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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TONSHA WILCHER,

Defendant and Appellant.

B275876

(Los Angeles County  
Super. Ct. No. BA436943)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman, Judge. Reversed and remanded.

Carlos Ramirez, 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, William H. Shin and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Tonsha Wilcher appeals from a judgment entered after a jury found him guilty of driving under the influence of a drug and causing injury (former Veh. Code, § 23153, subd. (e); count 1), hit and run driving resulting in injury to another person (Veh. Code, § 20001, subd. (b)(1); count 2), and resisting an executive officer (Pen. Code, § 69;<sup>1</sup> count 3). The jury further found true the special allegation that Wilcher personally inflicted great bodily injury on another in the commission of count 1 (§ 12022.7, subd. (a)) and two prior prison term allegations (§ 667.5, subd. (b)). The trial court sentenced him to seven years and eight months in prison. Wilcher contends the trial court committed reversible error when it declined to declare a doubt about his mental competence to stand trial. We agree and reverse the judgment.

## **BACKGROUND**

### **Prosecution Case**

At approximately 4:45 a.m., on May 30, 2015, Wilcher was driving on the wrong side of a surface street when he struck a car driven by an adult woman. After impact, the woman's vehicle spun and crashed into a pole. She fractured her neck in the car accident and wore a neck brace for three months. Her two adult passengers also sustained injuries.

Wilcher did not stop his car at the scene of the accident. Firefighters and police officers located him and his damaged car seven blocks away from where the woman's car struck the pole. Wilcher exited his car. He approached officers and, with slurred speech, "said to suck his dick, that he was the Son of God, and that if [the officers] came near him, he was going to fuck [them]

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise noted.

up.” As Wilcher continued to make verbal threats to the officers, he asserted that he could see the officers but they could not see him. At one point, he examined his damaged car and stated, “ ‘Woo wee, I survived that.’ ”

According to officers’ trial testimony, Wilcher’s behavior was “erratic.” “He would go up and down, calm one minute, and then up and very aggressive and belligerent the next.” He failed to comply with officer’s demands, threatening to take away one of their batons. Officers used pepper spray, a Taser, and a baton to subdue him and take him into custody.<sup>2</sup>

An ambulance transported Wilcher to a hospital. At trial, an officer described Wilcher’s behavior at the hospital as follows: “He would go from calm to extremely agitated and irate. He would stare -- it was like a blank stare. He was looking right through you, extremely angry. At times, incoherent. He was rambling.” The officer stated Wilcher made the following comments at the hospital: “He went on for a while, and he talked about chopping our heads off. He talked about -- he said that we were reptilians. He mentioned The Grand Architect. He was mentioning a righteous God. He brought up Lucifer. He said that he wanted to go to Hell, and he was going to take us all with him. He talked about -- I had asked him if he took any kind of medication, and he indicated that, ‘I don’t take Jesus or Lucifer.’ He talked about All Mighty [*sic*] God, and extremely angry, and just rambling on about it.” The officer believed Wilcher was under the influence.

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<sup>2</sup> The prosecution played for the jury a video recording of the struggle between Wilcher and officers.

A drug recognition expert from the police department attempted to examine Wilcher at the hospital. According to the expert's trial testimony, Wilcher "was very angry" and threatening to kill officers and hospital staff. Wilcher's speech "was slow, raspy, and slurred." His eyes were bloodshot and watery. He would begin to cooperate with various tests and then become angry, use profanity, and stop cooperating. When the expert asked Wilcher if "he had been drinking," Wilcher replied that "he had been drinking life." When the expert asked if Wilcher "was taking any medications or drugs," Wilcher responded, " 'Juice.' " The expert formed the opinion that Wilcher was under the influence of "a dissociative anesthetic, which is consistent with phencyclidine or PCP." According to the expert, persons under the influence of amphetamine and methamphetamine display signs and symptoms consistent with persons under the influence of PCP.

