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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ARTIS BELL, Defendant and Appellant.	C045135 (Super. Ct. No. 00F04818)

This appeal is a culmination of defendant Michael Artis Bell's practice of abusing and manipulating the law enforcement and judicial systems and the people who serve them.

Defendant is in prison for second degree murder. Since his arrival there in 1996, he has been a constant irritant, disrupting all those near him. He has received six write-ups for batteries on peace officers; five write-ups for resisting staff by force; seven write-ups for batteries on inmates; two

write-ups for inciting other inmates; and 27 write-ups for refusing to comply with orders.

The current case was born of two of his more serious disruptions. Once charged with the criminal offenses at issue here, defendant has done everything he could to disrupt local prison, custodial, and court officials, including the judges before whom he has appeared. He was represented by four different attorneys, and filed five different motions to replace them. He was granted pro per status twice, but also made multiple requests for appointment of counsel or for continuances of trial.

He showed grave disrespect for the court. During one court proceeding, upon being removed for disruptive behavior, defendant blurted out, “Fuck this courtroom,” and spit at the judge. On the third day of trial, following a 30-day continuance granted for defendant, he moved to disqualify the judge.

Ultimately, trial proceeded despite his efforts to delay. Having attempted to create reversible error at the trial court, defendant now comes before this court, arguing he should benefit from the confusion he created. The shenanigans stop with this decision. We affirm.

PROCEDURAL HISTORY

Defendant is serving a prison term of 15 years to life for committing second degree murder in 1994. An information filed in 2000 charged defendant with three counts of battery by an inmate (counts one, two and four; Pen. Code, § 4501.5), and one

count of interference with an executive officer (count three, Pen. Code, § 69).[1] The information alleged similar counts against a codefendant, Myron Payne, and alleged for purposes of the "Three Strikes" law defendant had previously been convicted of murder. (§ 187.)

In 2001, a jury acquitted defendant on count two and was unable to reach a verdict on the remaining counts. The jury acquitted codefendant on all counts.

In 2003, defendant was retried on the two remaining battery charges (count one, occurring on June 9, 1999; and count four, now designated as count two, occurring on April 19, 2000). A jury convicted defendant on both counts. It also found true the prior murder conviction allegation.

The trial court sentenced defendant to a total prison term of 10 years: the upper term of four years on count one, doubled under the Three Strikes law, and one-third the midterm, one year, on count two, also doubled under the Three Strikes law, both terms to be served consecutively.

On appeal, defendant asserts: (1) he was improperly tried in absentia and without counsel; (2) his identity as the assailant was not established by sufficient evidence; (3) the trial court failed to instruct sua sponte on self-defense for count two; (4) the trial court failed to give a unanimity instruction on count two; (5) prosecutorial misconduct; and

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[1] All undesignated references to sections are to the Penal Code.

(6) constitutional error in sentencing defendant to the upper term on count one.

FACTS

On June 9, 1999, Dale Apodaca was working as a correctional officer at California State Prison, Sacramento. Another officer, Alex Andrews, informed Apodaca that defendant, an inmate, had left a building and gone into the yard in violation of Andrew's direct order not to do so. Andrews asked Apodaca to assist him in approaching defendant.

Andrews told defendant he was going to handcuff him for disobeying the order. Defendant refused, yelling, "I'm not going to fucking cuff up and turn around." Attempting to diffuse the situation, Apodaca told defendant to calm down, assuring him he could see the sergeant if he allowed Andrews to handcuff him and take him to a holding cell. Defendant continued to refuse and continued to yell and curse.

Apodaca reached out with his right arm to have defendant turn around. As Apodaca did this, defendant hit Apodoca in the forehead with his closed fist. Apodaca lost his balance for a moment, staggering back three or four feet. Then he charged defendant and bear-hugged him in the chest to gain control of him. Andrews joined in the fray, and Apodaca fell on top of defendant. Defendant kept hitting Apodaca in the head and chest until other officers arrived and contained him.

As Apodaca got up off of defendant, defendant kicked him. Apodaca suffered permanent injuries to his leg, and as a result, was no longer able to work as a correctional officer.

On April 19, 2000, Correctional Officer Richard Mendoza was supervising the gymnasium at California State Prison, Sacramento. Defendant was one of about 15 inmates inside the gymnasium. At about noon, a melee broke out in the yard. Mendoza heard the officer in the central tower order all inmates in the yard to get down. He also heard shots of tear gas fired into the yard.

Mendoza immediately ordered the inmates in the gymnasium to get down. The inmates complied. Mendoza next opened the gymnasium door and stepped just outside the door's threshold. He did this to see if the staff in the yard needed additional help, and also to provide himself an avenue of escape in case the incident spread to the gymnasium.

After taking a quick look at the yard, Mendoza stepped back into the gymnasium. The microphone to his radio fell off his utility belt. As he reached down to grab the microphone, defendant "blindsided" him and hit him on the left side of his face. The blow pushed Mendoza into a locker and spun him around to face defendant. Mendoza grabbed defendant and began struggling and fighting with him. Defendant continued punching Mendoza in the head and face. Other officers arrived and subdued defendant. No other inmates were involved.

Defendant, representing himself, did not appear at trial.

