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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GARY JOHNSON, JR., Defendant and Appellant.	B265669 (Los Angeles County Super. Ct. No. TA124177)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Affirmed with directions.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Rama R. Maline, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Gary Johnson, Jr. (Johnson), among other things of two counts of second degree robbery (Pen. Code, § 211[1]) and four counts of attempted second degree robbery (§§ 664, 211). On appeal, Johnson makes two core arguments.[2] First, he argues that the trial court improperly denied his requests for self-representation under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). Second, Johnson contends that the trial court improperly denied his motion for a new trial based on the purported ineffectiveness of his trial counsel. We are unpersuaded by either argument and, accordingly, affirm.

BACKGROUND

On July 24, 2012, at approximately 8:00 p.m., while the owner of a mattress company was meeting in his warehouse

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Johnson also argues that he is entitled to certain additional presentence conduct credits. The People concede that Johnson is entitled to at least 164 additional days of presentence conduct credits. Accordingly, while we affirm the judgment, as discussed below, we also remand the matter to the trial court for the limited purpose of modifying the judgment so that it awards Johnson all presentence credits to which he is entitled.

with some of his employees and friends, two men armed with pistols and wearing "hoodie" styled jackets—one black and one red and black—entered the warehouse and demanded money from those present. At the same time, another employee, a truck driver, returned to the warehouse and saw the robbery in progress, including seeing one of the robbers pistol whip the owner. This employee then fled the warehouse and flagged down a passing patrol car.

As the employee explained the situation to the officers, two men wearing hoodies exited the warehouse; the employee identified the men as the two robbers he had seen inside the warehouse. When the robbers saw the police car they ran, each in a separate direction. The two police officers immediately began chasing the man wearing the black hoodie, at first in their patrol car and then on foot. Having never lost sight of him during the car and foot pursuit, the police officer who was driving the patrol car eventually caught up with the man in the black hoodie in a tunnel. After detaining Johnson, the police officer brought him back to the warehouse, where a group of individuals who had been confronted by the robbers yelled out, "That's him. That's him. That's him."

In connection with the events on July 24, 2012, the People eventually filed a second amended information charging Johnson with two counts of robbery (§ 211; counts 1 & 2), four counts of attempted robbery (§§ 664, 211; counts 3–6), one count of possession of cocaine (Health & Saf. Code, § 11350, subd. (a); count 7), and one count of

possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a); count 8).

On February 27, 2013, after jury selection, the public defender's office declared a conflict and stated that it was unable to represent Johnson. The trial court declared a mistrial and appointed bar counsel to represent Johnson.

A. *The first trial*

During the trial, as part of its case in chief, the People called, among others, several—but not all—of the individuals who had been confronted by the robbers in the warehouse. One such witness was Marco Solis (Solis), an employee of the company. In contrast to the other victim-witnesses, Solis did not identify Johnson as the man in the black hoodie. Among other things, Solis testified that he did not get a good look at the robber wearing the black hoodie because the man's face was covered by the hood and by a "kerchief." The defense, which did not call any witnesses of its own, made Solis's testimony a central part of its closing argument, arguing that his testimony created reasonable doubt.

On March 4, 2014, after a five-day trial (the first trial), the jury found Johnson guilty of possession of cocaine, as charged in count 7, and not guilty of possession of a controlled substance with a firearm, as charged in count 8. The jury, however, was unable to reach a unanimous verdict as to counts 1 through 6, the robbery/attempted robbery counts. The juror foreperson indicated that, after approximately three hours of deliberations, the vote was hopelessly deadlocked with three "guilty" votes to nine "not

guilty" votes. The court declared a mistrial as to counts 1 through 6.

On the basis of the mistrial, Johnson moved to dismiss the case. The trial court, however, denied the motion, stating that without faulting the jury's decision in any way, it "thought the evidence was overwhelming, overwhelming in terms of guilt."

B. *The second trial*

The retrial of counts 1-6 began on July 7, 2014 (the second trial). Once again, the People called several but not all of the robbery victims. One notable omission was Solis. Three of the five victim-witnesses who testified positively identified Johnson as one of the robbers; the fourth victim-witness was not sure Johnson was one of the robber because Johnson had gained some weight over the intervening two years; and the fifth victim-witness did not get a good look at either robber. Once again, the defense did not call any witnesses of its own.

