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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. DETRICK WALKER, Jr., Defendant and Appellant.	B275943 (Los Angeles County Super. Ct. No. MA059355)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed in part, vacated in part, and remanded with directions.

Gideon Margolis, 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, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Detrick Walker, Jr., guilty of, among other things, attempted murder, carjacking, and attempted second degree murder. On appeal, he contends that the trial court erred by failing to hold a second competency hearing, conducting proceedings in his absence, and misinstructing the jury on aider and abettor liability. We vacate the defendant's sentence and remand the matter for reconsideration of the sentence under recently enacted Senate Bill No. 620, but we otherwise affirm the judgment.

FACTUAL SUMMARY

A detailed recitation of the facts of the present offenses is unnecessary to resolve this appeal. Sufficiency of the evidence is not at issue.

1. The Attempted Robbery of Daniel Kelly (Count 3).

On April 8, 2013, defendant, armed with a firearm, attempted to rob Daniel Kelly, a cashier in a Lancaster market. On two occasions that day, defendant entered the store. The first time, he entered by himself, browsed items, and bought candy from Kelly. Later, around 8:30 p.m., defendant and a confederate entered the market. A bandanna partially covered the confederate's face, but when Kelly asked him to remove it, he complied. The confederate also wore gloves. Initially, the two browsed items and conversed.

The confederate approached the counter and tried to buy a lighter. When Kelly opened the register, the confederate pulled out a revolver, put it to Kelly's head, and asked for the money in the register. Kelly and the confederate struggled over the gun. The confederate fired two shots at Kelly, then fled. When the

shots were fired, defendant fled down an aisle where Kelly later found a bag containing bullets.

On April 18, 2013, Los Angeles County Sheriff's Detective Dale Parisi and another detective interviewed defendant. He admitted going into the store at the confederate's request. The defendant indicated that he was instructed to make a purchase and to hold the bullets.

2. The Attempted Robbery of Bassem Azar (Count 5).

On April 14, 2013, defendant attempted to rob at gunpoint Bassem Azar, a cashier in a Palmdale liquor store.

3. The Attempted Premeditated Murder, and Carjacking, of David Waud (Counts 1 & 2).

On April 17, 2013, defendant shot David Waud with a gun (count 1) and carjacked him (count 2) of his Chevy Malibu. Shortly thereafter, sheriff's deputies apprehended defendant in the Malibu. Gloves were found in the car.

4. Verdict and sentence.

A jury found defendant guilty of count 1, attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187, subd. (a)),[1] count 2, carjacking (§ 215, subd. (a)), count 3, attempted second degree robbery (§§ 664, 211) armed with a firearm (§ 12022, subd. (a)(1)), and count 5, attempted second degree robbery (§§ 664, 211). The jury found true firearm enhancement allegations under section 12022.53, subdivision (d),

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[1] Subsequent section references are to the Penal Code.

as to counts 1 and 2 and under section 12022.53, subdivision (b), as to count 5.

The trial court sentenced defendant on June 27, 2016. The court's articulation of the sentence is ambiguous, but it suffices to say that the court sentenced him on enhancements under section 12022.53 as to counts 1, 2 and 5.

ISSUES

Defendant claims the trial court (1) erroneously refused to hold a second competency hearing, (2) erroneously conducted the trial in his absence, and (3) erred as to count 3 by giving CALJIC No. 3.00 to the jury. In a supplemental opening brief, defendant claims he is entitled to relief under Senate Bill No. 620.

DISCUSSION

1. THE COURT PROPERLY DECLINED TO HOLD A SECOND COMPETENCY HEARING.

A. *Pertinent Facts*.

(1) Proceedings from September 18, 2013, to the January 9, 2014 Competence Finding.

On September 18, 2013, counsel for the defense declared a doubt as to defendant's competency to stand trial. The court suspended criminal proceedings and appointed Dr. Gordon Plotkin and Dr. Kory Knapke to evaluate defendant. Defendant reacted by saying, "That's wrong. Fuck all that." The court ordered the bailiff to escort defendant out of the courtroom. However, defendant, disobeying the orders of the court and bailiff, refused to leave his seat. The minute order for that date

reflects, "The defendant is immediately secured on the ground. Additional security is called and utilized to remove the defendant from the courtroom." The court later explained that defendant had been upset with the length of the continuance and had physically resisted the bailiff.

