedings over defense counsel's objection. On the same day, the court heard and denied Berry's motion to replace his appointed counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118.

B. Second Psychiatric Evaluation

Although the criminal proceedings had resumed, defense counsel arranged for psychiatrist Jack Rothberg to evaluate Berry on November 15, 2013. Rothberg, like Knapke, was not provided with prior medical records, and Berry refused to provide any information about his background or mental health history. Rothberg found Berry to be paranoid, angry, and uncooperative. He was "suffering from psychosis and experiences numerous delusional ideas which impair his thinking, his ability to interact with others and to function in an effective manner." Rothberg found that while Berry understood the nature and purpose of the proceedings, his perceptions were "colored by paranoid thinking. He more importantly would certainly have difficulty cooperating with counsel in the preparation of a suitable defense. He refuses to provide any information about his background or mental health history, concerned that we would obtain records and use [them] even though this would obviously be a mitigating factor under the circumstances since this is a very serious charge. He is delusional about the roles of all of the participants. He was paranoid of me. By virtue of his inability to cooperate with counsel he would not be competent to stand trial."

While Berry was taking psychotropic medication, Rothberg concluded that the medication was insufficient to manage his psychosis and that "more aggressive" treatment was required.

“He clearly needs to go to the state hospital for aggressive treatment with anti-psychotic medication,” Rothberg wrote. In Rothberg’s view Berry was “very likely to deteriorate further in the absence of appropriate aggressive treatment with such medication,” while treatment with antipsychotic medication would likely render Berry competent to stand trial. Rothberg concluded that while medication was necessary to avoid serious harm to Berry’s physical and mental health, Berry “lacks the capacity to make decisions about such medication, and he will have to be medicated involuntarily in all likelihood.”

C. December 4, 2013 Hearing

The parties appeared before Judge Edmund Willcox Clarke on December 4, 2013. Defense counsel advised the court that Berry wanted a *Marsden* hearing, and that he intended to declare a doubt as to Berry’s competence. Berry announced that he wanted to represent himself. Defense counsel provided the Rothberg report to the court.

After reviewing Rothberg’s report, the court told counsel that Rothberg “did not say [Berry] is incompetent. It says he needs treatment.” Because Rothberg phrased his conclusion as “By virtue of his inability to cooperate with counsel he would not be competent to stand trial,” the court said, “[I]t says [‘]virtue of[’] et cetera, that is clearly not a statement of he is. It’s he would be.” The court said that it had no doubt as to Berry’s competence. The court proceeded to accept Berry’s request to represent himself and relieved defense counsel.

D. Conditional Examination

On December 11, 2013, before Judge Stephen A. Marcus, Berry represented himself at the conditional examination of a witness.

E. Trial

1. January 27

The five-day trial began January 27, 2014, before Judge Michael Garcia. Berry waived his right to a jury trial. On the first day of trial the court granted the People's motion to amend the information to allege an assault by means likely to produce great bodily injury (§ 245, subd. (a)(4)), with the same special allegations attached as to the other counts.

In his opening statement, Berry argued, "Well, I intend to prove that a witness is not necessarily a witness. Because a witness is a witness to appear things, that can appear to that witness is going to appear to say things that could have appeared or might have appeared. But, then, when you really put it together, the witness is going to say, yes. That could have happened. Illusion. See, because things that appear to have happen, just because you a witness, you witness the things that could appear. Not only the things that did appear, but the things that could have appeared." Berry questioned witnesses and made objections as the trial progressed.

2. January 29

On January 29, 2014, the People sought to present a fingerprint identification witness out of order for the purpose of a potential post-conviction priors trial. While Berry did not initially object to the witness being taken out of order, when the

witness began to testify Berry began to protest, arguing that he had not been provided with relevant documents and needed time to prepare his defense with regard to them. He asserted several times that the failure to produce these documents constituted a violation of *Brady v. Maryland* (1963) 373 U.S. 83, and he asked that the case be dismissed.