On July 21, 2014, after only a few hours of deliberation, the jury found Johnson guilty of two counts of robbery (counts 1 & 2) and four counts of attempted robbery (counts 3–6). The jury also found the personal use and arming enhancements alleged as to each of those counts to be true.

On July 23, 2015, the court denied Johnson's motion for new trial and his *Romero*[3] motion to strike his prior "strikes" for purposes of sentencing. The court recalled Johnson's previously imposed sentence as to count 7 (nine years), reduced that conviction to a misdemeanor, pursuant to Proposition 47 (§ 1170.18, subd. (a)), and sentenced Johnson to time served on that count. The trial court consecutively sentenced Johnson to 25 years to life on count 1, plus 10 years for the section 12022.53, subdivision (b), enhancement, plus 10 years for the section 667, subdivision (a)(1), enhancements. The trial court imposed concurrent terms on counts 2 through 6. The court gave Johnson 1095 days of presentence custody credit (0 conduct days).

Johnson timely appealed.

DISCUSSION

I. The trial court properly denied Johnson's *Faretta* requests

Johnson contends that reversal is required because he made "unequivocal requests to represent himself, and that the trial court erroneously denied those requests, without any information from which it could have made a finding that it had proper grounds to do so." As discussed below, we find Johnson's argument to be without merit.

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[3] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

A. *Johnson's Faretta requests*

In connection with the first and second trials, Johnson made a total of four *Faretta* requests. His appeal concerns only the first three of those requests.

1. *FARETTA* REQUESTS MADE IN CONNECTION WITH THE FIRST TRIAL

On January 15, 2014, the court indicated that they were "8 of 10 today."[4] After his counsel advised the court

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[4] The trial court's characterization of January 15, 2014 as being day "8 of 10" refers to section 1382's 10-day grace period. Section 1382 provides a criminal defendant with a statutory right to a speedy trial. The statute requires dismissal of an action if, absent demonstrated good cause, a defendant is not brought to trial within a specified period following arraignment or plea. For defendants such as Johnson, who are charged with a felony, the statutory period is 60 days. (§ 1382, subd. (a)(2).) The action will not be dismissed for delay beyond the specified period, however, if the defendant enters a general time waiver or "requests or consents to the setting of a trial date beyond the [statutorily prescribed] period." (§ 1382, subd. (a)(2)(B) [felony]; § 1382, subd. (a)(3)(B) [misdemeanor or infraction].) But "[w]henever a case is set for trial beyond the [initial statutorily prescribed] period by request or consent, expressed or implied, of the defendant without a general waiver, the defendant shall be brought to trial on the date set for trial or *within 10 days thereafter*." (§ 1382, subds. (a)(2)(B) & (3)(B), italics added; see generally *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960, 969–970.) "The 10–day period does not begin to run until the defendant announces ready for trial on the date

that he was ready for trial, "ready to roll," Johnson requested to exercise his *Faretta rights* (the first *Faretta* request). The court denied the first *Faretta* request as "untimely": "It's the day of trial. I will not do it."

On February 21, 2014, Johnson asked to continue the case, claiming that his counsel was not fully prepared. The court denied the request, stating, "Not a chance. . . . Your case has been here a year and a half. . . . [¶] . . . [¶] . . . I think you are manipulating the system. You are not fooling me. We will see you back here on Monday for trial."

On February 24, 2014, after the case had been transferred to another department, Johnson made a *Marsden*[5] motion, seeking to discharge his court-appointed attorney. The court held an immediate hearing. During the hearing on his *Marsden* motion, Johnson explained that he and his counsel had been at odds over trial tactics and preparation, such as the filing of various motions: "I've been

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to which the trial was continued, or on a later date to which the defendant impliedly or expressly consented if the case was again continued. [Citation.] The 10–day period is 'automatic' by operation of Penal Code section 1382, subdivision (a)(2)(B), and cannot be unilaterally waived by a defendant. [Citation.] This is because the 10–day period not only protects the defendant by setting a time limit within which he must be brought to trial, but because it also protects the People by giving them 10 days if necessary." (*Medina v. Superior Court* (2000) 79 Cal.App.4th 1280, 1286.)

