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NOT TO BE PUBLISHED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. LAFONZO RAY TURNER, Defendant and Appellant.	C050169 (Super. Ct. No. 04F01206)

Defendant Lafonzo Ray Turner successfully brought a *Faretta*[1] motion and represented himself at trial, after which he was found guilty by a jury of one count of dissuading a witness in violation of Penal Code section 136.1, subdivision (a)(2).[2] The court sentenced defendant to the upper term of three years in state prison, plus one year to be served consecutively for a prior prison term found true by the jury.

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[1] *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562] (*Faretta*).

[2] All further statutory references are to the Penal Code.

On appeal, defendant contends the trial court erred by (1) allowing defendant to represent himself; (2) not conducting, sua sponte, a hearing to determine defendant's competency to stand trial; (3) allowing defendant to continue representing himself in light of information that he suffered from mental illness; and (4) imposing the upper term in violation of both *Blakely*[3] and the prohibition against dual use of facts. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Edd Stevenson, and his wife, Ronda Jackson, lived with their two children on Ridge Willow Court in South Sacramento. Defendant, Jackson's brother, stayed with them at their home for a brief period during December 2003.

According to Stevenson and other prosecution witnesses, defendant came to Stevenson's house in the early morning hours of December 14, 2003, and, after exchanging words with Stevenson, shot him in the leg.[4] Stevenson told Jackson, "'Your brother just shot me,'" and later told police that he had been shot by defendant.

Approximately two weeks after the shooting, defendant called Stevenson from jail and threatened him if he pressed

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[3] *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*).

[4] Defendant testified that he was somewhere else on December 14, 2003, and denies any involvement in the shooting or making threats to Stevenson during subsequent telephone conversations.

charges. Stevenson called the Sacramento County Sheriff's Department and obtained a restraining order the next day.

On September 24, 2004, after bailing out of jail, defendant telephoned Stevenson again and told him, "'Well, we coming for you, nigger! You dead, you and your family!'"

Defendant was ultimately charged, in an amended consolidated information, with assault with a firearm in violation of section 245, subdivision (a)(2) (count one); possession of a firearm by a convicted felon in violation of section 12021, subdivision (a)(1) (count two); dissuading a witness in violation of section 136.1, subdivision (a)(2) (counts three and five); and making a terrorist threat in violation of section 422 (count four). The information also alleged two prior felony convictions, one of which was subsequently stricken by the prosecution.

The trial court granted defendant's motion to represent himself at trial. The jury returned a verdict of guilty on the charge of intimidating a witness; however, the court declared a mistrial on the remaining charges. Defendant was sentenced to the upper term of three years for count three, plus an additional consecutive one-year enhancement for the prior prison term.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Defendant contends the court committed reversible error when it granted his motion to represent himself because, he

urges, his request to do so was neither unequivocal nor unambiguous. We disagree.

"A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.] A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 729.) "Moreover, the defendant 'should be made aware of the dangers and disadvantages of self-representation, *so that the record will establish* that "he knows what he is doing and his choice is made with eyes open."'" (*People v. Hall* (1990) 218 Cal.App.3d 1102, 1105.)

In order to determine whether defendant properly invoked his right of self-representation, we examine the whole record de novo. (*People v. Dent* (2003) 30 Cal.4th 213, 218.)

In this case, defendant first raised the notion of self-representation during the June 15, 2004, hearing on his initial *Marsden*[5] motion. When the trial court denied defendant's request to have defense counsel, Jennifer Schiavo, replaced, defendant

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

stated, “I refuse to go to trial with [defense counsel] . . . .” He added, “I’ll go co-counsel or I’ll go without her.” However, there was no further discussion in that regard, and pursuant to the court’s order, defendant continued to be represented by Schiavo.

At the hearing on defendant’s second *Marsden* motion on February 23, 2005, defendant again sought to have Schiavo removed, stating, “If it’s not to be that I can appoint a court appointed [attorney], I would like to file a Faretta motion and go pro per.” The court denied that motion as well, noting that Schiavo’s representation had been adequate, and asked defendant, “What would you like to do at this point in time? Would you like to think about representing yourself on this matter, or would you like to think about taking a little bit of time to think about working with Miss Schiavo?” Although defendant initially indicated he wanted to represent himself, the court explained the dangers and pitfalls of self-representation and continued the matter to the following morning to give defendant time to carefully consider his decision.