Berry's response to the documents the People were attempting to mark for identification prompted the court to abandon its plan to mark the documents and take the witness out of order. Instead, the court ordered a copy of the documents to be made and given to Berry. After Berry received the documents he argued that the "withheld" evidence was "very important" because it related to the contested issue of what he had been wearing. Berry moved to dismiss the case because the People had "maliciously with[e]ld exculpatory evidence that I cannot accurately represent myself without these documents." He asserted that the People had also withheld a video from him.

The court asked Berry if there was anything else, and Berry responded, "Yes, Your Honor. I know I'm not a lawyer and I wanted to thank you for, you know, taking the time out to kind of like help me out here. And, you know, not [to] just throw me in the wolves. But, Your Honor, I'm going to have to ask for a continuance because I'm having an emotional breakdown. I'm a mental patient, as you can see, I have been in the mental hospital for two years or better. And I'm having—the burden of this three strike just came off me, just told me, and I'm not able to function right now. I'm going to need some time."

The court asked what Berry meant about three strikes, and the People explained that they had discovered that three of the prior offenses alleged in the information were not actually

committed by Berry. The court asked the prosecutor if he wished to move to dismiss those prior allegations at that time, and the prosecutor said that he did.

The court said, “Mr. Berry, before we entertain any motion, because [of] some of the comments you made, are you prepared to go forward right now to entertain this motion that the People are going to make[,] which the Court understands is a motion to dismiss certain prior convictions?”

Berry said that he was prepared, and the court asked, “Are you sure? You’re okay to do that? Is that yes?” Berry again assented, but the court said, “I don’t want you to feel that the Court is pressuring you. If you’re not right now of the right mindset to do it, I’ll continue this until tomorrow.”

Berry told the court, “I’m okay,” and the court proceeded to hear and grant the motion to dismiss three prior conviction allegations. The court asked the People if there was any change in the plea bargain offer; there was not.

The court ended the proceedings early for Berry “to digest this information that was provided for the day.” The court asked Berry, “One last thing, Mr. Berry, would you like the court to contact counsel in light of some of your comments?”

“Please, Your Honor, please,” answered Berry.

The court agreed to have an attorney present the next day.

3. January 30

However, when trial resumed the following day⁴ and Berry asked whether the court had contacted counsel, the court said,

⁴ According to the minute order of January 30, 2014, Berry had refused to come to court in the morning. Proceedings did not begin until the afternoon. Berry apologized to the court and

“We’re not in a position at this stage of the proceedings to appoint counsel.”

Berry said, “Please, I’m having a difficult time here, because the fact I’m not getting the proper sleep and nutrients, and my medication. I’m not getting it because back here every day.”

The court reminded Berry that he had waived his right to be represented by counsel and that he had later refused to consent to a continuance for standby counsel to be obtained. “Well, Your Honor, at the time I was stable,” Berry told the court. Berry said that the change in his potential imprisonment the day before had affected him mentally, and he told the court that he was having a mental breakdown.

The court told Berry that because the People’s plea bargain offer had not changed when the allegations were dismissed, the dismissal of several strike allegations against him “doesn’t change anything with regard to potential disposition on the case.”

Berry explained to the court that the change in his potential exposure was in fact significant, because any plea bargain offer was always to be weighed against the fact that he would be sentenced to life in prison if he lost. He said he had come to accept the situation when he was facing a potential life sentence, but that this acceptance now had been taken away from him. He said that the entire case was about mistaken identity, that the strike allegations were another instance of mistaken identity, and that the People had mistaken his identity but suffered no consequences.

explained that he had been not been present because he had been mistaken for a gang member engaged in a fight.

Berry concluded by talking to the court about his mental state: “I don’t have the means or the time or the mental capacity to accept this type of criticism or anything, because I don’t have it. It’s not in me. I tried. I tried, Your Honor. I really did.” Berry told the court that he was suicidal. The court told Berry that it interpreted his comments as a motion for a mistrial, denied the motion, and resumed the trial.