[5] *People v. Marsden* (1970) 2 Cal.3d 118, 123–124.

getting just negativity from him on the things when I [sic] been requesting them." Later on in the hearing, Johnson explained that he and his attorney "just basically are not getting along. . . . [¶] . . . I got a better rapport with my private investigator and my paralegal than I do with him. . . . [¶] . . . [¶] . . . I can't see me going to trial fighting for my life with this gentleman."

After the court denied the *Marsden* motion,[6] Johnson made a renewed request to exercise his *Faretta* rights (the second *Faretta* request). The court told him to fill out the paperwork, and it would rule on his request later than day. The court added that, "I do want to point out to you that you've indicated to me—there were some equivocal statements that you made" "that your request to go pro per was one that you were not really into or behind." The court then asked Johnson if he really wanted to go pro per and Johnson affirmed that he did. However, Johnson added, "I didn't want to do it and I don't know the law. I feel if I could get access to the law library and time, I'll prepare and be ready for my case." When the court inquired of Johnson if he could be ready that afternoon, Johnson replied, "That is highly impossible."

Later on February 24, after considering the second *Faretta* request, the court denied it for two reasons. First, it was "untimely." The court noted that defense counsel had

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[6] On appeal, Johnson does not challenge the denial of his *Marsden* motion.

been appointed on March 28, 2013, and since that time had made 11 court appearances on behalf of Johnson, yet at no time prior to January 15, 2014, just days before trial, had Johnson requested to represent himself. In finding the request untimely, the court further noted that, "today is ten of ten and that you've been sent out for trial in this department with a jury panel waiting." Second, the court found that the second *Faretta* request was equivocal: "it was only made subsequent to the court or in the process of the court denying your request to replace counsel via the *Marsden* motion in that you have made a number of statements to the court indicating that that's not really what you want based upon your lack of experience and lack of education."

2. *FARETTA* REQUESTS MADE IN CONNECTION WITH THE SECOND TRIAL

On June 25, 2014, two days prior to the scheduled start of the second trial, Johnson once more told the trial court that he wanted to exercise his *Faretta* rights (the third *Faretta* request). When asked if he would be ready to proceed with his retrial in two days, Johnson stated he would not, but he "still want[ed] to exercise" his right to self-representation all the same. The court told Johnson that it could not rule on the third *Faretta* request, because his lawyer was not present. However, the court would put the hearing on the matter "over to another date," and allow Johnson to submit the necessary "paperwork" for the third *Faretta* request on the "understanding [that] you are

waiving and giving up your right to trial to next week and it will remain as 8 of 10. [¶] You understand?" Johnson said that he understood and would fill out the paperwork. In addition, the trial court cautioned Johnson that he was "up against one heck of a battle" and also warned him not to try and game the system: "You have been riding this one for a year and 11 months. And we will not play around with that." Johnson filed the *Faretta* paperwork that same day and the parties agreed to continue the matter.

Although Johnson appeared in court with his counsel on July 3, 10, 11, and 14, neither he nor his counsel reminded the court about the third *Faretta* request or otherwise renewed that request.

On July 15, 2014, after the jury had been selected for the second trial, Johnson informed the court that he had "a lot of disagreeable moments" with his counsel, but he did not renew his third *Faretta* request. When the court reminded Johnson that his counsel "did okay for you last time," Johnson said that his counsel did not seem to be fighting for him now and that he "d[id]n't like the type of relationship [they had] with each other." In response to the court's invitation to have him and his counsel discuss things in the back of the courtroom, Johnson replied that he did not need to discuss anything with his counsel, adding, "He can just do his job. I'll just sit right here. . . . It's just irked me when we have too many moments like this."

On August 26, 2014, after the guilty verdicts had been rendered, Johnson made another request to represent

himself (the fourth *Faretta* request), stating, "I should [go] pro per . . . and get the ball rolling on pretrial motions." After a brief recess to allow Johnson to complete the necessary paperwork, the court granted the fourth *Faretta* request.