At trial, the prosecution and defense stipulated that Wilcher had his blood drawn at the hospital, and subsequent tests conducted by police department criminalists revealed the presence of "the metabolites of THC, a main compound in marijuana" and amphetamine and methamphetamine.

### **Defense Case**

Wilcher testified in his defense. He denied being under the influence of drugs at the time of the car accident, but admitted to using marijuana and methamphetamine two or three days before the accident. He stated he used methamphetamine "for spiritual purposes."

Wilcher testified he had recently purchased the used car he was driving in the early morning on May 30, 2015. He claimed the car suddenly accelerated "like something was wrong with the

car mechanically.” He tried unsuccessfully to stop the car. He swerved to avoid hitting other vehicles. “[A]ll of a sudden,” his car began “pulling to the left,” and he collided with the victim’s car. His car “kept going straight” until it “stopped on its own.” He did not attempt to flee.

Wilcher stated he tried to answer the officers’ questions “as intelligently as [he] could” and comply with their orders. He claimed they became “belligerent” with him when he told them he was “‘a child of God’ ” in response to their questions about whether he was drunk or “high on drugs.” He stated it was “like they didn’t believe in God, or whatever.” Wilcher added: “But they don’t know what kind of God is. There is only one God, but they don’t know about God enlightenment. It’s not like Christian, Muslim, Satan. It’s in between. It’s a higher level of understanding . . . .” Wilcher testified he also told the officers: “‘I’ve been drinking juice, you know. I’m all for life, you know, natural.’ ”

Wilcher stated an officer used pepper spray on him as he was trying to answer their questions. Then, as he was trying to sit down in his car to comply with the officers’ demands that he “‘get down,’ ” an officer used a Taser on him. He denied resisting the officers.

During his direct examination and cross-examination, Wilcher acknowledged he had a 2003 conviction for child endangerment (§ 273a, subd. (a)) and a 2011 conviction for evading a police officer (Veh. Code, § 2800.2).<sup>3</sup>

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<sup>3</sup> Over Wilcher’s objection, the trial court ruled the prosecution could impeach him with these prior convictions.

## **Verdicts and Sentence**

The jury found Wilcher guilty of the charged offenses—driving under the influence (DUI) of a drug and causing injury, hit and run driving resulting in injury to another person, and resisting an executive officer. The jury also found true the special allegation that Wilcher personally inflicted great bodily injury on the driver of the other car in the commission of the DUI offense.

In a subsequent, bifurcated trial, the jury found two prior prison term enhancement allegations to be true.

The trial court sentenced Wilcher to seven years and eight months in prison: the middle term of two years for the DUI offense, plus three years for the great bodily injury enhancement; and one-third the middle term for resisting an executive officer (8 months), plus one year for each of the two prior prison term enhancements. The court also imposed a concurrent term of two years for the hit and run driving offense.

## **DISCUSSION**

Wilcher contends the trial court erred in declining to declare a doubt about his mental competence to stand trial.

### **Proceedings Below**

#### **May 3, 2016**

On May 3, 2016, during voir dire, Wilcher informed the trial court outside the presence of the prospective jurors that he did “not want to be present in the courtroom during the jury trial proceedings.” The court found he had “voluntarily absented himself” from the proceedings.

The trial court noted defense counsel previously stated off the record she had a doubt about Wilcher’s mental competence.

The court invited defense counsel “to make a record on this issue.”

Defense counsel stated she did not believe Wilcher was capable of assisting in his defense, explaining: “When I returned to court after the lunch hour, I was informed by the deputy that Mr. Wilcher wanted to speak with me. I went into the back to speak with him. It was at that time that he stated he did not want to come into the courtroom. In addition to that, he began making comments related to Satan, and that he was following the word of Lucifer. This is consistent with other remarks that Mr. Wilcher has made in court, on the record.

“I would note that on the October 6, 2015 court appearance, [seven months before the instant court hearing], Mr. Wilcher was in court -- or he was due to be in court that day; however, shortly before the case was called, we were informed by the courtroom deputy in Department 133 that Mr. Wilcher had been taken to psych because he was making comments about the Devil and sending the Devil after the deputies at that time.”