DISCUSSION

I

Trial of Defendant in Absentia and Without Counsel

Defendant asserts he suffered reversible error when the trial court refused to allow him to withdraw his request to represent himself, refused to appoint counsel, refused to grant him continuances to facilitate trial preparation, and wrongfully ordered him shackled. Defendant waived his right to be present at any stage of trial. Under these circumstances, he argues the waiver was not truly voluntary and the judgment is reversible per se. We disagree.

We provide a detailed review of defendant's participation in this case, stopping along the way to address his individual arguments.

A. *Requests for appointment before Judge Tochterman*

1. *Background information*

At the 2001 trial, attorney David Muller represented defendant. The court declared a mistrial on June 6 and reset the matter to June 22. On June 22, 2001, defendant refused to appear, but the court acknowledged attorney Ronald Castro now represented him.

In November 2001, Castro asked to be relieved as counsel in part because he was leaving the country for a long period of time and defendant did not want to wait for his return before proceeding to trial. The court appointed attorney Frances Huey.

The case was set for trial on April 22, 2002, but Huey was ill, so the court vacated the trial date. Trial was rescheduled

for July 9, but at Huey's request, the court put trial over to accommodate a motion by defendant to set aside the information under section 995. Defendant claimed the court had erred by allowing him to remove himself from his preliminary hearing. On September 13, 2002, the court denied the motion. The court set the matter for further proceedings on September 24.

On September 24, Huey was in trial on another matter and could not appear. Defendant orally made a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118), which the court set for October 15. At that hearing, defendant was represented by an unidentified public defender who informed the court attorney Castro was again inheriting the case from attorney Huey. On November 29, the court set trial for April 16, 2003.

On April 16, the prosecutor and attorney Castro announced they were ready to proceed, but no courtrooms were available. The prosecutor announced he would not be available again until the end of May. The court set trial for May 21.

At this point, defendant addressed the court. He stated the delays in getting this case to trial were holding up a transfer for him from an administrative segregation unit to another facility. If trial could not start that day, he offered to change his plea to no contest to both charges and be sentenced at that time.

The prosecutor asked the court not to agree to defendant's request. He had already offered defendant the low term on one count as a plea bargain, and believed it would not be fair to "up the ante" just because defendant wanted to plead.

The trial court noted defendant's objection, but set trial for May 21. It also scheduled a hearing for the next day, April 17, where defendant could announce whether he wanted to change his plea.

At the April 17 hearing, defendant repeated his request to plead guilty to both counts if he could not get a trial so he could be transferred out of administrative segregation. The court confirmed the offer made by the prosecution (low term on one count, doubled) was still available. Defendant, however, did not want a plea bargain. He wanted a trial.

The court gave defendant a choice. He could change his plea, or wait for trial on May 21. In response, defendant orally filed a *Marsden* motion. The court explained granting that motion would extend the trial until a new attorney could assume the case and become prepared. Defendant proceeded with his motion. The court convened an in camera hearing, denied the *Marsden* motion, and ordered the transcript of the hearing sealed.

Back in open court, defendant next asserted his right to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) [45 L.Ed.2d 562]. The court urged defendant not to represent himself, explaining the numerous and difficult problems he would encounter preparing a case while in administrative segregation. The court explained it could not assist defendant if the prison put restrictions on his library privileges. The court also explained it would not delay the case if he later decided to hire an attorney.

Defendant, however, was adamant. The court in writing informed defendant he was entitled to be represented by counsel at any stage of the case but the court would not delay the case after he waived his right to counsel to allow an attorney to prepare to represent him. After giving oral and written warnings, the court reluctantly relieved attorney Castro as defendant's attorney of record. Trial remained set for May 21. Castro agreed to copy his files and have them delivered to defendant.

On May 13, eight days before trial, defendant filed motions for an order unsealing the April 17 *Marsden* hearing transcript, and for an order to compel the Department of Corrections to allow him pro per privileges for preparing his case. He claimed he had been denied the use of prison procedures afforded to pro per prisoners.

On May 16, Judge Ronald Tochterman denied defendant's motions for lack of good cause. Regarding the pro per privileges, the court directed defendant to file a petition for an order to show cause to hold the Department of Corrections in contempt.

After the court confirmed the trial date of May 21, defendant moved to continue the trial date because he had not yet received the case records from Castro. The court denied the motion for lack of good cause and failing to comply with the procedural requirements for seeking continuances, as set forth at section 1050. Defendant complained he could not comply with the statute because he had no access to the law library. The

court again directed defendant to file a petition for an order to show cause with respect to contempt.

In response, defendant asked to withdraw his *Faretta* waiver, claiming he was not being allowed an adequate opportunity to defend himself. The court continued the matter to May 19 to learn if attorney Castro would be willing and ready to proceed to trial on May 21.

At the May 19 hearing before Judge Tochterman, attorney Castro refused to be appointed as defense counsel due to his past relationship with defendant. Castro complained defendant manipulated him and was untruthful. Fern Laetham, executive director of Sacramento County Conflict Criminal Defenders, stated a new appointment would be defendant's fifth. It would take two or three months before a new attorney could be ready to try the case. She offered to find a new attorney and have new counsel set a trial date in a week. The prosecutor did not oppose continuing the case to allow for new counsel.

