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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PAUL JONES,

Defendant and Appellant.

A135518

**(Contra Costa County
Super. Ct. No. 05-080483-1)**

Appellant Daniel Paul Jones was convicted after a jury trial of several counts relating to his possession of illegal drugs and firearms. On appeal, he argues (1) the trial court erred in denying his pretrial motion to represent himself, (2) a jury instruction regarding flight was impermissibly argumentative, (3) a jury finding that certain firearms were “loaded” was not supported by substantial evidence, (4) a jury instruction regarding knowledge was contrary to law, (5) the trial court erroneously admitted certain expert opinion testimony, (6) the trial court erred in denying appellant’s request for appointed counsel at sentencing, and (7) the trial court erred in failing to award appellant any presentence custody credit. We agree solely with appellant’s last contention and modify the judgment accordingly. We otherwise affirm.

BACKGROUND

The evidence at trial was as follows. In December 2006, police officers went to Stephanie Smith’s apartment to execute a search warrant. After knocking and

announcing that police officers were at the door, an officer saw appellant exit the apartment onto a balcony and jump off the balcony. A brief foot chase and physical struggle ensued before appellant was apprehended. Keys to Smith's apartment were found on the ground near where the struggle had taken place.

Police found two small bindles of methamphetamine on a table in the apartment's bedroom. In the bedroom closet, police found two bags: one bag contained appellant's birth certificate and identification card; and the other contained two handguns, each with a loaded magazine but no bullet in the firing chamber. Steve Buchanan, an admitted felon, gang member, and former methamphetamine user, testified that in November or December 2006, he saw appellant with one of the handguns subsequently found by the police. The parties stipulated that appellant was a felon during the time in question.

Smith testified for the defense. In December 2006, she and appellant were friends but he did not have keys to her apartment. At the time, she was a regular drug user and allowed many people to come and go from her apartment. Some of these people kept items at her apartment. She testified that the handguns found by the police were not appellant's, although she did not know whose they were. She further testified, although she and appellant used methamphetamine together during that time, the methamphetamine found by the police was solely hers, not appellant's.

The jury found appellant guilty of two counts of possession of a controlled substance while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)), two counts of being a felon in possession of a firearm (Pen. Code, former § 12021, subd. (a)(1)), one count of being a felon in possession of ammunition while armed (*id.*, former § 12022, subd. (a)(1), former § 12316, subd. (b)(1)), and one count of resisting arrest (*id.*, § 69).¹ In March 2012, appellant was sentenced to an aggregate prison term of 28 years to life. This term runs concurrently with a prison term of 46 years to life appellant was already serving on an unrelated murder conviction.

¹ Appellant was acquitted of two counts relating to stolen property found in Smith's apartment.

DISCUSSION

I. *Faretta Motion*

A. *Background*

At a December 28, 2010 hearing, with trial then set for January 18, 2011, appellant moved to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). When the trial court asked appellant why he wanted to represent himself, appellant stated only that he thought he could “do a good job” representing himself and just as “capable” a job as his counsel. Appellant also sought to continue the January 18 trial date, asking for “a little additional time so I can get all the discovery and everything needed to prepare myself in this case.” Appellant could identify no reason why he had not made his *Faretta* request sooner.

The People opposed appellant’s motion, arguing that the case was already “old.” After the indictment was filed in April 2008, proceedings had been delayed in part because this case was postponed pending appellant’s trial on the murder charge. Even after the murder trial finished, a previous trial date in this case had been vacated in February 2010 when appellant filed a successful motion to replace his appointed counsel. Because appellant had been sentenced on his murder conviction, this case was the only matter keeping appellant in local custody and out of state prison. Both the People and appellant’s counsel stated they would be ready for trial on January 18, 2011.

The trial court found appellant’s *Faretta* motion untimely and denied it. The court found the purpose of appellant’s request was to delay the proceedings, granting the request would in fact unreasonably delay the proceedings, and appellant was currently represented by experienced trial counsel.