4. Conviction and Sentence

The court found Berry guilty on all counts, and found true the special allegation with respect to the kidnapping that the victim had suffered great bodily injury. After the priors trial, the court found true several prior conviction allegations.

On count 1, the court sentenced Berry to the middle term of five years for the kidnapping, doubled pursuant to the Three Strikes law, plus three years pursuant to section 12022.7, subd. (a). On count 2, the court sentenced Berry to a consecutive two-year term. The court also imposed sentence enhancements of five years under section 667, subdivision (a)(1) and four years under section 667.5, subdivision (b). The court stayed count 3 under section 654. Berry’s aggregate sentence was 24 years in state prison.

F. Appeal

On appeal, this Court found substantial evidence that Berry had not been competent to stand trial as of the December 4, 2013 hearing; and concluded that the trial court had erred when it failed to declare a doubt, suspend the criminal proceedings, and conduct a competency hearing. (*People v. Berry* (Nov. 4, 2015, B254509) [nonpub. opn.].) We conditionally reversed the judgment and remanded the matter to the trial

court to allow the trial court to determine whether a retrospective competency hearing was feasible to evaluate Berry's competency at the time of trial.⁵ (*People v. Berry* (Nov. 4, 2015, B254509) [nonpub. opn.].)

II. Present Proceedings

A. Early 2016

On remand to Judge Clarke, counsel was appointed for Berry in March 2016. At counsel's request, the court appointed psychiatrist Ronald Markman to address the feasibility of a retrospective competency hearing. Markman's report, however, failed to address either the feasibility of a retrospective competency hearing or Berry's competency during the original criminal proceedings. Markman, who also did not have Berry's medical records to review, assessed Berry's current psychiatric condition, need for psychiatric treatment, and competence to stand trial as of April 2016.

Markman concluded that while Berry was psychotic, the condition was in remission due to his medication, and he was "clinically stable." In Markman's view, Berry required, inter alia, "long-term psychotherapy with a psychiatrist [who] can focus on his socially dysfunctional behavior and prescribe and monitor needed psychotropic medication."

Berry's counsel advised the court in April 2016 that Markman's assessment confirmed his opinion of Berry's present mental state, and he had no doubt as to Berry's present competence to stand trial.

⁵ This Court also concluded that the sentence on count 2 should have been stayed pursuant to section 654. (*People v. Berry* (Nov. 4, 2015, B254509) [nonpub. opn.].)

B. August 2016 Feasibility Hearing

The court conducted its feasibility hearing on August 4, 2016. The People had submitted briefing articulating their arguments as to why a retrospective competency hearing was feasible. Berry's counsel disagreed with the People as to feasibility, but said, "I didn't bring any materials or do a brief, because, basically, I intended to submit."

The court found that a retrospective competency hearing was feasible based on the factors for consideration set forth in *People v. Ary* (2011) 51 Cal.4th 510, at page 520, footnote 3. The court reasoned that there existed adequate contemporaneous medical evidence as to Berry's competence at the time of trial because doctors had seen Berry and evaluated him "close to the time frame when you're going to be evaluating his competency in hindsight, so it's not as if no doctor saw him and we're trying to guess what doctors might have said if they had seen him." The court noted that because Berry had spoken at his *Marsden* hearings before trial and represented himself at trial, the record included statements by Berry that could be evidence from which a person could reach a conclusion as to his competence to stand trial. Finally, the court observed that numerous witnesses, including trial witnesses, the prosecutor, and the trial judge all had interacted with Berry at the time of trial and were "available to comment" on his competence.

C. Competence Question Pending Retrospective Hearing

In October 2016, Berry's counsel advised the court that Rothberg had met with Berry and observed that he had decompensated. Rothberg believed that Berry was no longer competent. Based upon Rothberg's opinion and his own interactions with Berry, Berry's counsel declared that he had

doubts as to Berry's present competency. Counsel asked the court to suspend the criminal proceedings, appoint evaluators, and hold a competency hearing. Because Berry's counsel did not have documentation from Rothberg for the court to review, the court declined to declare a doubt.

