Filed 10/26/16 P. v. Mosley CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. SHONTE MOSLEY, Defendant and Appellant.	B267328 (Los Angeles County Super. Ct. No. YA091950-02)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan B. Honeycutt, Judge. Affirmed.

Paul E. Katz, 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, Assistant Attorney General, Herbert S. Tetef and Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Shonte Mosley was convicted of first degree burglary. On appeal, he contends (1) it was prejudicial error to admit into evidence the recording of a conversation between two men (neither of whom was defendant) while they were detained in the back seat of a police car as suspects in the burglary; and (2) he was denied the constitutional right to represent himself. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357), the evidence established that in February 2015, victim Humberto Castro lived with his wife and adult son, Daniel, on 175th Street in Torrance.[1] On the night of February 2, when Castro fell asleep in the second bedroom of his home while watching television, his wife was in the master bedroom and Daniel was in his own bedroom. At about 11:20 p.m., Castro was awakened by someone ringing the front door bell and pounding on the metal screen door. Castro looked out the living room window and saw an unfamiliar man standing on the front porch. Castro described the man as about five foot, eight inches tall, dark complexioned, wearing dark pants and a hooded jacket. The man stepped away from the door, looked across the street (north) as if he was looking for someone, then stepped back to the door and continued pounding. Eventually, the man left Castro's porch, crossed the street and opened the rear driver's side door of the white Nissan Altima depicted in People's Exhibit Nos. 2 and 3, which had been parked on the street. From his vantage point, Castro could not actually see the man get into the Nissan, but the car drove away. Suspicious, Castro immediately called the police and reported what he saw.

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[1] Because Castro and his son have the same last name, we refer to his son by his first name, Daniel.

The police operator told Castro a police car would be sent to his home. Castro returned to his bedroom but within 10 or 15 minutes he heard Daniel yelling, "Hey, Hey, Hey." Hearing the panic in Daniel's voice, Castro ran out of the bedroom and asked what was going on. Daniel said someone had tried to break into the house through the bathroom window. Castro saw that the blinds on the bathroom window were moving. He called the police a second time. Castro could not identify the person he saw knocking on his door or the driver of the white Nissan Altima, but identified a car located by police a short time later as that car.

Daniel's account of events that night was generally consistent with his father's. Daniel said he heard a "popping" noise in the bathroom. Daniel's first thought was that his father was in the bathroom and had dropped something. But when Daniel looked into the bathroom he saw the vertical window blinds were moving and something, possibly a hand, was reaching in through the window. Daniel yelled, "Hey," then heard what sounded like footsteps running on grass. Daniel went to alert his father, then came back to the bathroom and turned on the light. By that time, the blinds were still. The screen from the bathroom window was later found on the ground, outside the house; it had a damaged corner.

That night, uniformed Torrance Policer Officer Tyrone Gibben was a passenger and Officer Steven Masone was driving a marked patrol car near the Castro home in response to Castro's first call. Gibben saw Carlos Augustine and Armonte Sykes running south at "a full sprint." After appearing to notice the patrol car, Augustine and Sykes slowed to a brisk walk; Masone saw a third man turn west and run between some garages. Augustine and Sykes were stopped about "six houses away and just about one house south" of the Castro home. When the officers got out of the patrol car

to talk to Augustine and Sykes, Gibben observed Augustine remove something white from his hand and throw it over the wall of the house belonging to witness Francis Gosum; police later found a white sock on the other side of that wall. Augustine and Sykes were detained at a nearby gas station while a perimeter was established to find the third man. After Castro's second call to the police, in which he reported the actual break-in, Gibben left the gas station and went to the Castro home where he interviewed Daniel. Daniel said he saw "what appeared to be a hand" come through the bathroom window. On the outside of the house, underneath that bathroom window, Gibben saw a water meter that could have been used as a step to reach the window.

Officer Ryan Schmitz testified that he saw the Nissan depicted in People's Exhibit Nos. 2 and 3 parked near Castro's house. Upon further investigation, Schmitz discovered the doors were unlocked, the engine was still warm and there was a backpack on the back seat.