When the court asked defendant if he agreed to that proposal, he stated he wanted to continue representing himself, and he filed a written motion for a 90-day continuance to allow him to prepare a defense. Defendant claimed good cause existed because he had not yet received the case files from his prior attorney. The court asked whether defendant was now withdrawing his request for an attorney, and defendant confirmed he was doing so.

The court denied the motion for continuance: "I'm not going to grant an evidentiary hearing unless you file a

declaration under penalty of perjury satisfying me that there may be some basis for what you are talking about. You have to set forth in detail what requests you have made, when you have made them, to whom you have made them and what responses have been made. So far I haven't seen anything like that."

The court confirmed the trial date, at which point the following occurred:

"THE DEFENDANT: "I withdraw my right. I see that you guys are not going to fairly let me represent myself; that I don't get the same privileges as an attorney did when you --

THE COURT: [Defendant], you don't get to make a speech. First you make a motion and then maybe --

THE DEFENDANT: I made the motion. What I am saying --

THE COURT: I don't know what the motion -- wait a moment.

He is interrupting me. [Defendant] is interrupting me. I order that he be removed from the courtroom.

THE DEFENDANT: Fuck this courtroom."

As defendant was removed from the courtroom he spat at the judge. The court stated: "For the record, [defendant] actually spit in the direction of the bench. I don't know if he hit anybody, and he said what he said. [¶] I'm satisfied that his most recent motion was made in bad faith and was an effort to manipulate the Court given the history of that, have been now informed about."

2. *Analysis*

Defendant claims Judge Tochterman had no discretion to deny his requests for appointment of counsel on May 16 and May 19,

and, even if the court had discretion, it abused it. The argument fails because defendant withdrew his May 16 request for appointment before Judge Tochterman ruled on it, and defendant ineffectively attempted to raise the request again before he was removed from the courtroom.

After defendant made his request for counsel on May 16, the court continued the matter until May 19. At that hearing, the court was ready to grant defendant's request and vacate the trial date until new counsel was appointed and agreed to a date. Upon learning the court's intention, however, defendant withdrew his request and stated he would continue representing himself. The court verified through inquiries of defendant that he did in fact choose to withdraw his request, and defendant confirmed that was his intent. This occurred before the court ruled on his request for counsel.

After the court denied defendant's motion for a continuance, defendant attempted to request appointment of counsel again. The court tried to inform him his request had to take the form of a motion but defendant continued interrupting the court, and he was ordered out of the courtroom. Thus, no request for counsel was made before Judge Tochterman.

B. *Request for appointment before Judge Gilliard*

1. *Background information*

The case came on for trial on May 21 before Judge Maryanne Gilliard. When the court asked defendant if he was ready to proceed, he replied, "No." He explained he had not received any files from his previous attorney and had not been able to

interview witnesses. Because his request for a 90-day continuance had been denied, he requested appointment of counsel.

Defendant's investigator explained she had received the files and mailed them to the prison, but they apparently had not been delivered to defendant. Defendant renewed his motion for a 90-day continuance. The court denied both requests for counsel and a continuance.

Defendant then waived his right to appear at trial. The court directed the prosecutor to do whatever he could to facilitate delivery of the case files to defendant that day.

The following day, May 22, defendant indicated he received a box of materials the prior evening. The court indicated it was reconsidering defendant's request for a continuance. It made the following findings: "That [defendant] has made repeated and multiple requests for appointment of counsel; that [defendant] has previously been represented by at least four different attorneys throughout the course of this case; that there have been at least five *Marsden* motions made with respect to the number of attorneys that have been representing [defendant], that [defendant] has been granted pro per status at least twice, the most recent being on April 17th of this year; that even on April 17th of this year after a *Marsden* motion was denied and [defendant] was granted his [*Faretta*] rights and warned accordingly that subsequent to that granting of pro per status [defendant] again renewed his request for an attorney. Said request being denied.

"And then there have been multiple requests between April 17th and today's date for either appointment of counsel, motions to continue the trial date, as well as requests made on the same date for either appointment of counsel [or] the ability to proceed pro per and for motions to continue the trial.

"I do find that this is an attempt to delay trial in this matter. That these motions are not made in good faith. That [defendant] was appropriately given his [*Faretta*] warnings and is going to proceed in this case pro per."

Nonetheless, the court believed defendant was unable to prepare for trial adequately due to the "bureaucracy inherent in the running of a prison." The court granted defendant a 30-day continuance, the amount of time it believed defendant would have possessed the case files to prepare for trial had not the bureaucracy failed to deliver them timely. The court set trial for June 23, 2003, and instructed defendant to be prepared by that day.

2. *Analysis*

Defendant argues the court arbitrarily denied his request for counsel. He claims the court had no reason to deny the request since the court was willing to grant him a 30-day extension in order to prepare for trial. He also asserts the court could not reasonably conclude his prior request for a continuance was in bad faith when it granted him a continuance on this occasion.