Rothberg submitted a report on October 25, 2016. Berry indicated that he was actively hearing voices and was paranoid. He appeared to be actively psychotic although he maintained he was taking his medication. Berry refused to be interviewed further. Rothberg opined that Berry was not competent to stand trial as of October 2016, but Rothberg could not "render[] a definitive opinion as to his competency two years ago." To provide a final opinion, he would need to speak further with Berry, but because he could not, "I would have to opine only that he is not competent now and that until he is restored to competency a discussion of his competency back in January[] 2014 would have to be held in abeyance. There is nothing more that I can offer at this time until he has been restored to competence or, if you have some powers of persuasion that I do not have, for him to cooperate with me. At this point I do not believe that this is simply volitional. I suspect that there is psychosis and paranoia explaining his attitude toward me."

On November 1, 2016, the trial court found that Rothberg's report did not "support a finding of incompetence" and that "[t]he court has not been given a reason to declare a doubt in that regard."

Berry's competence was then discussed at a hearing on December 7, 2016. Berry's counsel suggested that Markman be appointed to review Berry's recent behavior in jail and to provide an update on whether he believed Berry to be presently

competent. The court agreed that Markman was possibly the best person to evaluate current competence because he was the person to most recently thoroughly examine Berry.

In February 2017, Berry's counsel represented to the court that Markman had spoken with Berry on multiple occasions and had reviewed additional records, and that Markman had no doubt about Berry's present competence. Berry's attorney also stated that he had no doubt as to Berry's competence at that time.

D. February 2017 Preparations for Retrospective Competency Hearing

At the hearing on February 21, 2017, the court discussed the parameters of the upcoming retrospective hearing with the parties. The prosecutor asked that the court consider the transcript of Berry's trial and also the transcripts of the *Marsden* hearings and other hearings on or about the time of the trial in which Berry spoke. The court questioned whether the transcripts of hearings that occurred close to the time of trial would be useful. Noting that competence can fluctuate from day to day and that the relevant period for consideration was the period of Berry's trial, the court agreed to accept the trial transcript and to "review those other documents which you have referenced to see if they enlighten me or not." Specifically, the court said that with respect to the transcripts from the *Marsden* hearings, "I'm not sure how strong they are because they precede the trial by at least days, if not weeks, and there are different issues at stake."

The court advised the parties that it had read the trial transcript, and it spoke at length about its views. The court stated that in the absence of other evidence, the trial transcript was enough to demonstrate Berry's competence at the time of

trial because “since from what I have found there is no evidence of incompetence in the transcript that I have seen.” The court noted that Berry had presented a defense with objections, statements of strategy, arguments to the court, and interactions with the court, “which suggests to me that Mr. Berry did understand the nature and purpose of the proceedings.” Plus, the court noted, the judge who conducted the trial was experienced and did not express any doubt as to Berry’s competence, creating “growing evidence of his competence with nothing to rebut it.” The court said, “But if you have evidence to rebut it, if you have experts who will come in and tell me to look at it differently or consider things that I’ve missed, I’m open to that”

E. May 2017 Retrospective Competency Hearing

The court held the retrospective competency hearing on May 12, 2017.

At the start of the hearing, the court advised the parties “about the way I look at this interesting combined legal and factual enterprise. I’ve said many times, and I still hold to this belief strongly, when Mr. Berry’s trial started, and when it ended, are the measuring points crucial to this decision in terms of his competence.” The court noted that competence can fluctuate: “[A] person can be incompetent on Friday and competent on the following Monday, and remain competent through the whole next week. And he can likewise be competent until Friday, and then arrive Monday incompetent. And although, perhaps, less likely, it seems that a person can be competent Friday and incompetent Monday, and competent Tuesday, and incompetent Wednesday, at least under the theories that the law uses to address the application of cognitive ability to a certain legal environment.”