The trial court reviewed the minute order from the October 6, 2015 appearance and noted Wilcher was “to be evaluated pursuant to [Evidence Code] section 730.” Apparently, a mental health evaluation never occurred.<sup>4</sup>

Defense counsel continued: “With today’s conversation with Mr. Wilcher, as I was speaking with him and he was making the comments about following the word of Lucifer, he began

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<sup>4</sup> Later in the hearing, defense counsel noted the reason she did not pursue appointment of a mental health professional in October 2015 was that she was not attempting to communicate with Wilcher about trial strategy at that time and, therefore, did not believe an evaluation was necessary.

pointing around the cell, talking about the number thirteen, that he had third eyesight. He then made references to snitches and that Mr. Weller [the prosecutor] and I were snitches, and that everyone in the courtroom were snitches. Then again, he restated that he did not want to be present. He was making hand gestures at me. I don't know what they meant, but he then concluded by saying, 'I know you're a Buddhist.' ” Defense counsel stated she was not a Buddhist, in response to the court's inquiry.

The trial court noted Wilcher “didn't display any such behavior” during the court's earlier discussion with him about absenting himself from the courtroom. The court further stated: “I am not doubting your [defense counsel's] representations of his behavior at all. I want that to be clear. But two things: one, you are not a mental health-care professional. And the second is that I don't know if Mr. Wilcher is unable or unwilling, and that's where a mental health-care professional would come into play, and their opinion would have a value to me. I am not being presented with competent evidence to find a doubt as to Mr. Wilcher's mental competence, and I am not going to declare a doubt at this point in time and suspend proceedings.”

Notwithstanding this finding, the court ordered “the Los Angeles Sheriff's Department/Department of Mental Health [to] evaluate [Wilcher] within 24 hours regarding [his] mental competence to stand trial.” The court further ordered a report on Wilcher's mental competence to “be provided to the court by [the] morning of May 5, 2016.” When voir dire resumed, Wilcher was no longer in the courtroom.



### **May 4, 2016**

The following day, on May 4, 2016, Wilcher came to court in his jail-issued jumpsuit. Outside the presence of the prospective jurors, he acknowledged the deputy had given him an opportunity to change his clothes, but indicated he had declined because he did not want to be present for the proceedings. He told the trial court that although he did not want to be present, he wanted to be updated about “what’s going on” in the proceedings, and he “want[ed] to let the court know that [he was] intelligent and focused . . . on the information.” The court told him he would be brought back to the courtroom after lunch. After he left, the court stated, “Mr. Wilcher has been removed from the courtroom at his request. He has voluntarily absented himself.”

Thereafter, defense counsel reiterated she had declared a doubt about Wilcher’s mental competence the day before (May 3, 2016). The trial court noted Wilcher had not yet been evaluated by the Los Angeles County Sheriff’s Department pursuant to the court’s order. Defense counsel stated her objection to proceeding with the trial absent a mental competence evaluation. The court indicated it was difficult to schedule the evaluation because Wilcher was at the courthouse during the day, but expressed hope that he would be evaluated “within the next 24 hours or so.”

The trial court decided to proceed with jury selection unless the parties stipulated to a continuance (which they did not). The court explained it would not suspend the proceedings unless a mental health professional found Wilcher to be incompetent, commenting: “I again have now had another conversation with Mr. Wilcher, and I am not getting the same feeling that [defense counsel] has. But, again, she has had much more contact with

Mr. Wilcher than I have. But that's how I would proceed at this point in time."

The trial court further commented: "I am confident in my ruling about requiring competent evidence to suspend proceedings, with all due respect. And we all know what that means to [defense counsel]. Just because the defense attorney comes in here and says, 'I have a doubt,' does not mean that I should immediately suspend proceedings. That's why in this court -- and neither of you guys work in this court -- I will not suspend proceedings without an evaluation from a mental health-care professional, because it is such a drastic measure at that point in time to hold someone in custody without the clock ticking. And for who knows how long before the issue ultimately gets resolved? But if I have a letter from -- a report from a psychiatrist or psychologist, saying that in their opinion the defendant is incompetent, at that point in time, I must and do suspend the proceedings, because that's someone who knows a lot more than I do, saying in their opinion he's incompetent. So we're doing the best we can. We're trying to get someone."