The following day, the court asked defendant if he still wanted to represent himself. Defendant told the court, “I didn’t say I wanted to represent myself. You are forcing me under duress to represent myself. [¶] So under duress, yes, I file a Faretta Motion.” When asked if he wanted the court to provide him with an opportunity to represent himself, defendant replied, “I want the court to provide me with proper representation and appoint counsel.” A recess was then taken to

give defendant time to review documentation explaining his rights pursuant to *Faretta*.

After the recess, the court confirmed that defendant had reviewed the documents provided to him and asked if he still wanted to represent himself, to which defendant replied, "As I said before, under duress I am being forced to represent myself. I don't want to represent myself, and as the rule states, number one, I have a right to be appointed counsel." Noting that counsel (i.e., Schiavo) had already been appointed, the court asked defendant whether he was simply requesting that another attorney be appointed to represent him. Defendant responded affirmatively, reiterating several of the complaints previously raised during the *Marsden* hearing. The court reiterated that defendant was still represented by Schiavo and asked if he wished to "continue with that representation" or represent himself. Defendant said, "I would like to represent myself under duress."

It is undisputed that defendant was extremely dissatisfied with Schiavo's representation and that his request to represent himself arose in conjunction with the court's denial of his February 23, 2005, *Marsden* request. However, the fact that the *Faretta* motion was made in conjunction with the court's denial of the *Marsden* motion alone "does not compel the conclusion that the *pro se* motion and its attendant waivers are unintelligent or unknowing." (*People v. Joseph* (1983) 34 Cal.3d 936, 944, fn. 3; see also *People v. Smith* (1985) 38 Cal.3d 945, 957 [no error in granting *Faretta* motion after *Marsden* motion properly denied].)

Furthermore, the record suggests that although defendant would have preferred to have *counsel of his choice*, his *Faretta* request was unequivocal under the circumstances. Defendant was given the opportunity to consider his request overnight. After doing so, he proclaimed that, although he did not want to, he was forced to represent himself "under duress" because the court would not substitute new counsel in for Schiavo. Defendant argues those statements demonstrate that his assertion of his *Faretta* rights was neither unambiguous nor unequivocal. Not so. As between representing himself and continuing to be represented by Schiavo, defendant was unequivocal in his request to represent himself. In other words, since he was not entitled to *counsel of his choice* (*Harris v. Superior Court* (1977) 19 Cal.3d 786, 795 [indigent defendant's right to appointed counsel does not include right to counsel *of his choice*]), it was his desire, albeit begrudgingly, to exercise his right to represent himself.

That decision of self-representation was subsequently confirmed by the court in several respects. After accepting the signed *Faretta* warnings from defendant, the court and defendant had the following exchange:

"THE COURT: All right. Mr. Turner, before we proceed, I want to make sure you understand what you are doing today. [¶] You do have the right to be represented by an attorney at all stages of these proceedings. An attorney has been appointed, and it's now your choice to not proceed with that attorney, is that correct?

"THE DEFENDANT: Under duress.

"THE COURT: I understand you say you are doing that under duress.

"THE DEFENDANT: Yes.

"THE COURT: You also understand it's not a smart move to actually proceed without an attorney?

"THE DEFENDANT: I understand.

"THE COURT: You understand that the penalty that you could be subject to if you are found guilty of all of these offenses are [*sic*] up to 22 years in the state prison?

"THE DEFENDANT: I understand.

"THE COURT: You understand that the court is not going to help you any time with regard to the legal issues that are associated with your case?

"THE DEFENDANT: I understand.

"THE COURT: You understand that the prosecutor is going to be a trained attorney, someone who does understand the laws of evidence, and the issues that are associated with your case because of his or her legal training?

"THE DEFENDANT: I understand.

"THE COURT: You have on [*sic*] obligation also to comply with all the rules of evidence. Do you understand that?

"THE DEFENDANT: Yes, I understand.

"THE COURT: If you are convicted of these charges, you do not have the ability to then appeal based on the representation that you did not have adequate counsel. [¶] Do you understand that?

"THE DEFENDANT: I understand.

"THE COURT: If you are disruptive, you can then lose this status of representing yourself. [¶] Do you understand that?