Also in its introductory remarks, the court told the parties that when Berry elected to represent himself, the court “did not have a doubt as to his competence, in terms of the [sections] 1368/1367 competence of understanding the nature and purpose of the proceedings, nor did I think there was a problem of assisting his attorney, especially since he was choosing not to have an attorney. But most importantly, I saw no reason to think that he could not conduct the trial.” The court stated, “So I find that Mr. Berry should not have been denied the right to self-represent because of any issue of his ability to conduct the trial. That’s based on how he presented himself at the time he chose to represent himself.”

When the court was ready to hear from the parties, it asked counsel for Berry to identify anything in the record prior to November 2013 that the court should consider in determining Berry’s competence at the time of his January 2014 trial. The court again advised counsel that anything that occurred prior to Knapke’s evaluation of Berry on November 4, 2013 “is unlikely to get much traction with me.” The court questioned Berry’s counsel about what relevant past information was missing from or misrepresented in the experts’ November 2013 reports, and Berry’s counsel argued that while there was nothing specifically missing from the reports, the evaluators lacked essential information about Berry’s extensive psychiatric history as they performed their evaluations.

The court turned to December 2013 and spoke at length about its memory of the December 6, 2013 hearing at which Berry’s counsel declared a doubt, the court declined to suspend proceedings, and the court permitted Berry to represent himself. The court stated that it had read the file before calling the case;

that Berry's counsel's choice to state that Berry wanted a *Marsden* hearing before declaring a doubt as to Berry's competence "raised some questions"; and that Berry's counsel had failed to immediately produce the November 2013 Rothberg report but was "holding it in his back pocket." In spite of this Court's determination that the Rothberg report was substantial evidence of incompetence requiring the suspension of criminal proceedings, the court stated that Rothberg report "did not create a doubt in my mind, and still doesn't." The trial court had found Rothberg's report "unconvincing," and it read the report to say not that Berry was incompetent to stand trial if he represented himself, but that he was incompetent to stand trial because he was incapable of cooperating with his attorney. The court stated that if a person was incompetent because their paranoia prevented them from assisting counsel, but the person "then chooses to represent himself, why would we declare that person not competent, since the communicating with the lawyer is now moot, since there's no lawyer[?]"

Defense counsel argued to the court that the examining psychiatrists did not know that Berry had spent four years hospitalized as a mentally disordered offender, and that during that time he was paranoid and uncooperative, would not take medications, and refused to participate in counseling. That history, Berry's attorney argued, indicated that Berry was a severely disturbed person who could not control his emotions. Berry's counsel argued that while Berry's paranoia, psychosis, delusions, auditory hallucinations, distrust of his attorney, and his apparent manipulateness may have appeared be volitional based on the information available at the time, had his mentally disordered offender history been known when his attorney

declared a doubt in December 2013, the court would have ordered a competency hearing and would not have permitted Berry to begin representing himself at that time.

The trial court said that it was interesting to consider whether knowing Berry's history would have caused a judge to find him incompetent, "but it's only interesting if it means that he remained incompetent in January." The court characterized Berry's argument as a "theory[] that the prior legal finding makes Mr. Berry forever incompetent"; commented that "[t]he prior status as a mentally disordered offender does not equate with lack of competence to conduct a hearing"; and talked at length about the problem of mentally ill but competent defendants who want to represent themselves but will be "their own worst enemy." The court advised counsel that "what happened before [December⁶] 4th, while interesting, doesn't tell me that he was incompetent in January," and it said that with respect to its decision to permit Berry to represent himself, "I don't see that that would come out any differently from the past history or anything that was presented that day."

The court stated that from its review of the December 11, 2013, conditional examination, at which Berry represented himself, Berry's conduct tended to demonstrate that he was competent.

Turning to the trial, Berry's counsel argued that Berry exhibited paranoid and delusional behavior during the trial. The court responded that "the fact a defendant . . . thinks the evidence does not show what the prosecutor argues is quite common. It's not a delusion, it's simply a bias and perspective."

⁶ The court said "November," but it appears from the context of the discussion that the court meant December.