Defense counsel replied: "I want to make the record clear that when I go into the back to try to have a conversation with Mr. Wilcher about the status of his case or decisions that are going to be made now that we're in trial, and he states to me that he's relying on quote, 'The Grand Architect,' that is definitely raising several red flags, along with all the other representations I made."

The trial court responded: "The same as it's just as easy for someone to call the police and say, 'This guy just hit me,' it's easy for a defense attorney to say, 'I have a doubt.' And again, as we talked about yesterday, there is a difference between 'unable' and

‘unwilling’ to cooperate in their defense, and I am not -- I’m not capable of telling the difference. And, you know, there is malingering at play. Possibly not here, but that’s a factor that needs to be considered. And those are things that a mental health-care professional is available [*sic*] of evaluating, that we are not. So we’re going to continue, unless you ask -- unless you agree to continue the case, and then I will continue the case. But I will not suspend proceedings, because I haven’t gotten that evaluation. And I get the impression that Mr. Wilcher would not give a time waiver, so it would have to be over his objection.<sup>[5]</sup> So we’re getting into a very slippery slope of things. So let’s see if we can get an evaluation and figure out where we go from here. But, again, if an evaluation comes back that he is incompetent, I will suspend proceedings upon request -- and I believe it’s probably automatic anyway -- declare a mistrial.”

At the beginning of the afternoon session on May 4, 2016, Wilcher was brought into the courtroom in his jail-issued jumpsuit. Outside the presence of the prospective jurors, he confirmed he did not want to be present for the proceedings. The trial court updated him, stating: “So we picked a jury. We’re going to probably start testimony this afternoon. But because I’ve asked you and, you know, we have a couple of hours left, we’re just going to ship you back [to county jail], okay?” Wilcher responded, “Well, I wanted to wait to see what was going to happen,” indicating he wanted to remain at the courthouse for the remainder of the day’s proceedings. The court agreed.

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<sup>5</sup> Wilcher objected to two prior continuances the trial court granted on defense counsel’s motions, related to discovery issues.

Wilcher was removed from the courtroom, and voir dire continued.

After the parties selected a jury and the jury was sworn, the trial court informed the parties, outside the presence of the jury: “As an update on our search for a mental health expert, we are working very hard at trying to get someone. We may have someone who can come here the day after tomorrow, but we’re not having any luck getting someone to examine Mr. Wilcher tomorrow. We cannot have someone examine him at the jail after he gets back to the jail in the evening, so our window of opportunity is only while he’s here.”

The trial court pre-instructed the jury and recessed for the evening.

**May 5, 2016**

At the beginning of the morning session on May 5, 2016, Wilcher was brought into the courtroom in his jail-issued jumpsuit. He confirmed he had an opportunity to change his clothes, but chose not to do so. The court inquired, “And are you deciding that you do not want to be here in court this morning?” Wilcher replied, “Yes, sir. Just for now, you know, until, you know, the victim get on the stand. I want to face my accuser.” After the court explained that the first victim would testify that morning, Wilcher decided he wanted to be present and went to change his clothes.

After Wilcher returned to the courtroom, defense counsel addressed the trial court, stating her belief that Wilcher was “not competent to assist in the defense of his case.” Counsel added: “Again, this morning, I had a conversation with Mr. Wilcher after the court brought him out the first time. I was called back in to lock-up. Mr. Wilcher -- after the court explained what was going

to be happening this morning, Mr. Wilcher asked me again whether or not the victims were present, after the court just explained that to him. [¶] So for those reasons, as well as all of the other reasons I have identified, I am objecting to the trial proceeding, absent Mr. Wilcher being evaluated.”