After several court appearances where Johnson represented himself prior to the sentencing hearing, Johnson sought to have a private attorney represent him going forward. Over the People's objection, the court granted the request.

B. *The right to self-representation and the standard of review*

Criminal defendants have the right both to be represented by counsel at all critical stages of the prosecution and the right, based on the Sixth Amendment as interpreted in *Faretta*, *supra*, 422 U.S. 806, to represent themselves. (*People v. Marshall* (1997) 15 Cal.4th 1, 20; *People v. Williams* (2013) 58 Cal.4th 197, 252.) "However, this right of self-representation is not a license to abuse the dignity of the courtroom or disrupt the proceedings. [Citation.] *Faretta* motions must be both timely and unequivocal. Otherwise, defendants could plant reversible error in the record." (*People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1002; *People v. Stanley* (2006) 39 Cal.4th 913, 931–932.)

1. *FARETTA* REQUESTS MUST BE TIMELY

"[T]o invoke the constitutionally mandated unconditional right of self-representation a defendant in a

criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 127–128; *People v. Williams* (2013) 56 Cal.4th 165, 193.) "The timeliness requirement 'serves to prevent a defendant from misusing the motion to delay unjustifiably the trial or to obstruct the orderly administration of justice.'" (*People v. Doolin* (2009) 45 Cal.4th 390, 454.) "[T]imeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*People v. Lynch* (2010) 50 Cal.4th 693, 724 (*Lynch*), overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 636–643.) "Even when the trial court does not state it is denying a *Faretta* motion on the ground of untimeliness, we independently review the record to determine whether the motion would properly have been denied on this ground." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433, fn. 15.)

An erroneous denial of a timely *Faretta* request is reversible per se. (*People v. Williams*, *supra*, 56 Cal.4th at p. 253; *People v. Butler* (2009) 47 Cal.4th 814, 824.) " 'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' " (*Williams*, at pp. 193–194.) Among the factors to be considered by the court in assessing an untimely *Faretta* request are " 'the quality of counsel's representation of the

defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.' " (*Id.* at p. 194.) In evaluating a trial court's denial of a *Faretta* motion, " '[a] reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made.' " (*People v. Bradford* (2010) 187 Cal.App.4th 1345, 1353.) We accordingly review the denial of an untimely *Faretta* motion for an abuse of discretion. (*People v. Jackson* (2009) 45 Cal.4th 662, 689–690.)

"Where . . . a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The "court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

2. *FARETTA* REQUESTS MUST BE UNEQUIVOCAL

With regard to whether a *Faretta* request is equivocal or not, courts must determine "whether the defendant truly desires to represent himself or herself." (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) Thus, "an insincere request or one made under the cloud of emotion may be denied." (*Id.* at

p. 21.) As our Supreme Court explained in *Marshall*, "the court's duty goes beyond determining that some of [the] defendant's words amount to a motion for self-representation. The court should evaluate *all of a defendant's words and conduct* to decide whether he or she truly wishes to give up the right to counsel and represent himself or herself and unequivocally has made that clear." (*Id.* at pp. 25–26, italics added.)

The importance of evaluating all of a defendant's words and conduct is illustrated by *People v. Scott* (2001) 91 Cal.App.4th 1197, 1204. In that case, the defendant asserted a *Marsden* motion four days before trial. After the trial court denied the motion, the defendant stated, "If that's the case, I hereby move the court to let me go pro se." (*Id.* at pp. 1204–1205 & fn. 3.) When the trial court asked, " 'For the record . . . are you sure you want to represent yourself?' " the defendant replied, " 'Yes. I do, judge. I don't want [appointed defense counsel] to represent me.' " (*Id.* at p. 1205.) He also said, " '[I]f I can't get a [new] state appointed attorney, then I['ll] represent myself,' " and " 'For the record, I don't want this attorney representing me. You the court is [sic] coercing me.' " (*Ibid.*) The court in *Scott* concluded that these remarks, viewed in context, were too equivocal to constitute a *Faretta* request, and that the defendant made them out of frustration at the denial of his *Marsden* motion. (*Scott*, at pp. 1205–1206.)