The court also pointed out that Berry made objections that were logical, demonstrated strategy, argued about the significance of evidence, and posed a question at trial that was drawn from the conditional examination. “[L]ooking at all these entries I made [in notes] about the conditional exam and the trial, almost all of them supported the notion of competence,” the court stated.

The court also noted that the trial judge, “that I know well, who is Judge Michael Garcia, who worked as a federal public defender before he took the bench, saw this trial every day, and I saw no sign in his comments that he doubted the competence of Mr. Berry.” The court said that “Judge Marcus, who has more years on the bench than Judge Garcia, sat at the conditional examination,” and Judge Marcus told Berry that he had done “an okay job” at the conditional examination. Both of those judges had the duty to stop the proceedings if they felt that Berry was incompetent, the court noted, but had not done so.

The court asked Berry’s counsel for any final argument, and Berry’s counsel said, “My client informs me—I don’t know if I read this in the transcript—that at one point Judge Garcia did say that he was considering stopping the trial because the defendant was acting in a suicidal way. One day he didn’t come out to court.”

The court commented that Berry’s “behavior in the jail, willingness to come to court, would not necessarily reflect on competence in court,” and asked the prosecutor for his recollection of what had occurred. The prosecutor denied that the trial judge had considered halting the proceedings because Berry had suicidal ideation.

The court then said, “I have a note to myself that the 29th of January was a short day, compared to the others, and the

transcript notes I made would reflect that. I don't know if that's what Mr. Berry is remembering, that there was not a full trial day for some reason. But I detected nothing in the transcript that suggests it was related to misgivings about self-representation or competency as viewed from the bench.”

The court concluded that Berry was competent to stand trial at all times pertinent to his trial and sentencing. Berry appeals.

DISCUSSION

I. The Competency Determination

“The criminal trial of a mentally incompetent person violates due process. [Citation.] However, a defendant is not incompetent if he can understand the nature of the legal proceedings and assist counsel in conducting a defense in a rational manner. [Citations.]’ [Citation.] A defendant is presumed competent unless the contrary is proven by a preponderance of the evidence by the party contending he or she is incompetent. [Citations.] In reviewing on appeal a finding of competency, ‘an appellate court must view the record in the light most favorable to the verdict and uphold the verdict if it is supported by substantial evidence.’ [Citation.]” (*People v. Blacksher* (2011) 52 Cal.4th 769, 797.) Berry acknowledges that contemporaneous competency determinations are reviewed under the substantial evidence standard of review, but he argues that this Court should review the trial court’s retrospective competency determination independently. As we identify no reason to review a retrospective competency determination differently than one made at the time of trial, we review the determination for substantial evidence.

As the court on remand (Judge Clarke) recognized, the key issue is whether Berry was competent at the time of his trial, from January 27 through January 31, 2014. Viewing the evidence in the light most favorable to the verdict, we are unable to conclude that the determination of Berry's competence during that time period is supported by substantial evidence. The court on remand failed to appreciate the link between the foundation for the November 2013 determination that Berry was competent—that psychotropic medication was necessary to control the symptoms of his mental illness—and the evidence that by the time trial was underway, Berry was no longer receiving his medication and his mental condition had deteriorated.

The most contemporaneous psychiatric evaluations of Berry's competence were performed in November 2013, more than two months before his trial. The first expert to see Berry in November 2013, Knapke, concluded that while Berry was then competent to stand trial, his competence depended on Berry continuing to take his psychotropic medication.⁷

Although defense counsel failed to draw the court's attention to relevant events at trial, in its review of the trial record the court either did not see or misconstrued the evidence that by the time of trial Berry was no longer taking the

⁷ The second expert, Rothberg, concluded later in November 2013 that Berry was at that time incompetent to stand trial. As we have previously ruled, this expert report and counsel's doubt as to Berry's competence should have prompted Judge Clarke to declare a doubt as to Berry's competency, suspend the criminal proceedings, and conduct proceedings to determine whether Berry was competent to stand trial. (*People v. Berry* (Nov. 4, 2015, B254509) [nonpub. opn.])