After learning about the Nissan, Gibben left the Castro home and returned to the gas station where suspects Augustine and Sykes were being detained. He told them a white Nissan had been found and was going to be impounded, but did *not* tell them that police were investigating a burglary, or that a window screen had been found on the ground, next to the house that had been burglarized. Gibben caused the two suspects to be placed together in the back of a patrol car. Unbeknownst to Augustine and Sykes, their conversation in the back of the patrol car was recorded (the Augustine/Sykes conversation). That recording and a transcript were introduced into evidence. Sykes and Augustine have the following exchange:

> **"Augustine**: Did they get cuz?
> **Sykes**: I don't know. He didn't even do nothing.

Augustine: But they got that screen off the damn house. They got a call, you know what I'm sayn', so they gonna put that with us.

Sykes: Ain't nothing broke. They can't say burglary.

Augustine: Why they can't?

Sykes: Because we didn't break no window or nothing. Burglary is when you're in there and you burglarizing shit. Feel me? We didn't even get in the house, you feel me? All they see is us running. They wasn't even coming for us. They was gonna do something else. They just seen us running and they stop.

Augustine: And they got that call.

Sykes: You feel me? They can't charge us with nothing 'cause we didn't do nothing. Running. We can be running for anything.

. . .

Sykes: . . . You ain't burglarize nothing, they ain't catch nothing, you ain't do nothing. You feel me? 'Cept if they wanna catch some tools, feel me? We ain't done shit.

Augustine: Yeah. We ain't break nothing, we're just running.

Sykes: Yeah, you can be running from anything. You can be running from a dog. You feel me?

Augustine: That's what I told them. He say run so I ran.

Sykes: And then they gon' say, you broke a window. I didn't break nothing. You feel me? They gotta say – people gotta say that we did that, for them – for them to take this case.

Augustine: Mmmhmm. They're gonna say we knocked something down for him to say, hey! And he was all down there. I feel I'm about to be sick, though.

. . .

Augustine: They can't press charges?

Sykes: Hell no, they can't press charges. 'Cause charges are if you break a window, you feel me? Or if you- you feel me? The screen, that ain't shit. He put that right back on there, you feel me?

Augustine: Yeah, 'cause that's all he did was pull the screen off.

Sykes: Yeah.

Augustine: And soon he get the screen off, he try to open the window. Shit was like, heavy. Oh, get me out of here.

. . .

Sykes: That why I said like he didn't do nothing. They can't do nothing, cuz, you feel me? Take you to the station, you gon' be right out.

Augustine: You think so?

Sykes: Hell, yeah. Man, this ain't no new charge, bro. What they gon' get us for . . . ?

Augustine: Attempted burglary?

Sykes: Attempted burglary. Ain't no attempt, 'cause we didn't do nothing. We ain't even get inside the house, you feel me?

. . .

Sykes: They got nothing, 'cause we didn't do nothing, bro. You feel me? Like if we break a window, that's a different story, you feel me? Break a window, or if we in the house, that's a different story . . . , like that's – Like they didn't catch us at that house, . . .

. . .

Sykes: They ain't – ain't - they ain't got no proof.

Augustine: The socks.

Sykes: The socks was on your hands?

Augustine: I threw them over the wall.

. . .

Augustine:	But even if they do find out them tools, cause they got the dogs out . . . .
Sykes:	But they didn't see us throw no tools, though.
Augustine:	Yeah, they ain't got our fingerprints on them.
Sykes:	Yeah, they ain't got our fingerprints on nothing. And we ain't done nothing. . . ."

Based on the Augustine/Sykes conversation, and other evidence, Augustine and Sykes were arrested. Officer Schmitz searched the Nissan. Defendant's identification, social security card and birth certificate were found in the backpack in the Nissan. Police concluded defendant was the third man seen running between garages when Augustine and Sykes were stopped.

Within a few hours, defendant was found hiding in a trash can on the side of Gosum's home (the same property where the white sock had been found). After defendant was pulled from the can by a canine unit on the scene, police found a hat, black sweater, knit gloves and a cell phone in the trash can. A screwdriver was found in Gosum's backyard, about 25 feet away. Gosum did not identify the screw driver as his property; he did not know defendant, Augustine or Sykes.

The parties stipulated that Oscar Gutierrez and his neighbor, Santiago Reynoso, would testify to a burglary at Gutierrez's home on April 11, 2013, involving a very similar method of operation to the burglary at the Castro home on February 2, 2015. It was stipulated that Reynoso would testify that on that date in April 2013, he saw defendant in Gutierrez's backyard holding a pillowcase, defendant jumped over the fence and got into a car Reynoso had seen driving past his house earlier the same day.