The trial court responded: “Every time Mr. Wilcher has been brought into court, I’ve made inquiries of him. He has understood my inquiries. He has answered them appropriately. I am not sure if it’s an unable or an unwilling situation at this point this time. We have made efforts to have someone come in and evaluate him. We have not been successful so far. We are continuing our efforts. So we will continue moving forward with the trial. I do not find a doubt as to Mr. Wilcher’s competency at this point in time, and that is my obligation.”

Defense counsel further commented: “I believe that further indication regarding Mr. Wilcher’s competency is the decisions he is making regarding his appearance and non-appearance in court. I don’t believe that -- over the past two days when the court has inquired of Mr. Wilcher whether or not he chooses to be present, I don’t believe he has made those choices competently. He is now deciding to be present. All of these things are making the jury percept [*sic*] him, which I don’t think his decisions are being competently made in his -- I cannot discuss this to him. I have not been able to, over the last three days that we have been sent out to trial, have a conversation with him that has been productive for purposes of me presenting a defense on his behalf, and I am again renewing my request for the court to declare a doubt.”

The trial court informed Wilcher that, in the future, if he made the decision not to change his clothes before a court session,

he would not be brought to the courtroom. Wilcher indicated he understood.

The prosecution made its opening statement and began its presentation of witnesses.

At the beginning of the afternoon session on May 5, 2016, Wilcher addressed the trial court and asked if he could have three minutes to speak with his attorney. The court granted his request. Thereafter, the prosecution's presentation of witnesses continued.

At the conclusion of the afternoon session, the trial court made the following comments: "As an aside, we've been dealing with this issue, whether Mr. Wilcher is currently competent. I will note for the record that some of the statements that he made on May 30, 2015 [the date of the crimes] are identical to the statements that he has purportedly made over the last couple of days.<sup>[6]</sup> So it is clear that everybody was well aware of the statements long before they were made, within the last day or two. My opinion remains the same."

#### **May 6, 2016**

At the beginning of the morning session on Friday, May 6, 2016, Wilcher was brought into the courtroom, dressed in civilian clothing. At the conclusion of the morning session, after additional prosecution witnesses testified, the proceedings were adjourned until May 9, 2016.

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<sup>6</sup> An example of this is Wilcher's reference to "The Grand Architect" during the crimes and also in his discussions with defense counsel.

**May 9, 2016**

In the morning on Monday, May 9, 2016, Wilcher came to court, appropriately dressed. After the prosecution concluded its presentation of evidence, defense counsel informed the trial court that Wilcher intended to testify. Counsel renewed her objection to the trial proceeding absent a mental competence evaluation. She stated that based on her conversation with Wilcher that morning, she did not believe he was making the decision to testify competently.

The trial court explained that the sheriff's department was planning to move Wilcher to a different facility so he could be evaluated. In the meantime, the court declined to declare a doubt about his mental competence. The court commented: "I do not have significant competent evidence at this point in time. In fact, my conclusion is exactly the opposite. I think Mr. Wilcher is well aware what he's doing at this point in time. It certainly is his right to testify."

The trial court explained to Wilcher that he had the right to testify and the right not to testify, and that his attorney was advising him not to testify, but it was his choice. Wilcher stated he wanted to testify.

Wilcher testified in his defense. His testimony is summarized above in the background section of this opinion.

Thereafter, the trial court instructed the jury.

**May 10, 2016**

Wilcher did not appear in court on May 10, 2016. Outside the presence of the jury, the trial court explained: "He has refused to come to court today. He was transported to county jail to be evaluated for competency, and then when the sheriff's department came to him this morning to have him transported to

court, he indicated that he was tired, and didn't want to come to court today because he got there too late last night."

The trial court further explained that Wilcher was not in fact evaluated (for reasons not made clear in the record) and would not be evaluated before the jury returned a verdict. The court assured defense counsel that Wilcher would be evaluated prior to sentencing. Over defense counsel's objection, the court proceeded with the trial.