antipsychotic medication on which his competency depended; that he knew he was no longer stable; and that he was experiencing suicidal ideation. Indeed, the record reflects that in the midst of trial, Berry had told the trial court (Judge Garcia) that he was having an emotional breakdown and that he was not able to function. It is evident from the record that the court credited Berry's statements: Judge Garcia repeatedly asked Berry if he was well enough to continue while prior strike allegations against him were dropped, and it offered to continue the matter if Berry was not in the right state of mind to proceed. The court ended proceedings early for the day, and although Berry had not said anything about representation by counsel, the court spontaneously offered to contact an attorney in response to what Berry had told him that day. "Please," responded Berry.

The next day, Berry immediately asked whether the court had contacted counsel for him. The court withdrew its offer of representation, stating, "We're not in a position at this stage of the proceedings to appoint counsel." Berry implored the court to reconsider, because he was not receiving his medication, nor was he receiving sufficient sleep or nutrition.⁸ The court reminded

⁸ This evidence showed a substantial change of circumstances since Berry had previously been determined to be competent, and the court should at that time have suspended the criminal proceedings and conducted new competency proceedings. (*Rodas, supra*, 6 Cal.5th at pp. 231-236.) However, the judge who presided over the trial was not the one before whom the issue of competency previously had been litigated, and there is no indication in the record that the trial judge was aware that the earlier determination of competence was based on a report that expressly conditioned Berry's competence on his continued use of psychotropic medication.

Berry that he had waived counsel and refused to consent to a continuance for standby counsel; Berry answered, “At the time I was stable.” Now, Berry told the court, he was no longer stable: he was experiencing a mental breakdown and having suicidal thoughts. The court treated Berry’s entreaties as a motion for a mistrial, denied the motion, and continued the trial.

At the retrospective competency hearing, Berry’s counsel failed to describe these proceedings accurately. Judge Clarke acknowledged that one trial day had been shortened, but said that he had seen nothing in the trial transcript to indicate that the abbreviated proceedings were related to “misgivings about self-representation or competency as viewed from the bench.” This characterization of events directly contradicts the record.

The court failed to appreciate the link between the evidence upon which the 2013 finding of competence was based and the events demonstrating Berry’s subsequent deterioration. The court did not consider the evidence that during trial Berry was no longer medicated and was decompensating—exactly as had been predicted by Knapke, who had explicitly conditioned his November 2013 conclusion that Berry was competent on his continued use of medication. Nor did the court consider Berry’s reports that he was having a mental breakdown and was no longer stable in conjunction with Knapke’s prediction that the stress of court proceedings could cause Berry’s mental status to deteriorate. Additionally, despite this Court’s previous determination that Rothberg’s November 2013 report constituted substantial evidence that Berry was incompetent to stand trial, the court continued to disregard Rothberg’s expert opinion that Berry was incompetent based on what appears to be its understanding that a defendant who is incompetent to stand trial

because he is unable to rationally assist counsel in preparing a defense is no longer incompetent if he chooses to proceed to trial without counsel. The court's competency determination, therefore, is not supported by substantial evidence.

II. The Appropriate Remedy

After this Court remanded the matter to the trial court to determine whether a retrospective competency hearing was feasible, and after the trial court made its feasibility determination and conducted the retrospective competency hearing, the California Supreme Court clarified when retrospective competency hearings are appropriate. In *Rodas*, emphasizing the “inherent difficulties” of a retrospective competency determination, the Supreme Court held that a retrospective competency determination is only feasible when there is “sufficient evidence to *reliably* determine the defendant's mental competence when tried earlier.’ [Citation.]” (*Rodas*, *supra*, 6 Cal.5th at pp. 239-240.) When a defendant's competence fluctuates and is dependent on medication, and there are no contemporaneous psychiatric evaluations, a trial court cannot “fairly come to a reliable conclusion that the defendant was competent at that time.” (*Id.* at p. 241.)