Plotkin and Knapke both concluded that defendant was competent to stand trial. According to Plotkin's report, defendant had been recorded in jail telling family members that he planned to present himself as mentally ill to get transferred to Patton State Hospital and to obtain a shorter sentence. Plotkin found that defendant did not have a major mental disorder. Instead, his "presentation, statements, and appearance are consistent with an individual who is feigning, malingering or embellishing a mental illness." Defendant "appeared to understand his current case, prosecution theory, courtroom participants, and even appropriate courtroom demeanor, despite the incident on [September 18, 2013] . . . ."

Knapke similarly found it "exceedingly clear" that defendant was competent to stand trial. Defendant clearly understood the charges and proceedings against him, and had the capacity to rationally cooperate with his attorney. Defendant was able to discuss various aspects of his legal situation and potential legal strategy. Defendant's jail phone calls indicated he "has been highly motivated to be found incompetent to stand trial and to be sent to Patton State Hospital." During the phone calls, defendant discussed "how his public defender is also trying to get him found incompetent to stand trial" and the benefits of being housed in a state hospital rather than being incarcerated.

At the January 9, 2014 competency hearing, defendant's counsel submitted based on the doctors' reports. The court found

defendant competent to stand trial and ordered criminal proceedings resumed. Defendant repeatedly interrupted the court, becoming verbally combative, requiring the presence of six deputies.

(2) Proceedings from February 20, 2014, through June 2, 2016.

During the next year and a half, defendant continued to behave in an outrageous manner in a calculated attempt to disrupt the proceedings. On February 20, 2014, for example, he refused to be searched in lockup so he could not be brought into the courtroom. The court noted defendant had "a number of gassing[2] cases."

On April 4, 2014, defendant was in the courtroom but was in a "safety chair," i.e., a "wheelchair with restraints," because of his uncooperative behavior with the sheriff's department. As a health measure, defendant could only be restrained in the chair for two hours, necessitating a medical check every 15 minutes. As a result, the court had to interrupt other proceedings and immediately call his case, otherwise, the fire department would have to be called to check on defendant. The court noted that it and the sheriff's department had gone out of their way to accommodate defendant's uncooperative behavior, he was not transported to court the day before because he had been uncooperative, and "[w]e have had more miss-out dates where [defendant] ha[d] not made it to court [than] I can remember."

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2 See *People v. Rices* (2017) 4 Cal.5th 49, 57, referring to " 'gassing' " as " 'throwing urine or feces' " and *People v. Becerrada* (2017) 2 Cal.5th 1009, 1020, referring to " 'gas[sing]' " as "spray[ing] . . . with . . . urine and feces."

Therefore, the court informed defendant, "From this point forward every time your court date comes up, I am going to instruct the sheriff's department that if you are not cooperative, you will be read a statement each time and the statement will go along the lines of, you have the right to participate in your hearing. Do you wish to cooperate and come to court. If you in any way exhibit uncooperative behavior, we will no longer put you in this chair. You will have voluntarily absented yourself, meaning this trial, these court proceedings will proceed without you. . . . I will no longer have the situation where I only get you for only a few minutes in a day and on your terms. [¶] So I want to make it abundantly clear. I want you present at every court proceeding. You have the constitutional right to be present at every court proceeding. It is not an absolute right. If you are uncooperative, you will not be rolled out to court anymore. [¶] Do you understand that right, sir?" Defendant replied, "Yes, sir."

Notwithstanding the trial court's earlier warning, defendant again could not be brought into the courtroom on February 24, 2015, "because he got physically violent with one of the deputies in the form of spitting at the deputy, so we have a gassing situation."

On June 8, 2015, the court asked if defendant would waive time and return on July 22, 2015. Defendant initially refused but after conferring with counsel he agreed to waive time, stating it was "the last time." Nevertheless, on August 28, 2015, he agreed to an additional continuance.

On November 2, 2015, defendant refused to leave lockup unless he was permitted to speak to his attorney first. The court once again accommodated defendant, after which time his

attorney informed the court that defendant wanted to enter a not guilty by reason of insanity (NGI) plea. The court advised defendant about the consequences of an NGI plea, and defendant said he understood, appearing to have no difficulty understanding the court's admonishment.[3] Defendant pled not guilty and not guilty by reason of insanity.