Once a defendant proceeds to trial in pro per, it is within the discretion of the court to determine whether the defendant

may withdraw the waiver of counsel and have counsel appointed. (*People v. Elliott* (1977) 70 Cal.App.3d 984, 993.) In exercising its discretion, the court looks at such factors as defendant's prior history in substituting himself for counsel and seeking representation, the reasons for the request, the stage of the trial proceedings, the disruption granting the request will cause, and the likelihood of defendant's effectiveness as his own attorney. (*People v. Smith* (1980) 109 Cal.App.3d 476, 484.) However, "in the final analysis it is the totality of the facts and circumstances which the trial court must consider in exercising its discretion as to whether or not to permit a defendant to again change his mind regarding representation in midtrial." (*Ibid*.; *People v. Gallego* (1990) 52 Cal.3d 115, 164-165.)

Of importance here, the request is properly denied where the court determines it is part of a defendant's deliberate attempt to manipulate the court system. (*People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1087.)

Here, the court did not abuse its discretion by determining defendant's request was part of a continuing attempt to delay his trial and was made in bad faith. Having reviewed the files, the court understood defendant had originally sought to change his plea to guilty because he could not have a speedy trial. But when given the chance, he instead opted to file a *Marsden* motion, knowing it would delay trial further if it was granted. When it was denied, he waived his right to counsel, with the

understanding the court may not grant a continuance if he chose to be represented again.

Nonetheless, eight days before trial, he sought reappointment of counsel, and the court appeared ready to grant his request. Seeing that, defendant withdrew the request and submitted a written motion for a 90-day continuance. When the court denied the continuance, he swore and spit at the court.

On the day of trial, he sought both reappointment of counsel and a 90-day continuance. It appeared to the court defendant was doing anything he could to prevent trial from proceeding. Considering this behavior, along with defendant's five prior *Marsden* motions and two *Faretta* waivers, the court was well within its discretion to deny defendant's request for appointment of counsel on the day of trial.

Defendant argues the court's subsequent grant of a 30-day continuance eliminated any basis for denying his request for appointed counsel. This is incorrect. Granting the continuance did not indicate the court had changed its mind and now believed the request for counsel was not made in bad faith.

C. *Shackling*

1. *Background information*

During the 30-day continuance period, defendant filed a petition for writ of mandate with this court, which was denied.

He also filed a *Pitchess*[2] motion for discovery in a different department to be heard on July 1.

At trial on June 23, defendant's first order of business was to request a continuance until after his *Pitchess* motion was heard. The court denied his request. Defendant next moved to disqualify Judge Gilliard. The court denied that motion as untimely. Defendant then asked to waive his right to be present at trial.

The court agreed to accept the waiver, but, relying on *People v. Gutierrez* (2003) 29 Cal.4th 1196, it required defendant to be present at least until a jury was called, unless he wanted to waive his right to a jury. Defendant stated he did not want to waive his right to a jury, but he did not want to be in the courtroom if he could not have an attorney. The court stated he would have to be in the courtroom until the panel came in and the court made its introductory remarks.

At this point, defendant apparently attempted to get up from his chair and roll the chair down the aisle. As officers restrained him, defendant said, "I change my mind already."

At some earlier point, defendant had requested not to be restrained in front of prospective jurors, and he had asked to be dressed out. After defendant was restrained, the court asked an officer from the Department of Corrections whether, in light of defendant's attempt to get up from his chair, it was prepared

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

to allow defendant not to be handcuffed during jury selection. The officer recommended defendant stay in restraints for public safety. Without ruling on the point, the court took a small recess and directed the officers to dress defendant out.

After the recess, however, defendant refused to leave his holding cell and return to the courtroom. He told the officer and his investigator he would not enter the courtroom without an attorney and he would be disruptive if he did return without an attorney.

The court reconvened the proceedings at the holding tank. The court confirmed defendant had signed a section 977, subdivision (b) waiver of his right to be present during all portions of the trial. As the court attempted to ascertain his understanding of the rights he was waiving, defendant either did not respond or said, "I plead the Fifth." At one point, he said he wanted an attorney to represent him. The court acknowledged his request, but stated that motion had been previously denied.

The court found defendant voluntarily and knowingly waived his right to be present at trial. It ordered defendant's investigator to determine defendant's status each day during trial. The court also announced it would not order officers to perform any kind of cell extraction against defendant so as to protect the officers from risk of injury.

Defendant asked for permission to have his investigator take a photograph of him to be presented to the jury. The court allowed that request. The court then reconvened in the courtroom and empanelled the jury.

The next day, June 24, the court commenced proceedings by inquiring of defendant's status. His investigator informed the court defendant would participate only with an attorney. At that point, defendant entered the courtroom and requested an in camera hearing to explain the situation and express himself about it. The court refused, saying it could not participate in ex parte communications with a party. Defendant asked if the prosecutor could join them. The court again refused and asked defendant to express himself in open court. He refused.

Defendant stated he intended to present a defense, call witnesses, and be present in court to do that. Defendant gave the court an offer of proof of the facts to which four witnesses would testify. He stated his investigator had been unable to interview two of the witnesses because they were in a lockdown when the investigator went to the prison to meet with them. Defendant asked to have the prisoners brought to court so the investigator could interview them. The court agreed to sign the orders to produce, expressing confidence the Department of Corrections would make all necessary efforts to secure the witnesses' timely appearances.