Defendant was charged by amended information with first degree burglary of Humberto Castro; also alleged were a gang enhancement (§ 186.22, subd. (b)(1)(C)) and prior conviction enhancements pursuant to the

Three Strikes law (§ 667, subds. (b)-(j), § 1170.12), section 667.5, subdivision (b) (one year) and section 667, subdivision (a) (five years).[2] After a jury found defendant guilty of first degree burglary, he pled no contest to the gang and prior conviction allegations. The trial court denied defendant's motion to dismiss the Three Strikes prior, but dismissed the one-year section 667.5, subdivision (b) enhancement. Defendant was sentenced to 23 years in prison comprised of 8 years on the substantive offense of first degree burglary (the four year mid-term doubled pursuant to Three Strikes), plus a consecutive 10 years for the gang enhancement, plus 5 years pursuant to section 667, subdivision (a)(1). He timely appealed.

DISCUSSION

A. Admissibility of the Augustine/Skyes Conversation

Defendant contends the trial court prejudicially erred by admitting into evidence the recording of the Augustine/Sykes conversation over defendant's hearsay and *Crawford* objections.[3] That recording includes two separate conversations – first a brief conversation between Gibben and Sykes regarding the Nissan, and second, the conversation between Sykes and Augustine. As we understand defendant's argument, it is that (1) the entire recording was inadmissible hearsay which did not fall within the spontaneous statement exception (Evid. Code, § 1240) and (2) Sykes's statements to Gibben were inadmissible under *Crawford* because those statements were testimonial. The People counter that the Sykes/Augustine conversation was not hearsay because it was not admitted to prove the truth of the matter stated (that no burglary was committed because no one entered

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[2] Only defendant was tried in September 2015, and defendant is the only defendant in this appeal.

[3] *Crawford v. Washington* (2004) 541 U.S. 36.

the house); alternatively, the evidence falls under the spontaneous statement exception. Regarding the *Crawford* challenge to Sykes's statements to Gibben, the People argue defendant's failure to object on this ground in the trial court constitutes a forfeiture of the issue; even if not forfeited, the People argue any error in admitting the evidence was harmless.

1. The recording of the Augustine/Sykes conversation is hearsay

Subject to statutory exceptions, evidence of an out-of-court statement offered to prove the truth of the matter stated is inadmissible hearsay. (Evid. Code, § 1200.) The People's argument that the recording of the Augustine/Sykes conversation is not hearsay because it was not offered to prove the matter asserted is not persuasive. In his conversation with Gibben, Sykes indicates he and Augustine were on their way back to the Nissan to leave when they were stopped. The recording also includes the following exchanges between Sykes and Augustine:

"Augustine: Did they get cuz?
Sykes: I don't know. He didn't do nothing.
Augustine: But they got that screen off the damn house. They got a call you know what I'm sayn', so they gonna put that with us.
. . .
Sykes: Hell no, they can't press charges. 'Cause charges are if you break a window, you feel me? Or if you- you feel me? The screen, that ain't shit. He put that right back on there, you feel me?
Augustine*:* Yeah, 'cause that's all he did was pull the screen off.
Sykes: Yeah.
Augustine: And soon he get the screen off, he try to open the window. Shit was like, heavy. Oh, get me out of here.
. . .
Sykes: They ain't they ain't got no proof.

Augustine: The socks.
Sykes: The socks was on your hands?
Augustine: I threw them over the wall.
. . . ."

In closing argument, the prosecutor stated:

> ". . . [T]hese guys and cuz who is sitting right over there, were connected to this car."
> "So how do we know that the defendant was in fact the perpetrator here? By what these two guys said in the back of the police car."

As the prosecution acknowledged, the recording was offered for the truth of the matter asserted – that Augustine and Sykes were connected to the Nissan, and they were involved in the burglary with a third man. We turn next to the question of whether the evidence is nevertheless admissible under a hearsay exception.