After the plea was entered, the court stated, "Mr. Walker, I want to let you know this and I only accommodated you because I was in a hurry. You indicated you would not come out unless your attorney came and talked to you. You can say that all you want. And the only reason I accommodated that is because I needed you physically here so you can enter your not guilty by reason of insanity plea personally. [¶] From now on, though, I will not accommodate that. If you tell us that you will not come out of the cell, that's fine with me. At that point I'm going to

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[3] In particular, as to the NGI plea, the following occurred: "The Court: All right, Mr. Walker, I need to let you know the following: [¶] If you enter a not guilty by reason of insanity plea and you are successful in that defense or in that assertion, you might end up serving essentially an indefinite commitment in a state hospital, upward to a maximum of life. There will be possible periodic extensions that might again result in a lifetime confinement. [¶] You can remain involuntarily committed at a state hospital for the rest of your life unless you successfully use your annual opportunity to convince [three-quarters] of a jury that the hospital staff, which refuses to release you absent judicial compulsion, is wrong in its diagnosis. [¶] And, again, your time in the state hospital might actually exceed your time that you would serve in state prison. [¶] Do you understand that? [¶] The Defendant: Yes, sir. [¶] The Court: And you still want to enter a not guilty by reason of insanity plea? [¶] The Defendant: Yes, sir."

have the sheriff's personnel read you a statement indicating that I would like you to participate. I'm encouraging you to participate. That I'm here to ensure your constitutional rights are protected. But I will not force you by physical force by way of the sheriff's department to come to this courtroom. You can waive your presence by refusing to come out of your cell. And I'm happy to do that. All right? So this is the one time I'm accommodating you. Never again."

On January 12, 2016, the court asked defendant if he agreed to waive his speedy trial right and return on January 21, 2016. Defendant replied, "I wanted to have a *Marsden*[4] motion, please, sir." After defendant made the motion and the court denied it, he stated he wanted a speedy trial. Defendant personally agreed to waive time to January 21, 2016, as a nonappearance matter. He then asked, "What is going to be a nonappearance?" The court explained he would not appear in court on January 21, 2016, because the court would simply be determining the status of the case, and defendant would probably appear in court on January 22, 2016. Defendant appeared to understand, replying "All right."

Outside defendant's presence, the court advised counsel for the parties, "Every time Mr. Walker comes to court he is in a suicide vest. He is very disruptive. . . . He claims that he swallowed razor blades on numerous occasions, necessitating the fact that he then has to be taken to the local hospital. [¶] We have had reports that while he is at the hospital he gropes the female staff there. [¶] And every time he's come to court he has been difficult and so we have had to videotape him at each point. [¶] So when we come back on the 21st, all we are going to do is a

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

status check to see what everyone's readiness status is. . . . [¶] But the sheriff's department has asked us to try to minimize the number of times they have to transport him out." Defendant's counsel agreed with this procedure.

On January 22, 2016, the court told defendant that his case needed to be assigned to a different deputy public defender and asked him if he agreed to waive his speedy trial right so the court could continue the case. Defendant replied, "Yes, sir." On March 2, 2016, defendant was represented by a new deputy public defender. The court once again asked defendant if he agreed to waive his speedy trial right so that his case could be continued. This time, he refused and asked to speak with the judge. After the court and defense counsel discussed the possible appointment of a third medical expert to evaluate defendant's sanity, the court permitted defendant to speak. He asked, "if the D.A. doctor didn't do a full assessment, how will you do a third assessment if -- [¶] . . . [¶] -- that doctor wasn't professionally – [.]" (*Sic.*)

On May 3, 2016, defendant was unavailable due to chest pains. At a hearing on May 11, 2016, the court stated defendant "has a very, very long history of obstructive behavior whenever we try to get him into court," "he has a number of downtown [Los Angeles] cases wherein he's been charged with gassing various deputies," and he had to be escorted to the present court by multiple deputies because of his violent behavior. Countless court proceedings failed to start or were interrupted because the defendant would arrive, then "claim various medical issues." It had been very difficult to commence the trial because of defendant's behavior, so the court, demonstrating foresight, memorialized what had happened in case, at some point, the court had to find that he had voluntarily absented himself.

The court further noted that defendant was at times unavailable because he habitually claimed he had swallowed razor blades. The claims were usually false, but every once in awhile the claim was true. On May 9, 2016, for example, a doctor indicated that defendant apparently swallowed razor blades which were in his lower colon, though he was refusing all examinations and was "highly uncooperative with the medical staff." Defendant also destroyed property in the medical cell, refused to cooperate with mental health professionals, and was returned to his jail cell.