With defendant still present, the court conducted a security hearing. A deputy sheriff testified defendant posed a serious threat to public safety if security measures were not taken at trial. He asked for defendant to be secured to the court chair with only his writing hand free of restraints.

The deputy testified defendant's disruptive behavior had escalated since being incarcerated in 1996. Defendant had

received six write-ups for batteries on peace officers; five write-ups for resisting staff by force; seven write-ups for batteries on inmates; two write-ups for inciting other inmates; and 27 write-ups for refusing to comply with orders.

Before one court proceeding in this case, defendant refused to leave the van and had to be removed physically. In another, defendant had to be physically extracted. In the hearing before Judge Tochterman, defendant spat on the floor after the court ruled against him. And on the preceding day, defendant attempted to leave the courtroom and had to be physically restrained.

Defendant argued one of the incidents was fabricated, and the others related to proceedings before other judges. The court found manifest necessity for restraints, and granted the sheriff department's request. However, the court required defendant's writing hand to remain free so he could take notes during the trial. After ruling, the court asked defendant if he wanted to be present for the prosecution's case. Defendant said he did not. He returned to the holding tank, and the prosecution proceeded with its case. After Officers Mendoza and Apodaca testified, the prosecution rested, and the court recessed for lunch.

2. *Analysis*

Defendant claims his decision to absent himself from court resulted from invalid orders to keep him restrained, and thus his absence was not truly voluntary. We disagree. Defendant's original decision on June 23 to waive his right to appear was

not based on a shackling order. The court did not make a shackling order that day. On June 23, defendant first raised the motion to absent himself and later refused to return to the courtroom because he was pro per and not represented by counsel: "I'm not going to be in this court while you guys railroad me. I have a right to an attorney." Defendant told the officer summoned to retrieve him from the holding cell, "I don't want the jury to know that I am pro per." He said nothing about a shackling order.

Defendant claims the trial court erroneously ordered him restrained on June 23. The record discloses the trial court made no such order that day. After defendant was restrained for attempting to get up from his chair, the court asked a custody officer the Department of Correction's position on restraining defendant. After the officer responded, however, the court made no shackling order. It simply ordered the officers to dress defendant out. Defendant then refused to return to the courtroom. The court issued no shackling order that day that could have affected his decision not to appear.

The following day, June 24, the court convened a security hearing at which time it took sworn testimony concerning defendant's history of violence and disrupting the court. It also heard argument from defendant. It then issued a shackling order. Defendant argues the order was erroneous and he absented himself due to judicial error. If it was correct, he argues the proper remedy was to revoke his *Faretta* rights and appoint

counsel, not require him to continue representing himself while shackled.

"[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints. [Citations.] . . . [I]n any case where physical restraints are used those restraints should be as unobtrusive as possible, although as effective as necessary under the circumstances. [¶] In the interest of minimizing the likelihood of courtroom violence or other disruption the trial court is vested, upon a proper showing, with discretion to order the physical restraint most suitable for a particular defendant in view of the attendant circumstances. The showing of nonconforming behavior in support of the court's determination to impose physical restraints must appear as a matter of record and, except where the defendant engages in threatening or violent conduct in the presence of the jurors, must otherwise be made out of the jury's presence. The imposition of physical restraints in the absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion." (*People v. Duran* (1976) 16 Cal.3d 282, 290-291, fns. omitted.)

"We are not unmindful of the dangers posed by unruly defendants or by those who have expressed an intention to escape. The rule expressed herein should not afford such defendants any solace, as their words or actions are likely to justify restraints." (*People v. Duran, supra,* 16 Cal.3d at pp.

292-293, fns. omitted.) "We do not mean to imply that restraints are justified only on a record showing that the accused is a violent person. An accused may be restrained, for instance, on a showing that he plans an escape from the courtroom or that he plans to disrupt proceedings by nonviolent means. Evidence of any nonconforming conduct or planned nonconforming conduct which disrupts or would disrupt the judicial process if unrestrained may warrant the imposition of reasonable restraints if, in the sound discretion of the court, such restraints are necessary." (*Id*. at p. 292, fn. 11.) The court's determination cannot be challenged on review except on a showing of a manifest abuse of discretion. (*Id*. at p. 293, fn. 12.)

The trial court here did not abuse its discretion in ordering restraints. The court received sworn testimony regarding defendant's violent and disruptive tendencies. Defendant had a long history of violence, threats of violence, and other nonconforming conduct that would certainly disrupt the court proceedings. The court had already witnessed one grossly insulting courtroom tirade by defendant.

Defendant claims even if the court did not abuse its discretion in ordering restraints, the court erred in not revoking his *Faretta* rights due to his disruptive behavior. Certainly the court had discretion to revoke those rights if defendant engaged in "serious and obstructionist misconduct." (*Faretta, supra,* 422 U.S. at p. 834, fn. 46.) However, the court could have reasonably believed the restraints would

prevent defendant from disrupting the proceedings while he presented his defense, as he stated was his intent. The court did not abuse its discretion in allowing defendant to proceed with his case while restrained.