Similarly, in *People v. Tena* (2007) 156 Cal.App.4th 598, the Court of Appeal held that the defendant's *Faretta*

requests were only "impulsive reactions to his frustrated attempts to secure an attorney who would subpoena the witnesses that he desired, rather than unequivocal *Faretta* requests." (*Tena*, at p. 608.) In *Tena*, the defendant's conduct—not immediately renewing his request for self-representation when presented with a new bench officer and engaging a private attorney to subpoena the witnesses he desired—further corroborated the conclusion that the defendant "sought an attorney amenable to his defense strategy, rather than self-representation." (*Id.* at p. 609.)

3. REQUESTS CAN BE WAIVED OR ABANDONED

Since a defendant is not entitled to be advised of the right to represent himself, "routinely the right of self-representation is impliedly and silently waived." (*People v. Kenner* (1990) 223 Cal.App.3d 56, 60.) Accordingly, numerous courts have held that after a defendant invokes the right to self-representation, a waiver may be found if it reasonably appears that the defendant abandoned the request. (See, e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 933*; People v. Dunkle* (2005) 36 Cal.4th 861, 907–908; *Kenner*, at pp. 60–62; see also *Brown v. Wainwright* (5th Cir. 1982) 665 F.2d 607, 611; *Wilson v. Walker* (2d Cir. 2000) 204 F.3d 33 35–36.)

"[A]lthough in some cases a 'personal dialogue' between the court and the defendant may be advisable to determine whether there is a waiver, no such inquiry is necessary where all circumstances indicate that the defendant has

abandoned his request to conduct his own defense." (*People v. Kenner*, *supra*, 223 Cal.App.3d at p. 61.)

The United States Supreme Court has indicated that a waiver of the right of self-representation may be presumed from conduct. In *McKaskle v. Wiggins* (1984) 465 U.S. 168, defendant's motion to proceed pro se was granted, but the court also appointed standby counsel. Both before and during trial, defendant frequently changed his mind about standby counsel's participation, sometimes objecting to that participation, but sometimes soliciting counsel's help. After his conviction, defendant urged that standby counsel's conduct had deprived him of his *Faretta* right to present his own defense. Rejecting that argument, the court reasoned in part, "A defendant can waive his *Faretta* rights . . . . [¶] . . . [¶] . . . *Once a pro se defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced*." (*Id.* at pp. 182–183, italics added.)

Because a waiver of the right of self-representation may be presumed from conduct, "[d]efendants who sincerely seek to represent themselves have a responsibility to speak up. The world of the trial court is busy and hectic, and it is to be expected that occasionally a court may omit to rule on a motion. When that happens, . . . we believe it is reasonable to require the defendant who wants to take on the task of

self-representation to remind the court of the pending motion." (*People v. Kenner*, *supra*, 223 Cal.App.3d at p. 62; see *People v. Tena*, *supra*, 156 Cal.App.4th at p. 610 [failure to renew request is evidence of abandonment].)

4. JOHNSON'S *FARETTA* REQUESTS WERE EITHER UNTIMELY OR ABANDONED AND EQUIVOCAL

All of the *Faretta* requests at issue—the first, second, and third *Faretta* requests—were untimely because they were made on the eve of trial. The first *Faretta* request was made when the case was on day "8 of 10"—that is, two days before trial had to commence or be continued again. The second *Faretta* request was made on day "ten of ten . . . with a jury panel waiting." The third *Faretta* request was made when the case was on day "8 of 10." Our Supreme Court has "held on numerous occasions that *Faretta* motions made on the eve of trial are untimely." (*People v. Lynch*, *supra*, 50 Cal.4th at p. 722.) For example, in *People v. Frierson* (1991) 53 Cal.3d 730, the Supreme Court held that a self-representation motion made on September 29, 1986, when trial was scheduled for October 1, 1986, was made on "the eve of trial" and was untimely. (*Id.* at pp. 740, 742.)

