

Filed 10/9/01

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RAUL GOMEZ GUTIERREZ,

Defendant and Appellant.

B145089

(Super. Ct. No. VA059091)

APPEAL from a judgment of the Superior Court of Los Angeles County.

C. Robert Simpson, Jr., Judge. Reversed.

Maureen J. Shanahan, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney
General, Marc E. Turchin, Acting Senior Assistant Attorney General, Robert F. Katz,
Supervising Deputy Attorney General, and Karla Cottis, Deputy Attorney General, for
Plaintiff and Respondent.

Raul Gomez Gutierrez appeals from the judgment entered following a jury trial resulting in his conviction of second-degree robbery and attempted second-degree robbery, with findings he had two prior convictions for which he served separate prison terms.¹ He was sentenced to an aggregate term of six years in state prison. He contends: (1) the trial court erred by concluding appellant voluntarily absented himself from the proceedings without questioning appellant personally about his desire to be absent; (2) the trial court erred by failing to give the jury instructions on a lesser-included offense of attempted robbery as to victim Bustamante; and (3) it is reversible error to charge the jury with CALJIC No. 17.41.1 since the instruction impermissibly chills jury deliberations.

We reverse the judgment since appellant was denied his rights to confrontation and to be present during the trial.

FACTS AND PROCEEDINGS IN THE TRIAL COURT

The information charged appellant and codefendant Elisaldo Abrego (Abrego) with the April 7, 2000 robbery of victim Adan Sanchez (Sanchez) in count 1 and the attempted robbery of Anabel Bustamante (Bustamante) in count 2.²

I. Trial Evidence

Viewed in accordance with the usual rules on appeal,³ the evidence established, after midnight on April 7, 2000, Anabel Bustamante and her boyfriend Adan Sanchez

¹ Pen. Code, §§ 211, 664/211, 667.5, subd. (b).

² On the second day of trial Abrego pled guilty to robbery. He is not a party to this appeal.

³ *People v. Ochoa* (1933) 6 Cal.4th 1190, 1206.

left Lito's Club in South Gate to get bottled water from a nearby liquor store. A white Chevrolet Baretta with two occupants stopped them in the liquor store's parking lot. The occupants questioned Sanchez and Bustamante about the club. The Baretta drove off.

Five or ten minutes later, the Baretta returned. Appellant, the driver, got out and pushed a gun into Sanchez's ribs. Bustamante was frightened. Another youth, Abrego, got out of the Baretta and stood four feet behind Sanchez. There were security guards in the area for the nightclub. Appellant ordered Sanchez to behave as if they were friends and kept the gun hidden from view.

Appellant demanded money. Sanchez removed his cash from his shirt pocket and gave appellant \$125 in cash in the following denominations: a \$100 bill, a \$20 bill and a \$5 bill. Appellant demanded "any jewelry" from Bustamante. Appellant looked at Bustamante's bracelet and rings.

By that time, the security guard across the street realized appellant was engaged in robbery. The security guard ducked down and was talking into his radio. Abrego was nervous and tried to hurry appellant. Abrego told appellant, "They are coming. They are coming. Let's go, let's go." Appellant pulled Bustamante's bracelet to her wrist, but fled without removing it. The robbers ran to the Baretta and sped off.

Bustamante and Sanchez supplied the police with a partial license plate for the Baretta, "3NG343." They described the Baretta as having chrome wheels and a burgundy interior.

Shortly thereafter, the police stopped the occupants in the Baretta, which had the license number "3NGP343." Appellant was driving. In a field identification procedure, Bustamante and Sanchez identified appellant and Abrego as the robbers and the Baretta. A BB gun was found on the rear seat of the Baretta. Appellant had a \$100 and a \$5 bill in his rear pants pocket.

Bustamante and Sanchez testified at trial they were certain appellant and Abrego were the robbers. Bustamante mentioned appellant and his passenger had changed their clothing after the robbery and before the field identification procedure.