D. *Denial of recess to interview witnesses*

1. *Background information*

At the commencement of the afternoon session, defendant appeared in court outside the jury's presence. He was under the impression when his witnesses arrived, he and his investigator could interview them briefly before putting them on the stand. The court understood defendant's position and that two of his witnesses had arrived, but stated it would permit him only to put them on the stand. Defendant had already provided an offer of proof of what he expected their testimony to be. The court would not grant him more time and delay the jury any further.

Defendant replied: "Well, I won't do what I can then. I will not do it like that being that I'll be setting myself up if I do it like that. I don't know exactly to what they going to say. I just have a general idea. And I don't want to bring them up, and it will be more damaging than good. So under those circumstances I can't proceed with it."

The court asked defendant if he wanted to see the prosecution's exhibits before they were moved into evidence. Defendant refused. The court encouraged defendant to look at them, but he refused to do so unless counsel represented him. He also again waived his right to be present for further proceedings.

The court accepted that waiver, but indicated for the record defendant had consistently engaged in a pattern of manipulation, delay, and attempts to thwart the trial from going forward. It noted the positive efforts made by the Department of Corrections in response to defendant's late requests for witnesses that morning. The Department had secured the physical presence of two witnesses from California State Prison, Sacramento, and had arranged for two other witnesses from Pelican Bay and Corcoran State Prisons to testify by means of closed circuit television. The court concluded defendant's requests for delaying the afternoon session were untimely and made for the purpose of further thwarting the system of justice. The court was not going to take any more time from the jurors' busy schedules and the trial to accommodate an investigation that should have been conducted months before.

The court again asked defendant if he wanted to participate in a defense or go back to the holding cell. Defendant asked his investigator to explain the steps she took to obtain and interview the witnesses, and then he would "peace out and let you guys finish the trial."

The investigator stated she wrote a letter asking for permission to visit the potential witnesses in prison. Two of the proposed witnesses responded in writing agreeing to her visit. The next time the investigator was able to visit the prison, the prison was in a lock down and she was not allowed to have a confidential visit with the witnesses. She was unable to visit with the witnesses before trial.

Upon again requesting an attorney, and again being denied one, defendant left the courtroom and went back to the holding tank. The jury deliberated that afternoon, convicted defendant on both counts, and found true the prior conviction allegation.

2. *Analysis*

Defendant claims the court's denial of his request to interview the witnesses was an abuse of discretion in violation of due process. We disagree. Defendant began representing himself in this matter on April 17, 2003, one day after his attorney had announced he was ready for trial and nearly 10 weeks before trial actually occurred. The court went to great lengths to discourage defendant from representing himself, cataloging the many issues that could arise, including subpoena problems, access to a law library, and investigation problems. It also informed defendant he would be expected to know and conform to the rules of the Evidence Code.

Defendant had nearly 10 weeks to subpoena witnesses. He did not have his prior attorney's files and records for much of that time, but it appears defendant knew his witnesses personally. He could have contacted them through the mail or begun subpoenaing them sooner, but he did not.

He did not request subpoenas until what turned out to be the last day of trial. However, he already knew in general to what the witnesses would testify, and he earlier gave an offer of proof to the court for each witness. Under these circumstances, we cannot say the trial court abused its

discretion in refusing defendant's request for a recess to interview his witnesses.

E. *Adequacy of* Faretta *warning*

Defendant complains his *Faretta* warning was inadequate because the court did not inform him his election to represent himself could be treated as irrevocable, nor did it inform him he would be forced to represent himself while shackled if the court deemed him disruptive.

"The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1225.) "As long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928-929.)

The court's warning to defendant satisfied this test. It advised defendant of the dangers of representing himself, including the particular complexities he would face in this case in his position as a prisoner. It required defendant to conform to all applicable laws. Defendant understood these dangers. Indeed, he admitted to representing himself unsuccessfully in another court proceeding.

The court is not required to warn a defendant exercising his *Faretta* rights that he may change his mind and, if he does, the court may well refuse his request. Nor is the court

required to inform him as a part of a *Faretta* warning that if he misbehaves he may be shackled. As discussed above, an order to shackle is based on many factors beyond those considered in the *Faretta* context.

Defendant was warned if he was disruptive he would be removed from the courtroom and counsel would be appointed. Defendant asserts a person receiving this warning would not realize he could be forced to defend himself while shackled or while absent from the courtroom, but would instead expect the court to appoint counsel. An attorney, however, would know otherwise. Once trial has started, the decision to remove a defendant, shackle a defendant, or appoint counsel for a defendant representing himself is left to the sound discretion of the court upon the proper evidentiary showing. Defendant's failure to understand this is simply a risk he took by representing himself. The court is not required in a *Faretta* warning to inform defendant of every possible risk and pitfall he might incur by engaging in repetitive disruptive behavior.

All of the above discussion demonstrates defendant voluntarily and knowingly chose to exercise his *Faretta* right to represent himself. When he sought continuances and subsequent representation, the trial court acted within its discretion in determining he was making the requests in bad faith and denying those requests. The shackling order was based on sufficient facts and did not coerce defendant to absent himself from trial.