Several other times in May 2016, defendant refused to leave lockup. On one such occasion, he verbally abused the female bailiff, yelling, "Get that bitch away from me. I don't want that slut around me." Later that day, he displayed a piece of metal that had been removed from a phone and deputies had to negotiate with him to surrender it. Shortly thereafter, defendant complained of stomach pain and was rushed to the hospital. X-rays of defendant's stomach revealed nothing unusual. Defendant complained of rectal bleeding but refused a rectal examination. The court commented that that was "a pretty common scenario that plays out with [defendant] where if he doesn't get what he wants, he begins to destroy things and then indicates that he is in pain."

A local hospital had also refused to take defendant because of his disruptive conduct, which included groping a female nurse. For defendant to receive treatment, he had to be transported

back to downtown Los Angeles, causing the court to lose an entire court day based on a false medical claim.[5]

On May 17, 2016, defendant had to be escorted to court by three deputies after initially refusing to exit his cell. On that occasion, defendant showed the deputies a razor blade in his mouth, threatening to swallow it if he was forced to come to court. The court read into the record an email from a sheriff's sergeant documenting defendant's conduct earlier that month. Defendant had made lewd comments to a female deputy, prevented personnel from closing a cell door, complained of stomach pain, and "trashed" a hospital room. He was also involved in a force incident with sheriff's personnel.

When the court conveyed its desire to begin the trial, defendant replied, "The only time I don't go to court is when I go to the hospital." The court reminded defendant that if he continued interrupting the court, he would be deemed making himself absent. Defendant seemed unconcerned, saying only, "All right" and "I know you already going to make it so I don't come. I not worried." (*Sic.*) The court continued, "it is our strongest desire and hope that you will be present for your trial. You have a constitutional right to be present." The court added, "It never looks good for a case to go to trial without the defendant. However, at a certain point you can become so disruptive the trial would proceed without you. If I determine that you are continually swallowing razor blades on purpose in order to cause

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[5] The court later commented, "We just got a call that downtown has stated there [are] 167 IRTS. And [*sic*] IRTS is a report that's generated every time there is a disruption by the defendant. So there [are] 167 of those. We are trying to see if we can get copies of every single one of those IRTS reports."

stomach pain and thereby delay the proceedings, the proceedings will go on without you." Defendant replied, "All right."

The court also said, "In addition, if I find that you are refusing to exit your cell unless certain demands are met, again, the trial will proceed without you." Defendant replied, "Yes. So if they tell you whatever, you just go by what they say. Okay. Thank you." Cursing under his breath, defendant referred to the bailiff as "little skinny ass," telling her to "shut up, bitch," and calling her a slut. The court noted this was ongoing behavior, and mild compared with his conduct in custody outside the courtroom. The court said defendant was "doing everything on his part to obstruct the proceedings of this trial" and the age of the case was largely caused by his dilatory tactics.

The court advised that, for safety reasons, it would not have defendant forcibly extracted from his cell, but the case would go forward with or without him. Defendant continually spoke over the court, having interrupted it 18 times that day alone.

Later that day, the court conducted a hearing with counsel outside of defendant's presence. The female deputy previously subjected to defendant's lewd comments on May 9, 2016, testified concerning them and other sexually-related conduct defendant had directed towards her on multiple occasions. The court noted that, on about three occasions when defendant interacted with the bailiff, he exposed his penis to her.

On May 24, 2016, defendant refused to board either of the two morning custody buses. Instead, he claimed a medical ailment and was taken to the hospital. The court observed that this was "the traditional situation almost every single time we try to get him to court." Defense counsel was "inclined" to declare

a doubt because the attorney who had stood in for him had shared that defendant had swallowed razor blades and had said things about the bailiff. The court declined to declare a doubt as to defendant's competency. The court explained defendant was "highly manipulative of the system. He has such a good working knowledge of our system and the procedures and protocols of the sheriff's department. He knows exactly what the sheriff's department must do if he does certain things and he fully utilizes that to his advantage. [¶] . . . [¶] When he was here in court and being rebellious towards this court, everything he said was in direct response to the record I was trying to make and his comments were directed right at what I was saying. It wasn't this obscure, tangential rambling. He was addressing everything I was saying. He just wasn't happy with what I was saying. [¶] So from everything I have seen he is a very highly intelligent individual. Just incredibly manipulative at this point."

At the May 25, 2016 hearing, the court explained, the day before, defendant had been taken to a medical clinic but was medically cleared that same day. Defendant successfully avoided being brought to court on May 25, 2016, by first refusing to be searched, then by claiming chest pain which required him again to be taken to a clinic.