Prior to closing arguments, the trial court informed the jury: "As you can see, Mr. Wilcher is not here today. He has decided that he didn't want to be here today, so we're going to continue without him, just like we did before, all right?"

That afternoon, the jury rendered its verdicts on the charged offenses and thereafter on the prior conviction allegations.

After the jury was excused, the trial court asked defense counsel to prepare an order for appointment of a mental health professional to evaluate Wilcher. The court also commented: "I will state for the record that I didn't see the same things you did, [defense counsel]. So, if necessary, comment further, but I'm waiting for a professional's evaluation."

### **June 28, 2016**

Wilcher was present for the June 28, 2016 sentencing hearing. The trial court indicated Wilcher had been evaluated and asked defense counsel if she still had an issue regarding his mental competence. Defense counsel replied: "It is not presently an issue. However, the report I received cannot speak to Mr. Wilcher's competence at the time I requested the court declare a doubt, and that is the issue I raised in my motion for new trial. [¶] So I'm submitting on the issue of competency at this time, as



Mr. Wilcher presently sits before the court; however, my previous concerns are noted.” In response to the court’s inquiry, defense counsel declined to have a copy of the evaluation report placed in the court’s file. The court stated for the record: “I did not have competent evidence to declare a doubt, and I am satisfied Mr. Wilcher was competent during the course of the trial. So the record speaks quite clear to that point -- is quite clear regarding that point.”

As set forth above, the trial court sentenced Wilcher to seven years and eight months in prison. At the conclusion of the proceedings, Wilcher interjected: “Judge, you have to answer to The Grand Architect too. Satan. All you all do. [¶] . . . [¶] Watch the news. Watch the news. Ha, ha, ha, ha, ha.”

### **Legal Analysis**

“ ‘ “A person cannot be tried or adjudged to punishment while mentally incompetent. (§ 1367, subd. (a).) A defendant is mentally incompetent if, as a result of a mental disorder or developmental disability, he or she is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner. (*Ibid.*)” ’ [Citation.] ‘ “Both the due process clause of the Fourteenth Amendment to the United States Constitution and state law require a trial judge to suspend proceedings and conduct a competency hearing whenever the court is presented with substantial evidence of incompetence, that is, evidence that raises a reasonable or bona fide doubt concerning the defendant’s competence to stand trial.” ’ ” (*People v. Townsel* (2016) 63 Cal.4th 25, 36-37.) “[T]his standard is satisfied if at least one expert who is competent to render such an opinion, and who has had a sufficient opportunity to conduct an examination, testifies under oath with particularity

that, because of mental illness, the accused is incapable of understanding the proceedings or assisting in his defense.” (*People v. Lewis* (2006) 39 Cal.4th 970, 1047.) “[W]here the substantial evidence test is satisfied and a full competence hearing is required but the trial court fails to hold one, the judgment must be reversed.” (*People v. Welch* (1999) 20 Cal.4th 701, 738.)

“[S]ubstantial evidence of incompetence is sufficient to require a full competence hearing *even* if the evidence is in conflict.” (*People v. Welch, supra*, 20 Cal.4th at p. 738.) “A trial judge’s personal observations do not “obviate the necessity for a competency hearing. [Citation.] ‘ “The function of the trial court in applying [the] substantial evidence test is not to determine the ultimate issue: Is the defendant competent to stand trial? It[’s] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant’s competency. *At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue.* It is only after the evidentiary hearing, applying the usual rules appropriate to trial, that the court decides the issue of competency of the defendant to stand trial.’ ” ’ ” (*People v. Johnson* (2018) 21 Cal.App.5th 267, 276 (*Johnson*).)

“A defendant’s demeanor and irrational behavior may constitute substantial evidence of incompetence [citation]; but calm behavior in the courtroom is not necessarily inconsistent with mental incompetence.” [Citation.] Defense counsel’s assessment is entitled to some weight.” (*Johnson, supra*, 21 Cal.App.5th at p. 276.) A bald assertion from counsel that the defendant is incapable of understanding the proceedings or

assisting in his defense does not constitute substantial evidence of incompetence. However, counsel's opinion coupled with "a statement of specific reasons supporting that opinion" may constitute substantial evidence. (Cal. Rules of Court, rule 4.130(b)(2).)