Here, the record demonstrates that this case is precisely the type that the Supreme Court identified as unsuitable for a retrospective hearing. Berry's mental state clearly fluctuated, as evidenced by the repeated instances in which concerns and doubts were expressed as to his competence over the course of the trial court proceedings. There were no contemporaneous psychiatric reports concerning Berry's mental state at the time of trial, when he was no longer taking medication. The most recent reports were more than two months old at the time of trial, and

both pertained to time periods in which Berry reported taking his prescribed medication. Had the trial court declared a doubt in January 2014 when it became apparent that Berry was no longer taking his medication and was experiencing a resurgence of symptoms, “the court would have appointed two experts to examine defendant and report on aspects of his mental condition relevant to competence, as well as the appropriateness of medical treatment for any condition found. [Citation.] Such evaluations would have been crucial in determining whether” the absence of medication had caused a return of Berry’s symptoms to such a degree as to render him incompetent. (*Rodas, supra*, 6 Cal.5th at pp. 240-241.) These evaluations would have made it possible (though unnecessary) for the trial court to look back and make a reliable retrospective determination of Berry’s competence at the time of trial.

In the absence of that crucial evidence, the court on remand was faced with the task of making a retrospective competency determination based on outdated psychiatric reports that considered Berry’s competence while medicated, one of which found him incompetent and the other of which tied his competence to the continuation of his medication; evidence that the precondition for Berry’s competence no longer existed by the time trial was underway; and the reports of an unrepresented defendant that he was no longer stable or functional, having a mental breakdown, and considering suicide.⁹ Under these

⁹ The court on remand did receive a 2016 report from Knapke in which Knapke said that his review of additional proceedings did not cause him to doubt Berry’s competence at the time of trial. However, Knapke’s list of the materials that he reviewed in preparing his report indicates that he did not review

particular circumstances, which are in crucial respects similar to those in *Rodas*, *supra*, 6 Cal.5th 219,¹⁰ “we do not believe the trial court could fairly come to a reliable conclusion that defendant was competent at that time.” (*Id.* at p. 241.) Therefore, like the court in *Rodas*, we conclude that under the circumstances of this case a retrospective competency hearing

the trial transcripts from January 29 and January 30, 2014. As Knapke did not review the transcripts in which Berry reported that he was no longer receiving his medication and that he was experiencing a resurgence of symptoms, Knapke’s report offered no assistance to the trial court in determining whether Berry was competent at the time of trial.

¹⁰ Like Berry, Rodas’s competency depended on his continued use of medication, and he also remained able to converse somewhat rationally with the court even as questions arose about his competency. (*Rodas*, *supra*, 6 Cal.5th at pp. 225-226, 228-229.) Unlike Berry, Rodas was represented by counsel, who declared a doubt as to Rodas’s competence at trial and placed before the court evidence that Rodas’s mental state had deteriorated. Rodas’s counsel advised the court that Rodas was no longer taking his medication, that he was making incomprehensible assertions, and that he had spoken in a “word salad” as he had previously done when incompetent. (*Id.* at p. 227.) Here, without an attorney representing him, Berry’s incomprehensible statements, such as his opening statement, went unremarked at trial. While the record here does not include the same level of documented incoherence and delusion as in *Rodas*, Berry’s disclosures that he was not receiving his medication, that he was having a breakdown, that he was no longer in a stable mental state, and that he was unable to continue with the trial demonstrated a substantial change in circumstances requiring the court to hold competency proceedings.

cannot supply an adequate remedy for the failure to hold a contemporaneous competency hearing.¹¹ (*Ibid.*)

DISPOSITION

The judgment of conviction is reversed. Defendant may be tried on the charges for which he was previously convicted if he is competent to stand trial.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.

¹¹ Our conclusion that the judgment of conviction must be reversed makes it unnecessary for us to address Berry's additional arguments concerning mental health diversion and his sentence. Berry may raise these issues on remand as appropriate.