On May 26, 2016, the court received a CD showing defendant refusing to be handcuffed and claiming he had stomach pain. He was, however, medically cleared. Having missed the two morning buses, he could not arrive at the courthouse until at least 2:30 p.m. The CD showed that defendant was "incredibly shrewd, highly manipulative, [and] very combative."

On June 1, 2016, Los Angeles County Sheriff's Sergeant Samuel Morales testified that in the past two days, defendant again claimed to have swallowed razor blades and was uncooperative. He refused X-rays; as a result, doctors would not release him for court. However, he gratuitously masturbated in front of the nursing staff in the hospital's jail ward, demanded things the medical staff could not provide, and tore apart his bed.

The court indicated that, despite defendant's purposeful delay, the court was ready to start jury selection the next day. Undaunted, the court planned to order defendant out and to have the sheriff's department read him a statement that "if he refuses medical attention, or if he swallowed razor blades and is medically ill and can't come to court, he will have voluntarily absented himself." The court stated, "I can't remember any other case in the last decade that I've been a judge where we've gone to such extreme efforts to try to get someone to come to court" so the person could exercise the person's rights to a speedy and public trial, and right to be present at trial. Short of physically forcing the defendant to come to court, the court was just going to find that he has voluntarily absented himself and proceed.

On June 2, 2016, defendant was still in the hospital and could not be cleared because he refused to let the staff examine him. The matter was trailed for jury trial to the next day, June 3.

(3) The June 3, 2016 Proceedings and the Court's Refusal to Declare a Doubt.

June 3, 2016, was the last day for trial and there were 65 prospective jurors waiting. Defendant, however, was not in court because, once again, he had swallowed razor blades, and they were still working through his system. He therefore was not

medically cleared to come to court. The court declined to order defendant's extraction because he might be injured, defendant's condition was self-inflicted, and it was "common practice for him to try to obstruct court proceedings." Having warned defendant numerous times of the consequences of his behavior, the court found that he had voluntarily absented himself: "We've gone through Herculean efforts to try to get him into court so that he can be present, but at this point, there's nothing more I can do that I can think of. [¶] So I'm finding that he's voluntarily absented himself from this trial, not for all purposes – day to day, we will try to get him out."

Defense counsel asked the court to declare a doubt: "I don't know if swallowing the razor blades and conduct [are] a product of a mental defect, but he clearly can't rationally assist his attorney if he's not in the courtroom, and/or if he decides to testify, he wouldn't be here to testify." The court declined to declare a doubt and referred to the recent video from the sheriff's department which showed that defendant was coherent, articulate, and intelligent "to a fault, where he knows exactly what the sheriff's policies are, and he knows exactly how to manipulate those policies." The court added, "in the video, he's very well groomed, very well-spoken. All of his responses, while belligerent, were appropriate to the questions and commands. So I'm going to decline your request to declare a doubt." The jury was sworn that day.

(4) Subsequent Proceedings.

Defendant was a "miss-out" on June 6 and 7, 2016, and the court found he had absented himself from trial because of razor blades he had swallowed.

On June 7, 2016, the jury convicted defendant of the present offenses. On June 9, 2016, the case was called for defendant's sanity trial, but defendant was still absent due to the razor blades. After the presentation of evidence, the jury trial was continued to June 15. Defendant was not present because, although he had been released from "LCMC," he claimed to have swallowed paper clips. He was returned to LCMC, but refused to submit to X-rays and could not be medically cleared to come to court.[6] That same day, the jury found defendant was sane when he committed the present offenses. On June 27, 2016, defendant was present in court when the court sentenced him.

B. *Analysis*.

Defendant claims the trial court erroneously failed to conduct a second competency hearing on June 3, 2016, when the jury was sworn in his absence. We disagree.

"A criminal trial of an incompetent person violates his or her federal due process rights. [Citation.] The state Constitution and section 1367 similarly preclude a mentally incompetent defendant's criminal trial or sentencing. [Citations.]

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[6] The June 15, 2016 minute order also states, "The court notes that it has compiled a collection of IRTS reports, refusal notices, transcripts, medical reports, and a DVD," they are in an envelope, and the envelope and its contents are court's exhibit No. 1.