"THE DEFENDANT: I understand.

"THE COURT: And you have the right to hire your own attorney at any point in time. You also have the right to have an attorney appointed to represent you on this matter. [¶] Do you understand that?

"THE DEFENDANT: I understand.

"THE COURT: You still wish to represent yourself?

"THE DEFENDANT: Under duress.

"THE COURT: I understand that. I [*sic*] court is going to grant your request to represent yourself on each of your three cases."

At the March 10, 2005, hearing, after defendant again mentioned that he was continuing to represent himself in "a duress situation you all left me in and forced me in," the court asked defendant if he would like counsel appointed for him. Defendant replied, "I asked you that in the beginning. You put me in the situation. I'm going to stay in the situation. I don't want an attorney. I will stay pro per."

At the April 20, 2005, hearing, the court noted in one of defendant's motions a statement that defendant did not want legal representation because he believed the court would assign Schiavo as his counsel. The court explained to defendant that his defense would be assigned to the public defender's office, which would then assign a particular attorney to the case. Defendant again confirmed that he wished to continue

representing himself because did not want to be "inappropriately reassigned [to] Miss Schiavo."

Again, at the April 22, 2005, hearing, the court inquired about defendant's decision to represent himself, particularly in light of the prosecutor's experience and the "significant sentences" associated with the charges. Defendant told the court, "I would like to continue to represent myself, Sir . . . ."

Finally, at the hearing on April 26, 2005, the court once again asked defendant if it was still his desire to represent himself. Defendant confirmed that it was, and indicated that he did not wish to have an attorney appointed to represent him.

Contrary to defendant's assertion that the record does not show his "'sincere desire to forego counsel and represent himself,'" the record clearly demonstrates his sincere desire to forego counsel if he could not have *appointed counsel of his choice*. The trial court took painstaking efforts to make defendant aware of the perils and pitfalls of self-representation and insure his continuing desire to act as his own counsel. The record is replete with defendant's unequivocal statements that, given the choice between self-representation and representation by someone other than counsel of his choosing, he wished to represent himself. We find no error in the trial court's granting of defendant's *Faretta* motion.

II

Defendant asserts that the trial court erred in not conducting a hearing, sua sponte, into defendant's competency to

stand trial. In particular, he urges that substantial evidence existed to raise a reasonable doubt as to his mental stability, such that a competency hearing was necessary. We disagree.

A defendant is incompetent to stand trial when he suffers a mental disorder or developmental disability rendering him "unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a); see also *People v. Danielson* (1992) 3 Cal.4th 691, 726.) "As a matter of due process, the trial court is required to conduct a section 1368 hearing to determine a defendant's competency whenever substantial evidence of incompetence has been introduced." (*People v. Frye* (1998) 18 Cal.4th 894, 951-952, citing *People v. Hale* (1988) 44 Cal.3d 531, 539; *People v. Stankewitz* (1982) 32 Cal.3d 80, 92; *People v. Pennington* (1967) 66 Cal.2d 508, 518.) Substantial evidence is evidence that raises a reasonable doubt about the defendant's competence to stand trial. (*People v. Davis* (1995) 10 Cal.4th 463, 527; *People v. Howard* (1992) 1 Cal.4th 1132, 1163; *People v. Jones* (1991) 53 Cal.3d 1115, 1152.)

Defendant argues there was "extensive substantial evidence of [defendant's] incompetence" before the court as of April 22, 2005. First, defendant points to a letter from Tami Turner, his friend and former fiancée, which was provided to the court on March 10, 2005. In that letter, Turner informed the court that defendant was not fit to represent himself because of a "long time physiological [*sic*] mental illness," that he "needs psychotic medication," and that he was institutionalized at Napa

State Mental Hospital at the age of 12. Turner's letter also states that defendant had a "physicological [*sic*] evaluation in November of 2004" and that he "was given psychotic medication." The name and address of an outpatient clinic where Turner claims defendant was seen were also provided in the letter.

Defendant asserts that Turner's letter is, on its face, substantial evidence of defendant's incompetence. We disagree. Turner alleges mental illness in defendant's childhood but provides no information as to his recent condition other than to mention that he had an "evaluation" in 2004 for which he was allegedly prescribed medication. Not only are the allegations vague and general, but they are virtually unsubstantiated. More important, however, is the fact that there is nothing in the letter to suggest that Turner has either the training or the expertise to evaluate defendant's mental competency. Finally, Turner's opinion regarding "differences" between defendant and his previous counsel and her request that the court "appoint another public defender" throw into question altogether the motive underlying the letter.