"[I]t is well settled that a defendant for an offense not punishable by death is entitled to absent himself from the

proceedings. [Citations.] Further, it is settled that the right of a defendant to represent himself includes the right to decline to conduct any defense whatsoever. 'The choice of self-representation preserves for the defendant the option of conducting his defense by nonparticipation. [Citation.] A competent defendant has a right to choose "simply not to oppose the prosecution's case." [Citation.] . . . There is no question but that a defendant's right to effective counsel is violated if his attorney fails to attend the proceedings. Where a defendant has chosen to represent himself, however, he is entitled to conduct that defense in any manner he wishes short of disrupting the proceedings, and thus is free to absent himself physically from trial. If, as here, that choice was voluntary, it will be respected. It follows that a defendant who has exercised his right of self-representation by absenting himself from the proceedings, may not later claim error resulting from that exercise." (*People v. Parento* (1991) 235 Cal.App.3d 1378, 1381-1382.)

II

Sufficiency of Evidence Establishing Defendant's Identity

Defendant argues the prosecution failed to introduce sufficient evidence to establish him as the assailant described in both offenses at trial. We disagree.

A. *Background information*

Outside the presence of the jury, defendant stated he did not want to be present for the prosecution's case. However, he did intend to be in the courtroom to present a defense.

During the prosecution's case, Officers Apodaca and Mendoza were each shown a photograph and asked if they recognized the person depicted in the photograph. Both witnesses stated the person was "Inmate Bell." Then they proceeded to describe what Inmate Bell did to them. The photograph, identified in the clerk's transcript as exhibit 8, a "photo of Michael Bell," bears the label "M Bell K-10775 10/16/2001."

As described above, after the prosecution completed its case and the court denied defendant time to interview his witnesses, defendant informed the court he no longer intended to present a defense. Thus, at no time did defendant appear before the jury.

The court asked defendant if he wanted to see the exhibits the prosecution would move into evidence. Defendant declined the offer. The court again suggested showing him the exhibits to see if he had any objections to them. Defendant refused to view them. The photograph of "M Bell" was included in the exhibits, and it was admitted into evidence.

B. *Analysis*

Defendant argues insufficient evidence supports his identification as the perpetrator of the crimes. Because he absented himself from trial, he was never identified before the jury as the perpetrator. Although the officers testified they were attacked by "Inmate Bell" and identified the photograph as depicting "Inmate Bell," defendant claims the prosecution never established "Inmate Bell" in the photograph was in fact the

defendant. We conclude substantial evidence established defendant's identity as the perpetrator.

"'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier [of fact] could reasonably deduce from the evidence."' [Citation.]" (*People v. Staten* (2000) 24 Cal.4th 434, 460.)

"Ordinarily a criminal defendant can be *required* to be present in the courtroom for the purpose of identification. (Pen. Code, § 1043 ['nothing herein shall limit the right of the court to order the defendant to be personally present at the trial for purposes of identification unless counsel stipulate to the issue of identity']; *People* v. *Breckenridge* (1975) 52 Cal.App.3d 913, 936.)

"Where, as here, the defendant absents himself and cannot be found, his conduct requires that other means of identification be used. A single person photographic showup is not inherently unfair. (*People* v. *Floyd* (1970) 1 Cal.3d 694, 714.) Showing the witnesses a single photo of the defendant is no more *impermissibly* suggestive than an in-court identification with the defendant personally sitting at the defense counsel table in the courtroom. (See *People* v. *Breckenridge, supra*, 52 Cal.App.3d at p. 935; *People* v. *Green* (1979) 95 Cal.App.3d 991, 1003.)" (*People v. Yonko* (1987) 196 Cal.App.3d 1005, 1008, italics in original.)

The trier of fact could reasonably deduce that the photograph of Inmate Bell submitted into evidence was the same defendant Bell being tried in this case. Otherwise, we would be forced to determine the prosecution committed a fraud on the court, a fraud the trial court would have easily detected due to its familiarity with defendant. Nothing in the record indicates that to have been so.

Defendant has little standing to fault the identification procedure used. After he refused to leave the holding tank to appear in court for jury selection, and the court ordered officers not to extract him to protect their own safety, the prosecution was left with no option but to show a photograph of defendant to the witnesses and jury. "Here, as noted, the assertedly unreliable photographic identification procedure was necessitated by defendant's own disruptive conduct. Under these circumstances, we find no undue unfairness in that procedure." (*People v. Medina* (1995) 11 Cal.4th 694, 753.)

We also note the number on "M Bell's" photograph, K-10775, is the inmate number assigned to defendant by the Department of Corrections. The jury correctly identified defendant as the "Inmate Bell" who committed the batteries against Officers Apodaca and Mendoza.

III

Self-defense Instruction on Count Two

Defendant asserts there was substantial evidence supporting a theory of self-defense and, consequently, the court should

have instructed the jury sua sponte on an inmate's right of self-defense against a correctional officer. We disagree.

A trial court has a duty to instruct on affirmative defenses sua sponte when "'"it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citations.]" (*People v. Maury* (2003) 30 Cal.4th 342, 424.)