B. *Analysis*

Appellant contends his request was timely and the denial was improper. Although a trial court generally “must grant a defendant’s request for self-representation if the defendant unequivocally asserts that right within a reasonable time prior to the commencement of trial, and makes his request voluntarily, knowingly, and intelligently,” an *untimely* motion is “ ‘addressed to the sound discretion of the court.’ ” (*People v.*

Lynch (2010) 50 Cal.4th 693, 721, 722 (*Lynch*), abrogated on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.)

In *Lynch*, the California Supreme Court held that “timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made.” (*Lynch, supra*, 50 Cal.4th at p. 724.) The factors for consideration include “not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.” (*Id.* at p. 726.)

Appellant urges us to reject *Lynch* as inconsistent with *Faretta*. According to appellant, *Faretta* stands for the proposition that a request made “weeks before trial” is timely. But *Lynch* itself rejected such an argument, concluding “*Faretta* nowhere announced a rigid formula for determining timeliness without regard to the circumstances of the particular case. . . . Rather, the high court’s statement in *Faretta* that the defendant’s motion was ‘weeks before trial’ implies a recognition that a motion that interferes with the orderly process of a trial may be denied. [Citation.]” (*Lynch, supra*, 50 Cal.4th at pp. 724-725.) In any event, *Lynch*’s interpretation of *Faretta* is binding on this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Appellant next contends his request was timely even under *Lynch*’s totality of the circumstances test.² In *Lynch*, the court considered a *Faretta* motion filed just over three weeks and heard two weeks before pretrial motions were to begin. (*Lynch, supra*, 50 Cal.4th at pp. 726-727.) The case involved multiple counts and special circumstance allegations, requiring an estimated 65 prosecution witnesses, some elderly. (*Ibid.*) The case was nearly four years old; and, although the court found the delay “cannot be

² Although the applicable standard of review for a trial court’s determination of the timeliness of a *Faretta* motion appears to be unclear, we need not decide the issue because we reach the same result using either de novo review or a deferential standard.

attributed to [the] defendant, he did not thereby escape any responsibility for timely invoking his right to self-representation.” (*Id.* at p. 727.) The defendant offered no explanation why he had not made his request sooner. (*Ibid.*) Finally, the defendant “would have required an undetermined amount of time to investigate and prepare for trial.” (*Id.* at p. 728.) In light of all these circumstances, the court found the motion untimely. (*Ibid.*)

Appellant argues his case is factually distinguishable from *Lynch*, and instead is comparable to *People v. White* (1992) 9 Cal.App.4th 1062 (*White*). In *White*, the defendant’s *Faretta* motion was made four weeks before the trial date. (*Id.* at p. 1073.) However, in rejecting the trial court’s conclusion the request was untimely, the Court of Appeal explicitly noted that “defense counsel had not yet announced ready” for the trial date and “the [trial] court expressly recognized the possibility that, because of calendar conflicts, [defense cocounsel] might have to be replaced, thus providing good cause to continue the case.” (*Ibid.*; see *id.* at p. 1076 [“Under the circumstances presented here, including the fact that the court expressly contemplated a continuance if defense cocounsel was replaced because of a conflict in her schedule, we find [the] defendant’s *Faretta* motion was timely.”].)

The facts of this case are more akin to *Lynch* than *White*. A firm trial date had been set just weeks away from the *Faretta* hearing and both sides had announced they were ready for trial. Appellant’s *Faretta* motion would have required a continuance of an undetermined length. Contrary to appellant’s suggestion, the trial court was not bound to accept appellant’s characterization that he would only need “a little additional time” to prepare, particularly as appellant added that he needed to “get all the discovery and everything needed to prepare myself in this case.” “A trial court may properly consider the delay inherently caused by such uncertainty in evaluating timeliness. [Citations.]” (*Lynch, supra*, 50 Cal.4th at p. 728.) The fact that the trial date was later continued a short time does not impact our analysis, as “the trial court’s determination of untimeliness necessarily must be evaluated as of the date and circumstances under which the court made its ruling.” (*People v. Marshall* (1997) 15 Cal.4th 1, 24-25, fn. 2.)