Johnson argues that while the first and second *Faretta* requests may be untimely, the third was not. The third *Faretta* request was made on June 25, 2014, "some 12 days before the second trial began on July 7, 2014." Johnson's argument misses the point. At the time the third *Faretta* motion was made, neither Johnson nor the court knew that the trial would not begin until 12 days later; what they did

know was that on June 25, the case was on day 8 of 10—that is, the eve of trial. Our Supreme Court has held that when a *Faretta* motion is made while an actual start date for a trial is close but uncertain due to short continuances, the motion is untimely. (*People v. Clark* (1992) 3 Cal.4th 41, 99–100.)

Even if the third *Faretta* request could be considered timely, Johnson abandoned it. At no time following June 25 did Johnson ask the court to address the third *Faretta* request. Indeed, Johnson did the exact opposite. In the wake of the third *Faretta* request, Johnson invited or acquiesced in his counsel's continued and substantial participation in trial preparation (e.g., selecting a jury). Moreover, on July 15, after a jury was selected, Johnson raised with court his dissatisfaction with his counsel, but, instead of renewing the third *Faretta* request, Johnson elected not to mention it and affirmatively stated that his counsel "can just do his job." Under such circumstances, and given Johnson's conduct, it reasonably appears that he abandoned the third *Faretta* request. (*People v. Kenner*, *supra*, 223 Cal.App.3d at pp. 61–62; see *People v. Tena*, *supra*, 156 Cal.App.4th at p. 610.)

Not only were each of the *Faretta* requests at issue untimely, they were also equivocal. The first *Faretta* request was not only made on the eve of trial, but it was preceded by 11 months of silence from Johnson on the issue of his counsel's competence and/or ability to work effectively with him. The second *Faretta* request was made immediately after the *Marsden* motion was denied, suggesting that the

request was born out of frustration more than anything else. (See *People v. Scott*, *supra*, 91 Cal.App.4th at pp. 1205–1206.) Moreover, in his comments explaining his reasons for the second *Faretta* request, Johnson indicated that he was seeking "an attorney amenable to his defense strategy, rather than self-representation." (*People v. Tena*, *supra*, 156 Cal.App.4th at p. 609.) And finally, if Johnson was unequivocally committed to representing himself at the second trial, he would not have abandoned the third *Faretta* request, but would have either renewed it at the earliest opportunity—which he did not do—or raise the issue repeatedly until there was a hearing on the matter—which he also did not do.

Because we must consider " 'the total circumstances confronting the court' " when a decision on a *Faretta* request is made, (*People v. Bradford*, *supra*, 187 Cal.App.4th at p. 1353), including "all of a defendant's words and conduct" (*People v. Marshall*, *supra*, 15 Cal.4th at pp. 25–26), we hold that the court did not abuse its discretion in denying the first, second, and third *Faretta* requests.

Assuming arguendo that the trial court did err in denying some or all of the first three *Faretta* requests, any such error was harmless. Given the facts of the case, it is not reasonably probable that Johnson would have achieved a more favorable result had he represented himself.[7] As a

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[7] An erroneous denial of an untimely motion for self-representation is reviewed for harmless error under *People*

practical matter, self-represented defendants are rarely able to obtain a better outcome than an experienced attorney can obtain. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." (*Faretta*, *supra*, 422 U.S. at p. 834.) Indeed, "[i]t is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051.)

Here, there were multiple witnesses—both law enforcement and civilian witnesses—that put Johnson at the scene of the crime at the time of the crime. Judging by how quickly the jury in the second trial reached its verdict, it appears that it regarded the evidence against Johnson as quite compelling. It is hard to see how Johnson, who freely admitted a lack of legal education and experience, would have obtained a better result.

II. The trial court properly denied Johnson's new trial motion

A. *Johnson's motion for a new trial*

On July 16, 2015, with the assistance of private counsel, Johnson filed an amended motion for a new trial. The central argument in that motion was that Johnson had been denied the effective assistance of counsel. Among other

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v. Watson (1956) 46 Cal.2d 818, 836. (See *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058.)

things, Johnson argued that he was denied a fair trial because his trial counsel did not call Solis as a witness and because his counsel did not develop a "[t]heory of [t]hird [p]arty [c]ulpability"—that is, Johnson's trial counsel through his cross-examinations "failed to develop or introduce the idea that the [warehouse] is located in an area known for drug trafficking; that [Johnson] was merely present in that area at the time of [the] robberies to purchase narcotics; and that an actual perpetrator of the robbery was confused with [Johnson] when both fled to avoid arrest by police officers."