II. Facts Pertinent to Appellant's Voluntary Absence From The Trial

Before trial, appellant made a *Marsden* motion.⁴ Appellant complained counsel had advised him to accept the plea bargain and told appellant he would not win at trial. Appellant claimed trial counsel had such a negative view of his case that counsel would not be able to represent him adequately at trial.

Trial counsel told the court that he was prepared for trial and appellant simply did not want to hear his honest advice about the viability of defending the case at a trial. Trial counsel told the court he and appellant were still speaking to one another. The court denied appellant's request for new counsel.

Trial commenced on Monday August 21, 2000. On the afternoon of August 21, 2000, victim Bustamante testified and was cross-examined by cocounsel.

On Tuesday August 22, 2000, appellant was in the courtroom lockup and refused to leave the lockup. Trial counsel spoke to appellant and advised the court of the situation. Trial counsel returned to the lockup with the court reporter, the Spanish interpreter and the bailiff.⁵

Trial counsel and appellant had the following conversation, which was transcribed by the court reporter:

“[Trial Counsel:] Okay, I spoke to the judge, told him of your intention. There's nobody out there, no family. [¶] If you don't want to come out, the judge says fine, we're going to do the trial without your presence. The judge has no time for fun and games. [¶] We're in the middle of trial. You want to do that, that's fine. I'll

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

⁵ Appellant was using a court-appointed Spanish interpreter.

represent you without you there. [¶] Personally, I don't need your presence there. I know what I'm going to say and argue. [¶] If you want to do that and waste the court's time, the judge is prepared to let you spend the rest of your trial here away from everybody. That's what we're going to do.

“[Appellant:] I want to wait for my attorney. He told me he was coming. I need

some time. I need two days so I can get the attorney in case that he doesn't show up, because I'm not going to go to court.

“[Trial Counsel:] If you're willing to come out and talk to the court and see what the judge tells you about that, I'm here to tell you that he has said no and he's willing to proceed without you. [¶] If you want to come out and talk to the judge, I'm sure that gentleman will bring you right now and let you talk to the judge.

“[Appellant:] To talk about what?

“[Trial Counsel:] Your demand, so you can hear in person that the judge says no, we're resuming trial.

“[Appellant:] But then you're going to leave me in there; you're not going to bring me back in there.

“[Trial Counsel:] You know, I'm going to make the decision for you. I'm done. I'm leaving you in here. I'm proceeding without you. I'm tired of dealing with this.”

Trial counsel returned to court and related his version of the lockup conversation to the court, indicating appellant had refused to leave the lockup until his new counsel arrived in the courtroom. (The court did not read the reporter's transcript of the conversation trial counsel had with appellant.) The court asked the bailiff if trial counsel was faithfully recounting what had occurred in the lockup. The bailiff replied yes. The court asked the bailiff if he was certain appellant was freely and voluntarily and of his own free will refusing to make an appearance in the courtroom. The bailiff said yes.

The court found appellant had voluntarily absented himself from trial and announced they would proceed with the trial with appellant in the courtroom lockup.

Trial counsel objected to proceeding with the trial without appellant. Trial counsel claimed that appellant's absence from trial would have a severe, adverse impact on the jury's attitude toward appellant.

The court told the jury appellant had voluntarily absented himself from the proceedings and it was his choice. The court admonished the jury during the deliberations it was not to consider or discuss the fact appellant had absented himself from the trial.

During the ensuing trial proceedings, the codefendant pled guilty and no longer was on trial. Trial counsel cross-examined Bustamante. Then victim Sanchez and the detaining police officer testified to the events of the robbery and appellant's apprehension.

The next day, on August 23, 2000, the parties were ready to make their final arguments to the jury. Appellant appeared with his counsel and was present for the duration of the trial proceedings and at sentencing.

DISCUSSION

There is merit to the contention appellant was denied his right to confrontation and due process. The court failed to obtain a knowing waiver of appellant's right to confrontation and to be present at his trial.