In this case, the trial court was presented with substantial evidence which raised a reasonable doubt about Wilcher's competence to stand trial. Wilcher exhibited odd behavior in declining to attend some court proceedings and appearing at other proceedings, potentially prejudicing himself in front of the jury and suggesting he did not understand the nature of the proceedings. Moreover, the court was aware of bizarre behavior in the preceding year. At the time of his arrest in May 2015 (about a year before defense counsel raised a doubt), Wilcher made statements about "The Grand Architect" and Lucifer and displayed irrational and volatile behavior. In October 2015 (seven months before defense counsel raised a doubt), Wilcher missed a court appearance because he threatened to send the Devil after some deputies and was "taken to psych."

Most substantially, defense counsel presented the trial court with a statement of specific reasons supporting her opinion Wilcher was incapable of assisting in his defense due to mental incompetence. Counsel explained Wilcher referenced Satan and "following the word of Lucifer," in attempting to communicate that he wanted to absent himself from the courtroom. He pointed around the room, made hand gestures counsel did not comprehend, and attached some undisclosed significance to the number 13 as well as his "third eyesight." He accused defense counsel, the prosecutor, and everyone in the courtroom of being "snitches," and seemingly related this accusation to his belief that

defense counsel was a Buddhist. Counsel represented she had been unable to have a productive conversation with Wilcher regarding his defense due to his bizarre behavior and stated she did not believe he was making decisions competently about whether to absent himself from proceedings and testify.

On seven, consecutive court dates, from pretrial proceedings through trial, defense counsel continually raised a doubt about Wilcher's mental competence, stating she did not believe he was competent to assist in his defense. It is not clear what additional information counsel could have presented about Wilcher's mental competence, absent a mental health evaluation. As the Court of Appeal stated in *Johnson, supra*, 21 Cal.App.5th 267, "The most glaring deficit in this case is the utter lack of any psychological evaluation of defendant available to the court [at the time it declined to suspend the proceedings]. Unlike most of the reported cases cited by the parties, no psychiatrist, psychologist, or any other mental health expert testified whether defendant was capable of understanding the nature of the proceedings or was equipped to help his lawyer with his defense. The trial court's decision that defendant was competent was based exclusively on its own observation of defendant's behavior . . . ." (*Id.* at p. 277.)

The trial court expressly stated on multiple occasions it did not have any reason to doubt defense counsel's representations about Wilcher's behavior. Yet the court repeatedly indicated it would not suspend proceedings absent a mental health evaluation, stating neither defense counsel nor the court was qualified to determine if Wilcher was unable or unwilling to assist in his defense. Because the court had before it substantial evidence of Wilcher's incompetence, the court was required to

suspend proceedings and conduct a competency hearing. After a full hearing, with expert testimony, the court could *then* make the determination whether Wilcher was unable or unwilling to assist in his defense.

The fact Wilcher was found competent at the time of sentencing has no bearing on our determination. “We review the correctness of the trial court’s ruling at the time it was made . . . and not by reference to evidence produced at a later date.” (*People v. Welch*, *supra*, 20 Cal.4th at p. 739.) “[M]ental health can be fluid; defendant’s competency could very well change over time. (*Johnson*, *supra*, 21 Cal.App.5th at p. 277.)

We must reverse the judgment because the trial court declined to suspend the proceedings and hold a full competence hearing at the time it was presented with substantial evidence of Wilcher’s mental incompetence.<sup>7</sup>

#### DIPSOSITION

The judgment is reversed and the matter remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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<sup>7</sup> Because we reverse the judgment on this ground, we need not address the other contention Wilcher raised on appeal—that the trial court erred in allowing the prosecution to impeach him with his 2003 conviction for child endangerment and his 2011 conviction for evading a police officer.