Although considerable time and effort was expended by Johnson and the trial court following the second trial to obtain and decipher the notes of Johnson's trial counsel, Johnson did not submit any evidence or argument about the reasons why his trial counsel did not call Solis as a witness in the second trial. The motion simply alleged without explanation or support that the failure to call Solis was a violation of Johnson's right to a fair trial.[8]

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[8] The same is true for other purported missteps by Johnson's trial counsel. For example, Johnson argued that it was a mistake for his trial counsel not to call an eye witness identification expert, but he did not offer the court any explanation for why Johnson's trial counsel elected not to do so. Similarly, Johnson argued that his trial counsel failed to "search for, interview, and subpoena" two potential witnesses, but he did not offer any evidence (e.g., no declaration by Johnson or by his trial counsel) establishing

Similarly, with regard to the purported failure to develop a theory of third party culpability, Johnson's motion did not cite to any part of the trial transcript in support of its arguments; instead, it simply stated in a wholly conclusory manner that it was "clear" from the trial transcript that Johnson's counsel had failed to develop any factual basis to argue that Johnson was simply at the wrong place at the wrong time. In so doing, Johnson failed to address the fact that during the second trial his trial counsel had developed on cross-examination of various police officers that, inter alia, the area around the warehouse was a "high drug area," that the warehouse was near a homeless "encampment," that the police officers pursued Johnson through this encampment, and that on the day following the robbery two people from the encampment were arrested for possession of weapons, ammunition, and drugs.

On July 23, 2015, after hearing oral argument from the parties, the trial court denied the motion, stressing the close temporal sequence of the following facts: an employee observed the crime in progress and then, in short order, flagged down a passing police car; the employee and the police then saw Johnson and another man emerge from the warehouse; and that Johnson immediately ran away from the scene of the crime before being apprehended. In short, the trial court found "nothing persuasive in the motion for a

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the foundational fact that his trial counsel did in fact fail to search for these witnesses.

new trial which would cause this court to feel that its confidence was shaken in the outcome of the jury verdict, the propriety thereof."

On appeal, Johnson argues that the "different result of the two trials where defense counsel handled the evidence differently" is "telling" proof of his counsel's prejudicial ineffectiveness.

B. *Standard of review*

" ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) " ' "[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background." ' " (*Ibid.*)

"Where . . . a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) The "court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

C. *Johnson's burden on his ineffective counsel claim*

To prevail on a claim of ineffective assistance of counsel, a defendant must (1) establish that his or her attorney's representation fell below professional standards of reasonableness and (2) affirmatively establish prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hart* (1999) 20 Cal.4th 546, 623–624.) If the defendant's showing is insufficient as to one component of this claim, we need not address the other. (*Strickland*, at p. 697.)

1. DEFICIENT PERFORMANCE

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] . . . [Citation] Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel '*only* if the record on appeal *affirmatively* discloses that counsel had no rational tactical purpose for his act or omission.' " (*People v. Frye* (1998) 18 Cal.4th 894, 979–980, italics added.) In other words, "[a] reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

" 'In some cases . . . the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged. In such circumstances, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, these

cases are affirmed on appeal.' " (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

2. PREJUDICE

To show prejudice, a defendant must show there is a reasonable probability that he or she would have received a more favorable result had his or her counsel's performance not been deficient. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693–694; *People v. Ledesma*, *supra*, 43 Cal.3d at pp. 217–218.) "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the [trial counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland*, at p. 695.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

D. *Johnson failed to meet his burden*

Johnson concedes that—with the exception of his counsel's failure to call Solis and his purported failure to develop that the area around the warehouse was known for "drug and gang and gun activity"— insufficient evidence was presented to the trial court for it to grant a new trial and, as a result, "those failings should be left for resolution through habeus proceedings."