The court in *United States v. Gagnon* (1985) 470 U.S. 522 explained:

"The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, e.g., *Illinois v. Allen*, 397 U.S. 337 (1970), but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or

evidence against him. In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the Court explained that a defendant has a due process right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . . [The] presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.’ *Id.* at 105-106, 108; see also *Faretta v. California*, 422 U.S. 806, 819, n. 15 (1975).”⁶

The California Constitution also guarantees a defendant’s presence at his trial.⁷ Penal Code sections 977 and 1043 implement the California Constitution.⁸

Trial counsel did not present to the court a written waiver of appellant’s presence pursuant to Penal Code section 977 and never asked appellant if he would submit such a waiver to the court. Trial counsel did not waive appellant’s right to be present and objected to the proceeding with trial without appellant.⁹ The court made no effort to secure in open court, or in the lockup, a written or oral waiver of appellant’s presence from appellant personally.¹⁰ Since appellant was in custody and

⁶ See also *Taylor v. United States* (1973) 414 U.S. 17, 18-20; *People v. Hines* (1997) 15 Cal.4th 997, 1038-1039.

⁷ Cal. Const., art. I, § 15; *People v. Johnson* (1993) 6 Cal.4th 1, 17-18.

⁸ Penal Code section 977 requires a written waiver of presence in a felony if the defendant wishes to absent himself from trial and contains the recommended form for such a waiver.

⁹ See *Larson v. Tansy* (1990) 911 F.2d 392, 396-397 [appellant must waive his right to be present personally]; see also, *United States v. Gomez* (10th Cir. 1995) 67 F.3d 1515, 1528 [if the right to make the waiver is not personal to defendant, counsel can only waive the right on behalf of his client after advising a defendant of his right to be present and with defendant’s consent].

¹⁰ Pen. Code, §§ 977, subd. (b), 1043, subd. (b)(2); compare *People v. Howard* (1996) 47 Cal.App.4th 1526, 1537 [the court entered the lockup and obtained an oral waiver of personal presence from defendant personally].

in the court's own lockup, appellant was "present" in court and did not voluntarily absent himself from the trial.¹¹

By failing to make any effort to obtain a waiver from appellant, the court denied appellant his rights to confrontation and due process.¹² The error requires a reversal since it was likely appellant's one-day absence from the courtroom influenced the jury's attitude toward him. Also, it was critical to appellants' defense that appellant be present in the courtroom to assist counsel during cross-examination of the prosecution's witnesses.¹³

¹¹ *United States v. Gomez, supra*, 67 F.3d at p. 1528 [no showing on the record defendant personally, or his counsel, waived appellant's presence when the court replied to questions posed to the court by the jury]; *United States v. Watkins* (7th Cir. 1993) 983 F.2d 1413, 1421-1422 [the court used unreliable third-hand information to justify the conclusion defendant had knowingly and voluntarily consented to the waiver of his right to be present at trial when better sources and a hearing should have been held to determine the issue]; *Larson v. Tansy, supra*, 911 F.2d at pp. 395-397 [counsel's waiver of presence is insufficient to waive defendant's right to presence at the trial]; *United States v. Gordon* (D.C. Cir. 1987) 264 U.S. App. D.C. 334, 829 F.2d 119, 125-126 and fn. 7 [defendant in custody cannot be found to have absented himself voluntarily from the trial; only a personal waiver of the defendant's presence is sufficient to avoid constitutional error]; *Cross v. United States* (D.C. Cir. 1963) 117 U.S. App. D.C. 56, 325 F.2d 629, 631 [defendant telling counsel he does not wish to appear is insufficient to show a waiver of presence; if the defendant is in custody, the court must bring the defendant into court, advise him of his constitutional rights and obtain a voluntary waiver of his right to be present at the trial].

¹² The trial court relied on *People v. Parento* (1991) 235 Cal.App.3d 1378, 1381, to support its conclusion appellant was "voluntarily absent" from the courtroom under Penal Code section 1043, subd. (b). The *Parento* decision is not on point. *Parento* held a pro. per. defendant cannot waive counsel under *Faretta v. California* and then voluntarily waive his presence at trial and secure a reversal on appeal by claiming the court had a duty to appoint counsel for him upon his waiver of his right to be present at trial. *Parento* did not address issues of when a defendant is denied the right to be present at his trial and whether a trial court has obtained a voluntary waiver of presence.