Moreover, the case was many years old, rendering the delay more burdensome than it might be for a newly-filed case. At the *Faretta* hearing, the prosecutor estimated he would call eight witnesses. There was a legitimate concern this evidence could grow stale. (See *Lynch, supra*, 50 Cal.4th at p. 722 [timeliness requirement “reflects that ‘the government’s interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant’s interest in acting as his own lawyer.’ [Citation.]”].)

Finally, appellant had earlier opportunities to invoke his right to self-representation, even after his substitute counsel was appointed in February 2010. Appellant appeared in court at least six times between February and November, but chose not to make his *Faretta* motion until the end of December, three weeks before the trial date.³ He was unable to articulate any reason at all, much less a worthy one, for his delay. (See *Lynch, supra*, 50 Cal.4th at p. 727 [considering the defendant’s failure to “timely invoc[e] his right to self-representation”].) Accordingly, given the totality of the circumstances, we agree with the trial court that appellant’s request was not timely.

An untimely *Faretta* motion “is ‘addressed to the sound discretion of the court.’ [Citation.]” (*Lynch, supra*, 50 Cal.4th at 722, fn. omitted.) In considering such a motion, “the trial court considers such factors as ‘the quality of counsel’s representation of the defendant, the defendant’s prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion.’ [Citation.]” (*Id.* at p. 722, fn. 10.) The trial court did not abuse its discretion in denying appellant’s untimely motion.

³ Appellant argues his motion was in fact made four weeks before the trial date, because an unverified “Department 11” superior court form indicates that on December 20, 2010, his attorney requested a hearing on “Mot (Farretta).” But this calendar form is neither a written nor an oral motion. Accordingly, it is “the date of the hearing, when the court was able to elicit from [appellant] his concerns, that we must treat as the date of [appellant’s] *Faretta* motion.” (*People v. Moore* (1988) 47 Cal.3d 63, 79.) In any event, the difference of one week’s time would not alter our analysis.

II. *Flight Instruction*

Based on CALCRIM No. 372, the trial court instructed the jury regarding appellant's flight from the police officers as follows: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." Appellant challenges the first sentence in this instruction as argumentative, contending it impermissibly favors the prosecution's view of the evidence.

As an initial matter, the People claim this argument is waived because appellant did not object to the instruction below. Appellant's failure to object did not forfeit his claim. (*People v. Taylor* (2010) 48 Cal.4th 574, 630 & fn. 13 (*Taylor*) [claim that flight instruction was impermissibly argumentative not forfeited by failure to object below, citing Pen. Code, § 1259].) However, his claim is meritless.

An argumentative instruction is one that "invite[s] the jury to draw inferences favorable to [one side] from specified items of evidence on a disputed question of fact." (*People v. Wright* (1988) 45 Cal.3d 1126, 1135.) Our Supreme Court has repeatedly held that the CALJIC version of the flight instruction, CALJIC No. 2.52, is not argumentative.⁴ (See, e.g., *Taylor, supra*, 48 Cal.4th at p. 630 [CALJIC No. 2.52 is not impermissibly argumentative; noting "we have repeatedly rejected identical challenges"]; *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181 [CALJIC No. 2.52 "is not argumentative; it does not impermissibly direct the jury to make only one inference"].)

⁴ CALJIC No. 2.52 (Fall 2013 ed.) states: "The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

Appellant contends such cases are inapplicable because of differences in the language of CALJIC No. 2.52 and CALCRIM No. 372. Appellant focuses on the order of CALCRIM No. 372's statements, first stating any flight may constitute evidence of consciousness of guilt, and only second stating the jury determines the meaning and importance of any flight. But we see no significance in the order, as "we certainly do not view one part of an instruction in isolation from another part." (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 31 [rejecting challenge to CALCRIM No. 372, including argument based on differences in language from CALJIC No. 2.52].) The instruction as a whole clearly directs that it is up to the jury to decide whether or what inferences to draw from any flight. The flight instruction was not argumentative.