2. The recording was admissible under the spontaneous statement exception

"When evidence is offered under one of the hearsay exceptions, the trial court must determine, as preliminary facts, both that the out-of-court declarant made the statement as represented, and that the statement meets certain standards of trustworthiness." (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.) Here, the trial court identified the "spontaneous statement exception" set forth in Evidence Code section 1240 as the exception pursuant to which it was admitting the recording of the Augustine/Sykes conversation. Evidence Code section 1240 reads:

> "Evidence of a statement is not made inadmissible by the hearsay rule if the statement:
>
> (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and

(b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

As we shall explain, the recording of the Augustine/Sykes conversation satisfies this two prong test.

a. Standard of review

Whether an out-of-court statement meets the statutory requirements for a hearsay exception is a "question of fact for the trial court, the determination of which involves an exercise of the court's discretion. [Citation.] We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception. [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 65 (*Merriman*).)

b. The challenged statements narrate, describe, or explain an act, condition, or event perceived by Augustine and Sykes

The following excerpt from the Augustine/Sykes conversation demonstrates that the evidence satisfies this first statutory requirement:

"**Sykes:** Hell no, they can't press charges. 'Cause charges are if you break a window, you feel me? Or if you –you feel me? The screen, that ain't shit. He put that right back on there, you feel me?
Augustine: Yeah, 'cause that's all he did was pull the screen off.
Sykes: Yeah.
Augustine: And soon as he get the screen off, he try to open the window. . . . "

From this exchange, it is apparent that Augustine and Sykes are describing an event that they perceived.

c. Augustine and Sykes were under the stress of excitement caused by their perception of that startling occurrence

To be admissible under the spontaneous statement exception, " ' "(1) [T]here must be some occurrence startling enough to produce this

nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." [Citations.]' [Citation.] A statement meeting these requirements is 'considered trustworthy, and admissible at trial despite its hearsay character, because "in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." [Citation.]' [Citation.]" (*Merriman, supra*, 60 Cal.4th at p. 64.) The statements in this case meet all of these requirements.

1) A startling occurrence

The People do not cite to any case holding that an arrest is a startling occurrence within the meaning of Evidence Code section 1240. Although defendant argues a detention or arrest cannot be a startling occurrence, he cites no case so holding, and logic tells us otherwise as our entire body of law dealing with arrests, searches, seizures is based on limiting when police may take the intrusive and, usually, unexpected steps to engage in such conduct. Our independent research has found no case directly on point, but two case offer guidance on the issue: *People v. West* (1980) 107 Cal.App.3d 987 (*West*) and *People v. Spearman* (1969) 1 Cal.App.3d 898. In *Spearman*, the defendant was convicted of petty theft with a prior. The evidence included a police officer's testimony that he was about to return the defendant to jail after telling the defendant that he (the officer) would not question the defendant because he knew the defendant would want a lawyer, when the defendant blurted out: " 'I have been trying real hard to go straight, I just

made a mistake last night.' " (*Spearman*, at p. 905.) Affirming, the appellate court found it unnecessary to determine whether the defendant had been given a complete *Miranda* warning because the statement was spontaneous and voluntary and in response to defendant being told he was going back to jail.

The defendant in *West* was convicted of second degree burglary. He had been caught in the act of burglarizing a store. After his accomplice was discovered, the defendant "was placed in a police car, and an officer heard him shout to the officer who had arrested him and asked him who was with him, 'Pool (the officer's name), I should have blown you away, when I had the chance.' " (*West*, 107 Cal.App.3d at p. 994.) The appellate court affirmed, finding no error in the trial court's finding that no *Miranda* warning was necessary because the statement was spontaneous. (*Id*. at pp. 994-995.)

Although the issue in *Spearman* and *West* was the adequacy of the *Miranda* warning, those cases are consistent with the unremarkable proposition that an arrest may be startling enough to produce a spontaneous statement. We conclude that the burglary, attempted escape and capture in this case was a series of events over a very short time period that constituted an "occurrence startling enough to produce nervous excitement" in Augustine and Sykes.

1) The statement relates to the burglary, attempted escape and capture

Undoubtedly the challenged statement relates to the circumstance of the occurrence preceding it: Augustine and Sykes are discussing the burglary, their capture, and whether there is enough evidence to charge them with burglary.

2) No time to contrive

Here, the burglary occurred sometime after 11:00 p.m., Augustine and Sykes were detained at about 11:20 p.m. and were arrested about an hour later (i.e. at about 12:20 a.m.). The recorded conversation occurred in the one hour interim between their detention and arrest. On this record, we find no abuse of discretion in the trial court's conclusion that the statements were made soon enough after the burglary, attempted escape and capture that Augustine and Sykes did not have time to contrive or misrepresent.