Since defendant chose not to appear at trial, there was no indication he was relying on self-defense. The court's duty would have arisen only if there was substantial evidence in support of self-defense. Defendant claims that evidence is found in Officer Mendoza's testimony. Defendant states Mendoza claimed he was "blindsided" by a blow to his head while there was "chaos and commotion" in the prison gymnasium. Mendoza spun around to face defendant, grabbed him while trying to get his own senses, and began fighting him. Defendant asserts this testimony is evidence Mendoza was possibly mistaken about the identity of his attacker. Mendoza did not see who or what hit him, was knocked somewhat senseless, and in the chaos and commotion deduced defendant hit him because that is who he saw. If Mendoza was mistaken as to who blindsided him, defendant concludes, defendant was acting in self-defense.

Defendant's recitation of the facts is incomplete. Officer Mendoza testified the chaos and commotion was occurring outside in the yard, not in the gym. In fact, he ordered all of the inmates in the gym to get down onto the floor, which they did.

After looking into the yard, Mendoza was hit as he walked back into the gym. Mendoza stated he was "blindsided" by a punch to the left side of his face. The momentum spun him around to where he was facing defendant. Defendant then continued attacking Mendoza after the initial hit, punching him in the head and face. There is no evidence any other inmate was standing. There is no evidence any other inmate was involved in the attack.

This testimony does not provide substantial evidence supportive of a defense of self-defense. Defendant was the aggressor. Officer Mendoza identified him as such. Mendoza was not mistaken because no other inmate was standing or participated in the assault. The court committed no error when it did not instruct the jury sua sponte on self-defense.

IV

Unanimity Instruction on Count Two

Defendant argues, based on the possibility another inmate first hit Officer Mendoza, the court was required to give a unanimity instruction. He claims the evidence shows there were two different batteries on Mendoza; one when Mendoza was blindsided, the other when Mendoza and defendant fought with each other.

We have already determined there is no substantial evidence supporting this theory. The only evidence in the record shows defendant attacked Mendoza first, and continued attacking him until he was restrained. No one else was involved. A unanimity instruction is not required where there is only one act or

where, as could also be argued here, the two or more acts are so closely related in time they form a single transaction. (*People v. Whitham* (1995) 38 Cal.App.4th 1282, 1295.) The court committed no error here.

V

Prosecutorial Misconduct

Defendant argues the prosecutor committed misconduct in his closing argument. To preserve a claim of prosecutorial misconduct on appeal, defendant must object to the alleged misconduct and request a curative admonition. (*People v. Price* (1991) 1 Cal.4th 324, 447.) Defendant, obviously, did not object to the argument because he absented himself from trial. Defendant forfeited this argument.

Defendant argues forfeiture should not apply against an absent defendant who was not represented by counsel. We strongly disagree. Defendant was clearly and adequately warned of the risks of representing himself. He knew he was responsible for making all evidentiary objections. He was also warned of the risks of absenting himself from trial. He understood he would not be able to make objections if he was not in the courtroom. Forfeiture of claims for failing to object is one of those risks he voluntarily and knowingly assumed.

Defendant argues an objection was not required because an admonition would not have cured the alleged misconduct. Under the circumstances here, we disagree.

Defendant faults the following portion of the prosecutor's closing argument: "And I'll tell you in . . . 33 years I can

never remember another prosecutor in our office having anything like this. It's scary. It really is. 'Cause normally we're used to having somebody hollering at us most of the time. You know, being at your back so to speak to keep us, you know, honest so we don't ask leading questions, so we don't go over the boundaries.

"In this case -- kind of a case you have to act -- I do -- as my own guard. And it is difficult. And *perhaps I didn't put on as much as I normally would have tried*, but let's get back to the two witnesses. What is it about them that you would find unbelievable? Nothing. What is it that they said that would allow you to doubt them? Nothing. There was no inconsistencies. They testified about what happened to them.

"*Could there have been other witnesses? Yes. There were other people who were present. What are they going to say? Do you want redundancy? No. You don't need that, and I don't need to keep you here that long. And that's why we cut it down to the two witnesses who were the victims*." (Italics added.)

Defendant alleges it was misconduct to claim other eyewitnesses were not called because their testimony would have been redundant. (See *People v. Hall* (2000) 82 Cal.App.4th 813, 817.) Even if that were so -- a point the People do not concede -- had an objection been made, the court could have cured the harm with an admonition. It could have admonished the jury not to infer there were other witnesses, not to speculate what the testimony might have been from other witnesses or what other evidence the prosecution might have presented, and not to

speculate whether such evidence would have corroborated or contradicted the officers' testimony.

Even without an objection, the harm from any error made by the prosecutor was minimized by the trial court's instruction on witnesses. The court informed the jury: "Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events. Neither side is required to produce all objects or documents mentioned or suggested by the evidence."

Thus an objection was required, but defendant, by choosing not to appear, chose not to object. He thereby forfeited his opportunity to raise the objection here.

VI

Sentencing to Upper Term

Defendant claims the court violated *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403], when it imposed the upper prison term on count one based on facts not found by the jury or admitted by defendant. Our Supreme Court has determined California's determinate sentencing system does not violate *Blakely*. (*People v. Black* (2005) 35 Cal.4th 1238, 1261-1264.) The trial court committed no constitutional error in sentencing defendant to the upper term.

DISPOSITION

The abstract of judgment incorrectly states the year count one was committed was "OO." This must be corrected to note the year count one was committed was "1999." In all other respects,

the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NICHOLSON, Acting P.J.

We concur:

ROBIE, J.

BUTZ, J.