Johnson's concession, however, does not go far enough. His motion for a new trial was equally deficient with respect to both the Solis issue and the third party culpability theory. Johnson failed to present to the trial any evidence that his trial counsel's representation in the second trial fell below

professional standards of reasonableness with respect to both these issues.

With regard to the decision to call or not call Solis as a defense witness, this is "precisely the type of choice which should not be subject to review by an appellate court." (*People v. Knight* (1987) 194 Cal.App.3d 337, 345.) Even if such a decision was the proper subject of review, nothing in Johnson's motion (or in the record) affirmatively disclosed that Johnson's trial counsel had no rational tactical purpose for his decision not to call Solis. Although none of the victim-witnesses at the second trial testified that the face of the robber in the black hoodie was covered by a kerchief, as Solis did at the first trial, two of those five witnesses at the second trial were unable to positively identify Johnson as one of the robbers. Johnson's trial counsel could have rationally concluded based on any number of factors, such as his reading of the jury during voir dire and subsequent proceedings, that this testimony was tactically sufficient to create reasonable doubt in the mind of at least one juror, especially if counsel had also concluded that there was a risk that Solis's testimony might not be as strong or even the same as it was at the first trial. For example, the key part of Solis's testimony—that is, the testimony that a kerchief covered the face of the robber wearing a black hoodie—was not something that Solis initially disclosed to the police. Arguably, Solis's belated disclosure of this fact made him vulnerable to cross-examination by the People if Johnson's counsel had called him at the second trial. Moreover, there

is nothing in the motion (or in the record) indicating that Johnson's trial counsel was ever asked for an explanation about his decision regarding Solis and failed to provide one.

With regard to the third party culpability theory, Johnson's motion for a new trial did not and could not establish that his counsel's cross-examination of the police officers failed to inform the jury that the area around the warehouse was an area rife with drug trafficking and guns—such testimony was in fact elicited by Johnson's counsel. On appeal, Johnson concedes this point, but argues there was a difference in degree: in the second trial "defense counsel did not *extensively* cross-examine law enforcement to elicit information about the known drug and gang and gun activity in the area." (Italics added.) However, this assertion is as conclusory and unsupported as that made to the trial court. Johnson does not show that his counsel's cross-examination of the police officers on the issue of drug trafficking and related issues in the second trial was appreciably less "extensive" (either in length or effect) than the cross-examinations in the first trial. At the hearing on the motion, the prosecutor stated that in his view the issue of third party culpability was not only "even[ly]" developed by the defense in "[b]oth trials," but that the issue was "thoroughly investigated" by the public defender who initially represented Johnson and then by his bar counsel replacement.

In the absence of *any* evidence on his trial counsel's decision-making and performance, and because there is a

" 'strong presumption' " that the conduct of Johnson's counsel fell within the wide range of reasonable professional assistance, and because "great deference" must be accorded to the tactical decisions of his counsel (*People v. Frye*, *supra*, 18 Cal.4th at pp. 979–980), we hold that the trial court did not abuse its considerable discretion in denying the motion for a new trial. The trial court's decision to deny the motion for a new trial was not irrational or arbitrary, but rational and logical. Because Johnson's showing is insufficient as to the issue of deficient performance, we decline to address the issue of prejudice. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.)

In *People v. Mendoza Tello* (1997) 15 Cal.4th 264, our Supreme Court observed that "[b]ecause claims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding, the rules generally prohibiting raising an issue on habeas corpus that was, or could have been, raised on appeal [citations] would not bar an ineffective assistance claim on habeas corpus." (*Id.* at p. 267.) Accordingly, we affirm "without prejudice to any rights [Johnson] may have to relief by way of a petition for writ of habeas corpus." (*People v. Garrido* (2005) 127 Cal.App.4th 359, 367.)

DISPOSITION

The trial court is directed to determine and award Gary Johnson, Jr., all presentence credits to which he is entitled. The superior court is further directed to send an amended abstract of judgment to the Department of Corrections and Rehabilitation reflecting such modification. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.