A defendant is incompetent to stand trial if the defendant lacks ' "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [or] a rational as well as factual understanding of the proceedings against him." ' [Citations.] [¶] Under section 1368, subdivision (a), a judge must state on the record any doubt that arises in her mind as to the mental competence of the defendant, and either seek defense counsel's opinion as to the defendant's mental competency, or appoint counsel if the defendant is unrepresented." (*People v. Mickel* (2016) 2 Cal.5th 181, 194–195.)

"When . . . a competency hearing has already been held and the defendant was found to be competent to stand trial, a trial court is not required to conduct a second competency hearing unless 'it "is presented with a substantial change of circumstances or with new evidence" ' that gives rise to a 'serious doubt' about the validity of the competency finding. [Citation.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 33 (*Marshall*).) There must be "substantial evidence sufficient to meet the standard of a substantial change of circumstances or new evidence casting a serious doubt" about the validity of the original competency finding. (*People v. Kaplan* (2007) 149 Cal.App.4th 372, 385.)

"More is required than just bizarre actions or statements by the defendant to raise a doubt of competency. [Citations.]" (*Marshall*, *supra,* 15 Cal.4th at p. 33.) " ' "An appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper." ' [Citations.]" (*Ibid.*) "[D]isruptive conduct and courtroom outbursts by the defendant do not necessarily demonstrate a present inability to understand the proceedings or assist in the defense." (*People v. Mai* (2013)

57 Cal.4th 986, 1033.) Moreover, " 'when . . . a competency hearing has already been held, the trial court may appropriately take its personal observations into account in determining whether there has been some significant change in the defendant's mental state.' [Citations.]" (*People v. Mendoza* (2016) 62 Cal.4th 856, 885.)

As our Supreme Court observed in *People v. Medina* (1995) 11 Cal.4th 694, "[d]efendant's cursing and disruptive actions displayed an unwillingness to assist in his defense, but did not necessarily bear on his *competence* to do so, or reflect a substantial change of circumstances or new evidence casting serious doubt on the validity of the prior finding of the defendant's competence. [Citation.]" (*Id.* at p. 735.)

In the present case, in January 2014, the trial court found defendant was competent to stand trial based in part on mental health experts' opinions that defendant was competent and was feigning mental illness to secure placement in a state hospital and to obtain a lenient disposition. The court's finding was also based on defendant's own admission to his family that he was malingering. Defendant does not challenge that finding on appeal. He instead contends that the court should have held a second competency hearing on June 3, 2016, the first day of trial. The record, however, contains insufficient evidence of a substantial change in circumstances or new evidence that would give rise to a doubt about the trial court's initial competency ruling.

Rather, there was no change, except that defendant became even more extreme in his malingering and more sophisticated in his manipulation of the system. Being familiar with law enforcement procedures regarding ailing inmates, he took

advantage of them. He swallowed razor blades or claimed to have swallowed them to avoid being brought to court. He was uncooperative, disruptive, and verbally combative with jail and courthouse sheriff's deputies. The trial court personally observed numerous instances of defendant's unruly and dilatory tactics, and expressly found that they stemmed from a deliberate attempt to manipulate the system rather than from a lack of competence. There was overwhelming evidence that the above actions were part of his ongoing malingering and obstreperous effort to avoid coming to court and to force a disposition in keeping with his above mentioned stratagem.

Moreover, when defendant appeared in court, he fully understood the nature of the proceedings, he communicated effectively and with significant sophistication, he was able to consult with his counsel with a reasonable degree of understanding, and defendant had a rational and factual understanding of the proceedings against him. There was no evidence of a substantial change of circumstances or new evidence giving rise to a serious doubt about the validity of the trial court's original competency finding. Accordingly, the trial court properly refused to hold a second competency hearing.

2. THE COURT PROPERLY CONDUCTED TRIAL ABSENT DEFENDANT.

Defendant next claims his trial was erroneously conducted in his absence. As our recitation of facts above demonstrates, the claim is meritless.

" 'A criminal defendant's right to be present at trial is protected under both the federal and state Constitutions. [Citations.]' [Citation.] [¶] But the right is not an absolute one.

[Citation.] It may be expressly or impliedly waived. [Citation.] As relevant here, the high court has stated that 'where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.' [Citation.] Section 1043, [subdivision] (b)(2)[7] has adopted this majority rule as state law. [Citation.]" (*People v. Espinoza* (2016) 1 Cal.5th 61, 72

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7 Section 1043, subdivisions (a) and (b), state: "(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial. [¶] (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: [¶] (1) Any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom. [¶] (2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent."