¹³ *United States v. Gomez, supra*, 67 F.3d at p. 1529; *Larson v. Tansy, supra*, 911 F.2d at p. 397; *United States v. Gordon, supra*, 829 F.2d at pp. 127-129.

We do not have to reach appellant's other contentions since we will reverse the judgment and remand the cause for a new trial.

DISPOSITION

The judgment is reversed and the cause is remanded for a new trial.

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JOHNSON, J.

I concur:

LILLIE, P.J.

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WOODS, J.:

I respectfully dissent.

I would reject appellant's claim he was denied his right to be present, to confrontation and to the assistance of counsel under the state and federal constitutions and Penal Code sections 977 and 1043. I would affirm the judgment since it appears appellant was attempting to manipulate the court, and he voluntarily absented himself from the trial within the meaning of Penal Code section 1043, subdivision (e)(4).¹

¹ Although the majority found it unnecessary to reach the other contentions appellant raises on appeal, I would find no merit in appellant's contentions. The contentions involve complaints pertaining to jury instructions.

I would reject the contention the trial judge had a duty to charge the jury with the lesser-included offenses to attempted robbery as to victim Bustamante. Appellant's theory is that there was little evidence the attempted robbery was accomplished by force and fear, and thus the lesser-included instructions he submitted were required. Bustamante testified appellant held her and her boyfriend at gunpoint and demanded their money and valuables. Appellant asked Bustamante to give him her jewelry and reached for her bracelet and moved it to her wrist. At that moment, the robbery was interrupted, and appellant and his companion fled. The only evidence in the record is that the attempted robbery was accomplished by force and fear. Hence, the court had no duty to charge the jury with the lesser-included instructions. (*People v. Barton* (1995) 12 Cal.4th 186, 194-195.)

Appellant makes the contention that the court committed reversible error by charging the jury with CALJIC No. 17.41.1. This issue is pending review before the California Supreme Court in *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 26, 2000 (S086462), and *People v. Taylor* (No. B128957, May 2, 2000) 80 Cal.App.4th 804, 810-813, as modified May 22, 2000, review granted August 23, 2000 (S088909). In the present case, there is no evidence the instruction affected the verdict and the evidence of appellant's guilt was overwhelming. Accordingly, if it was error to use the instruction, the error was harmless beyond a reasonable doubt. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1336.)

After the commencement of trial, and on the morning of August 22, 2000, appellant unilaterally refused to participate in the trial proceedings. Appellant apparently believed that his family had hired new counsel. By refusing to appear in the courtroom, appellant deliberately attempted to bring a halt to his trial and force the trial judge to start proceedings again with new counsel. New counsel never appeared. Nevertheless, appellant refused to enter the courtroom to speak to the court about his future attendance at the trial or to be present when the trial recommenced. Appellant apparently acted on his belief trial counsel's request he speak with the trial judge was a trick to get him into the courtroom to proceed with the current trial.

Under these circumstances, the trial judge was not required to leave the bench, march into the lockup with the court reporter, interpreter and trial counsel and seek a waiver of presence from the defendant personally. The trial judge is not required to have his bailiff risk bodily injury by dragging or carrying an uncooperative defendant into the courtroom to discuss a waiver. If the trial judge obtains accurate representations from his staff and counsel that a defendant will not voluntarily leave the lockup to enter the courtroom, the court is entitled to find the defendant has "absented himself voluntarily" from the proceedings. (Pen. Code, § 1043, subd. (e)(4); *Taylor v. United States* (1973) 414 U.S. 17, 18-20; see *People v. Howard* (1996) 47 Cal.App.4th 1526, 1537-1539; cf. *People v. Howze* (2001) 85 Cal.App.4th 1380, 1395-1396 [defendant estopped from complaining of the error.]) The reporter's transcript reveals the representations of trial counsel and the bailiff to the trial judge as to what occurred in the lockup were accurate.

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WOODS, J.