3. Crawford *and the right to confrontation*

The People do not dispute that the statements Sykes made to Officer Gibben were testimonial and for that reason fall under *Crawford*. The People argue defendant forfeited the issue by failing to object on Sixth Amendment grounds in the trial court. Even if not forfeited, the People argue any error was harmless under both *Watson* and *Chapman* standards.[4] We conclude the issue was not forfeited and any error was harmless.

a. The challenged evidence

Gibben testified that he is the officer identified as "O" in the transcript of the recording, introduced into evidence as People's Exhibit No. 15a. That transcript identifies the suspects as "AS" (Armonte Sykes) and "CA" (Carlos Augustine). Gibben testified that before Sykes was placed in the patrol car, Gibben had the following discussion with him about the white Nissan found on 175th Place:[5]

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[4] *People v. Watson* (1956) 46 Cal.2d 818, 836 and *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

[5] At trial, Gibben answered affirmatively when asked whether, prior to putting *Augustine* in the car with Sykes, Gibben had a discussion with *Augustine* about impounding the white Altima. But both the prosecutor and Gibben appear to have misspoke inasmuch as the transcript indicates it was

"**[Gibben]**: Quick question dude. Uh, the white car.
[Sykes]: That's not my white car.
[Gibben]: This your buddy's or what?
[Sykes]: No.
[Gibben]: Well, whose is it? Obviously, you guys came in it, we looked in it already –
[Sykes]: No. Not me.
[Gibben]: Well, so are you gonna tell me that you weren't in the white Nissan?
[Sykes]: No.
[Gibben]: Come on, man, I mean – I'm not –
[Sykes]: Yeah, I'm sure.
[Gibben]: Is it, is it your car, or your buddy's car? The thing is this – we're gonna impound it. It's obviously registered to some female. I wanna make sure it doesn't get impounded for some silliness, you know what I mean?
[Sykes]: Yeah, I didn't do nothing, so –
[Gibben]: Well I understand that, obviously you didn't do anything. But my point is, is your car is it your buddy's car –
[Sykes]: Oh no.
[Gibben]: Do you have the keys? Who has the keys?
[Sykes]: Oh no. I don't got the keys.
[Gibben]: Who has the keys?
[Sykes]: I really don't know who has the keys. To keep it real with you.
[Gibben]: Ok well, obviously you guys were in that white car. There's no doubt about that. Is that where you guys were going to? To get back in it to leave?
[Sykes]: Yes.
[Gibben]: Ok. Alright. Alright, so do-do I need to impound it? Or is there someone I can call to come get it?
[Sykes]: Well, that's . . .[sic] that's not up to me, sir.
[Gibben]: I'm sorry.
[Sykes]: That's not up to me, sir.
[Gibben]: Ok. Alright. I'm just trying to help you out."

"AS" (Armonte Sykes) not "CA" (Carlos Augustine), with whom Gibben had this discussion. Consistent with the transcript, Appellant's Opening Brief identifies *Sykes* as the speaker.

b. Governing legal principals

In *Crawford*, the United States Supreme Court held that "the admission of testimonial out-of-court statements violates a defendant's confrontation rights unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. [Citation.]" (*People v. Valadez* (2013) 220 Cal.App.4th 16, 30, citing *Crawford*.) To be considered testimonial under *Crawford*, "the out-of-court statement (1) must have been made with some degree of formality or solemnity and (2) must have a primary purpose that pertains in some fashion to a criminal prosecution." (*People v. Barba* (2013) 215 Cal.App.4th 712, 720.) " 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' [Citations.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158–1159.) Failure to object on Sixth Amendment grounds constitutes a forfeiture of the issue. (*People v. Redd* (2010) 48 Cal.4th 691, 730, citing *People v. Raley* (1992) 2 Cal.4th 870, 892 [a hearsay objection did not preserve a claim under the confrontation clause].)

c. Forfeiture

In his motion to sever his trial from that of Augustine and Sykes, defendant argued a joint trial would violate his Sixth Amendment rights. Specifically, he argued that "statements to police officers of non-testifying co-defendants are out-of-court statements which are viewed as 'testimonial'

under [*Crawford*]." The trial court denied the motion to sever. This was sufficient to preserve the *Crawford* issue for appeal.