(*Espinoza*), italics omitted.)[8] "Sections 977[9] and 1043 implement the state constitutional protection." (*Gutierrez, supra,* 29 Cal.4th at p. 1202.)

"Cases finding implied waivers have often involved disruptive behavior. . . . ' "Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." ' " (*People v. Concepcion* (2008) 45 Cal.4th 77, 82 (*Concepcion*).) " ' "Unquestionably section 1043, subdivision (b)(2), was designed to prevent the defendant from intentionally frustrating the orderly processes of his trial by voluntarily absenting himself." ' " (*Concepcion*, at p. 83.) A "trial judge may rely on reliable information, such as statements from jail or court personnel, to determine whether a defendant has waived the right to presence." (*Gutierrez*, *supra*, 29 Cal.4th at p. 1205.) The "decision whether to continue with a trial in absentia under [section 1043, subdivision (b)(2)] . . . rests within the discretion of

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8 Whether the defendant is in custody is not dispositive. "[S]ection 1043, subdivision (b)(2)'s statutory language does not distinguish between custodial and noncustodial defendants. [Citation.] Moreover, the underlying premise, that a custodial defendant cannot be absent voluntarily because 'presence or absence is not within his own control' [citation], is an unrealistic view of a defendant's volition and resolve to remain absent from court proceedings. A person in custody, as any person, can voluntarily choose to be absent." (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1208 (*Gutierrez*).)

9 Section 977, subdivision (b)(1), states, in relevant part, "in all cases in which a felony is charged, the accused shall be personally present . . . during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence."

the trial court." (*Espinoza, supra*, 1 Cal.5th at p. 75.) " 'In determining whether a defendant is absent voluntarily, a court must look at the "totality of the facts." ' " (*Id.* at p. 72.) "The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence." (*Id.* at p. 74.)

In the present case, there is no dispute as to the validity of the trial court's January 9, 2014 competence finding. On June 3, 2016, the trial court, alluding to the well-documented history of defendant's contrived, self-serving, and uncooperative behavior and his dilatory and obstructionist tactics, found defendant had voluntarily absented himself. That finding was supported by, not merely substantial evidence, but overwhelming evidence. Defendant's claim thus fails; no error, abuse of discretion, or violation of defendant's right to due process, right to confrontation, or other constitutional right occurred.

None of the cases defendant cites, or his arguments, compel a contrary conclusion. In particular, defendant, focusing on the events of June 3, 2016, and relying on *People v. Molina* (1976) 55 Cal.App.3d 173 (*Molina*), and section 1043, argues that since he was not present in court when the jury was sworn, the trial court erred in conducting the trial in his absence. Section 1043, subdivision (a), dictates that felony defendants must be "personally present at the trial." Subdivision (b) discusses the "absence of the defendant . . . *after* the trial has *commenced*." (Italics added.) *Molina* read the two subdivisions to mean a felony defendant must be personally present *when* trial *commences*. Accordingly, *Molina* concluded section 1043 had been violated in that case because defendant was absent before a jury had been impaneled and sworn, before the first witness had

been sworn, and before an exhibit had been admitted into evidence. (*Molina*, at p. 177.) Thus, defendant was not present when trial commenced.

However, no published case has followed *Molina* on this point. To the contrary, *Molina* and its reasoning have been criticized and rejected. (*People v. Ruiz* (2001) 92 Cal.App.4th 162, 166–169; *People v. Granderson* (1998) 67 Cal.App.4th 703, 711-712; *People v. Lewis* (1983) 144 Cal.App.3d 267, 277–278.) *Lewis*, for example, stated, "It is enough the defendant is physically present in the courtroom where the trial is to be held, understands that the proceedings against him are underway, confronts the judge and voluntarily says he does not desire to participate any further in those proceedings." (*Lewis*, at p. 279.) Here, defendant's conduct was effectively a voluntary statement he did not desire to participate any further in the proceedings. The requirements of *Lewis* were therefore satisfied. No violation of section 1043 occurred.

Even if the trial court violated section 1043, defendant does not argue the alleged error was prejudicial and, on this record, we would reject any such argument. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Disandro* (2010) 186 Cal.App.4th 593, 604–605.)

3. THE COURT DID NOT PREJUDICIALLY ERR BY GIVING CALJIC NO. 3.00.

The court instructed the jury with CALJIC No. 3.00, which stated, "Persons who are involved in attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is *equally guilty*. [¶] Principals include: [¶] One, those that directly and actively attempt to commit the act constituting the crime; or,

[¶] Two, those who aid and abet the attempted commission of the crime." (Italics added.)