As evidence of his questionable competency, defendant also points to several other facts, such as (1) his complaint, at the March 9, 2005, hearing, that he was evaluated by a "psychiatric . . . person" who evaluated him and wanted to medicate him; (2) an issue raised in one of his motions regarding the absence of an inquiry as to his mental competency in conjunction with his execution of the *Faretta* waivers; and

(3) the fact that defendant was apparently taking "his own" medication at the county jail. We are not persuaded.

Put into context, defendant's comment about having had a psychiatric evaluation was part and parcel of defendant's request to the court that he be moved to another facility, not an indicator that he lacked mental stability.

The issue raised by defendant's motion was similarly taken out of context. Without any prompting by defendant, the court noted a statement in defendant's motion that he was "forced into a Faretta under duress without investigating into the defendant's mental stability." When the court inquired whether defendant questioned his own mental competence, defendant confirmed that he did not and clarified that he raised the issue only because he was under the impression, from talking to "other individuals," that part of the procedure in considering a *Faretta* motion included a "line of questioning" regarding the defendant's mental stability. Defendant gave the court no reason to believe there was an issue as to his mental competence, either objectively or in his own mind, and we see nothing in the record to suggest otherwise.

Finally, defendant makes much of a statement by Julie Pederson, a supervisor at the main jail, that defendant was taking "his own" medication. Defendant concedes the medication was not identified, but expects us now, without any factual support, to assume that it was taken to treat an unidentified mental illness. There is nothing in the record to support that conclusion, and we reject it.

None of the examples cited by defendant raise a reasonable doubt as to his competence to stand trial, nor do other behavioral issues he points out, such as complaints of law enforcement threats and conspiracies, false complaints of counsel misconduct and write-ups for bad behavior, none of which appear to be out of the ordinary for a defendant dissatisfied with his state of incarceration. We also note that defendant's conduct in representing himself throughout the trial, although at times disrespectful and belligerent, demonstrated his capacity to prepare and present his defense and, to a certain degree, understand the procedures inherent in that process. He effectively wrote and argued motions, cross-examined witnesses, negotiated jury instructions, discussed exhibits, and asserted objections.

We conclude the court was under no compulsion to conduct a competency hearing on this record.

III

In an argument virtually identical to his first contention, defendant urges that the trial court erred by allowing him to continue to represent himself once it learned he suffered from a mental illness. For the reasons already discussed in part II of this opinion, we reject the notion that there was reasonable doubt as to defendant's competency, and we therefore reject this contention as well.

IV

Citing *Blakely*, *supra*, 542 U.S. 296, defendant contends he was entitled to a jury trial on aggravating factors used by the court to impose the upper term sentence. We disagree.

In *Blakely*, the United States Supreme Court reiterated its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435] (*Apprendi*) that, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely*, *supra*, 542 U.S. at p. 301.) The statutory maximum is the greatest sentence the court can impose based on facts reflected in the jury's verdict or admitted by the defendant. (*Id.* at p. 303.)

Although defendant concedes that the California Supreme Court subsequently held, in *People v. Black* (2005) 35 Cal.4th 1238, 1261, 1262-1264, that the California sentencing scheme -- including the procedure for selecting an upper term -- does not violate the holding in *Blakely*, he raises the contention solely to preserve it for federal court review. Nonetheless, we are bound by the holding in *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In any event, we point out that not only does the holding in *Black* defeat defendant's claim of error, it fails because the trial court imposed the upper term based, at least in part, on the fact that "the defendant does have multiple convictions, one prior conviction that was proven to the jury, which prior

conviction resulted in the one-year enhancement," and another that "was stricken" from the information. The rule of *Blakely* does not apply to the use of prior convictions to increase the penalty for a crime. (*Apprendi*, *supra*, 530 U.S. at p. 490.) Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to defendant's prior convictions, to impose the upper term did not violate the rule of *Blakely*.

DISPOSITION

The judgment is affirmed.

RAYE, Acting P.J.

We concur:

MORRISON, J.

CANTIL-SAKAUYE, J.