d. Harmless error

The only statement in Sykes's conversation with Gibben that inculpates defendant is Sykes's affirmative response to Gibben's question "Is that where you guys were going to? To get back in it to leave?" "It" being the Nissan in which defendant's identification was found. The argument goes like this: Augustine and Sykes were inculpated in the burglary by the recorded statements they made to one another; the statement Sykes made to Gibben connected Augustine and Sykes to the Nissan, from which it could be inferred that the Nissan was the intended getaway car; defendant was connected to the burglary through the discovery of his identification in the getaway car; from the evidence connecting defendant to the getaway car, it could reasonably be inferred that defendant was the person Augustine and Sykes refer to as "cuz" and "he" in their recorded conversation.[6]

While Sykes's statement to Gibben was circumstantial evidence from which it could be inferred that the Nissan was the intended getaway vehicle, any error in its admission was harmless beyond a reasonable doubt because the other evidence of defendant's guilt was overwhelming. (*Chapman, supra*, 386 U.S. at p. 24.) From their recorded conversation, it is abundantly clear that Sykes, Augustine and a third man were involved in the burglary. That defendant was this third man is demonstrated by the evidence that he was found hiding in a trash can and a screwdriver was found nearby. That the Nissan was their intended getaway car includes evidence of the location

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[6] For example: "Did they get *cuz*?" "The screen, that ain't shit. *He* put that right back on there, you feel me?" "Yeah, 'cause all *he* did was pull the screen off." "And soon as *he* get the screen off, *he* try to open the window."

where it was found (one block south of the Castro's residence where the burglary occurred); the awkward manner in which it was parked suggesting it had been parked in a hurry; the warm engine suggesting it had been parked recently; the unlocked doors suggesting a desire for quick reentry; and the location where Sykes and Augustine were stopped – along a route from the location of the burglary to the car.

B. Defendant was not denied right to represent himself

Defendant contends he was denied his constitutional right to represent himself. He argues that he unequivocally stated his desire to represent himself and the fact that he did not complete the *Farretta* form given to him by the trial court is immaterial.[7] We find no error.

Criminal defendants have a Sixth Amendment right to represent themselves. (*People v. Becerra* (2016) 63 Cal.4th 511, 517, citing *Farretta, supra*, 422 U.S. at pp. 807, 819.) "*Faretta* motions must be both timely and unequivocal . . . . [Citations.] Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration. [Citation.] Of course, a defendant may withdraw his *Faretta* motion before a ruling is made. [Citation.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1002.)

At a pretrial hearing on June 16, 2015, three months before the evidentiary portion of the trial began, defense counsel informed the trial court that defendant had indicated a desire to represent himself. Defendant answered affirmatively when the trial court asked if defendant thought he could do a better job than his appointed counsel. Defendant once again answered affirmatively when, after describing the pitfalls of self-

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[7] *Farretta v. California* (1975) 422 U.S. 806.

representation, the trial court asked whether defendant still wanted to represent himself knowing the dangers. After informing defendant that his maximum sentence exposure was 22 years, the trial court stated:

> "So [defendant], if you still think it's a good idea for you to represent yourself and you want to give up the right to have this experienced attorney represent you, I need you to fill out a form to make sure that you do in fact understand all the dangers of self-representation. And if you fill that out, then I'll read it and decide as to whether I'm going to grant you pro per status. [¶] So if that's what you wish to do, we'll pass the matter. We'll have you go back in the lockup and send the paperwork back with you, and we will see you in about a half hour. Okay?"

When proceedings resumed later that day, the trial court made the following statement:

> ". . . [Defendant] was in lockup. He was given the standard *Farreta* waiver. He was given it by the deputy. Approximately 20 or 30 minutes later, [the deputy] went back into the holding cell and asked [defendant] for the paperwork, as to whether he had completed it. [Defendant] was unresponsive. He would not return the paperwork. And as to what he told the deputy as to where the paperwork was, he has been uncooperative. The court is not going to grant pro per status to [defendant]."

Neither defense counsel nor defendant objected.

Based on this record, we find the trial court could reasonably conclude that defendant's refusal to return the *Faretta* paperwork – to even tell the deputy where it was – rendered his *Faretta* motion equivocal at the least, and perhaps even constituted a tacit withdrawal of the motion. Accordingly, we find no error.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.