The court also gave CALJIC No. 3.01, which stated, inter alia, "A person aids and abets the attempted commission of a crime when he: [¶] One, with knowledge of the unlawful purpose of the perpetrator; and [¶] Two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime; and [¶] Three, by act or advice, aids, promotes, encourages or instigates the commission of the crime."

Relying on cases holding that aiders and abettors are not necessarily *equally guilty* as the direct perpetrator (*People v. McCoy* (2001) 25 Cal.4th 1111; *People v. Nero* (2010) 181 Cal.App.4th 504; *People v. Samaniego* (2009) 172 Cal.App.4th 1148), defendant argues that the trial court prejudicially erred as to count 3 by giving CALJIC No. 3.00.[10] *Samaniego* explained that "an aider and abettor's *guilt may . . . be less* than the perpetrator's, if the aider and abettor has a *less culpable* mental state." (*Samaniego*, at p. 1164, italics added.) *McCoy*, *Samaniego*, and *Nero* thus stand for "the unremarkable proposition that the *extent* of an aider and abettor's *liability* is dependent upon his particular mental state, which may, under the specific facts of any given case, be the same as, or greater or *lesser than*, that of the direct perpetrator. [Citation.] *Samaniego* and *Nero* take the matter a step further, however, by holding that pattern aiding and abetting instructions, to the extent they describe aiders and abettors and direct perpetrators as being

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[10] Although defendant did not object to the instruction or otherwise request a modification, we address the issue on the merits because he also argues that counsel provided ineffective assistance.

'equally guilty,' may be misleading under certain circumstances." (*People v. Mejia* (2012) 211 Cal.App.4th 586, 624, italics added.)

Here, defendant's reliance upon *McCoy*, *Samaniego*, and *Nero* is misplaced. Defendant is not really arguing there was evidence that, because of his mental state, his "guilt" as a *criminal* aider and abettor might be "less than" that of the gunman in this case; he had a *culpable*, but "less culpable," mental state than that of the gunman; or the "liability" of defendant as an aider and abettor was less than that of the gunman. Instead, defendant is really only arguing there was evidence that, because of his mental state, he was not guilty of attempted second degree robbery, or, indeed, of any crime.

Defendant's argument is therefore similar to one our California Supreme Court rejected in *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 44. In that case, our Supreme Court observed the defendants did not assert a defense theory or point to extenuating circumstances "that might have led the jury to find that one defendant's individual culpability was less than that of the other defendant, nor does the evidence at trial suggest any such defense or circumstances. Rather, defendants simply speculate that they 'may have had different levels of culpability.' Under the circumstances, there is no reasonable likelihood that the jury was confused or misled by the trial court's instruction that the aider and abettor and the direct perpetrator were 'equally guilty.' " (*Ibid.*) This is equally true here, where defendant first entered the store, presumably to case it, then returned with an armed accomplice who wore gloves and a face covering, and defendant admitted to holding ammunition at the accomplice's request.

Therefore, defendant's claim fails, as does his related ineffective assistance of counsel claim. (See *Strickland v. Washington* (1984) 466 U.S. 668 [a defendant claiming ineffective assistance of counsel must establish both error and prejudice].)

4. REMAND IS APPROPRIATE TO PERMIT THE TRIAL COURT TO EXERCISE ITS DISCRETION UNDER SENATE BILL NO. 620.

When defendant was originally sentenced in 2016, the trial court lacked discretion to strike the enhancements found true under section 12022.53. However, newly amended section 12022.53, subdivision (h), which became effective January 1, 2018, provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." Defendant correctly contends that he is entitled to the benefit of this new law.[11]

The amendment to section 12022.53 applies retroactively to defendant's case. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507; *People v. Woods* (2018) 19 Cal.App.5th 1080; *In re Estrada* (1965) 63 Cal.2d 740.) Because nothing in the record suggests how the trial court would have exercised its discretion, remand is necessary. We offer no opinion as to how its discretion should be exercised.

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11 Respondent does not dispute defendant's contention.

DISPOSITION

The judgment is affirmed, except defendant's sentence is vacated and the matter is remanded with directions to the trial court to reconsider defendant's sentence in light of Senate Bill No. 620.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

WE CONCUR:

EDMON, P. J.

EGERTON, J.

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