III. *Substantial Evidence the Firearms Were Loaded*

Appellant was convicted of two counts of Health and Safety Code section 11370.1, subdivision (a), which penalizes the possession of certain illegal drugs "while armed with a loaded, operable firearm." The handguns found in Smith's apartment contained no bullet in the firing chamber, but had loaded magazines attached. A police officer testified the following steps were required to fire the guns: "Pick the gun up, take the slide, slide it back, slide it forward. The round is in the chamber and you pull the trigger." Appellant argues no substantial evidence supports the jury's finding the handguns were "loaded" because the firing chambers were empty.

The term "loaded" for purposes of Health and Safety Code section 11370.1 is not defined by statute. Its meaning was examined in *People v. Clark* (1996) 45 Cal.App.4th 1147 (*Clark*). The single-shot shotgun at issue in *Clark* had no shell in the firing chamber, but shells were found "in a covered storage compartment in the rear of the [shotgun's] stock." (*Id.* at p. 1152.) "[A] shell would have to be removed from the compartment and placed by hand in the chamber before [the shotgun] could be fired." (*Ibid.*) In *Clark*, the People urged the court to adopt the definition of "loaded" contained in Penal Code former section 12031, subdivision (g): "A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in

any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm” (Italics added.) The People argued in *Clark* that, because the shotgun shells were “attached” to the shotgun, the shotgun was loaded for purposes of Health and Safety Code section 11370.1. (*Clark*, at p. 1152.)

The court rejected this argument, first declining to import the definition in Penal Code former section 12031, subdivision (g) because, “in general, the language of a statute is to be given ‘its usual, ordinary import.’ [Citations.]” (*Clark, supra*, 45 Cal.App.4th at p. 1153.) “Under the commonly understood meaning of the term ‘loaded,’ a firearm is ‘loaded’ when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not ‘loaded’ if the shell or cartridge is stored elsewhere and not yet placed in a firing position. The shells here were placed in a separate storage compartment of the shotgun and were not yet ‘loaded’ as the term is commonly understood.” (*Ibid.*) But even if the definition contained in Penal Code former section 12031, subdivision (g), did apply to Health and Safety Code section 11370.1, it would not change the outcome because the court declined to construe the phrase “attached in any manner to” as broadly as the People sought. (*Clark*, at pp. 1153-1154.) Instead, the court found the Legislature intended the definition to reflect the common meaning of the term “loaded,” as indicated by the statute’s provision of “some examples of how a shell would be ‘attached’ to a firearm so that the firearm is loaded, i.e., in the firing chamber, *magazine or clip*; situations in which the firearm would be ‘loaded’ in the usual meaning of the word, i.e., the shell is placed in a position from which it can be fired.” (*Id.* at p. 1154, italics added.)

We agree with *Clark* that, when a shell is loaded in a magazine attached to a handgun, it is in a position from which it can be fired and the handgun is therefore “loaded” within the ordinary meaning of that term. Indeed, this has been the commonly understood meaning for some time. (See *People v. Simpson* (1933) 134 Cal.App. 646, 651 [discussing crime of assault with a deadly weapon: “An automatic repeating rifle may not be termed an unloaded gun when its magazine contains loaded cartridges which may be instantly transferred to the firing chamber by the mere operation of a lever. It is

unreasonable to hold that a rifle is unloaded and that it is not susceptible of immediate discharge under such circumstances.”.) We further agree with *Clark* that “[t]here is nothing in Health and Safety Code section 11370.1 which indicates the Legislature did not intend to use the term ‘loaded’ in its commonly understood meaning.” (*Clark, supra*, 45 Cal.App.4th at p. 1153.) Accordingly, substantial evidence supported the jury’s finding that the handguns were loaded.

IV. *Knowledge Instruction*

The jury was instructed on the Health and Safety Code section 11370.1 charges: “Knowledge that an available firearm is loaded and operable is not required.” Appellant urges us to reconsider our decision in *People v. Heath* (2005) 134 Cal.App.4th 490 (*Heath*), holding that such knowledge is not an element of a Health and Safety Code section 11370.1 violation. We decline to do so, as *Heath* was properly decided for the reasons set forth in that decision.

Apprendi v. New Jersey (2000) 530 U.S. 466 and *Cunningham v. California* (2007) 549 U.S. 270, relied upon by appellant, do not impact *Heath*’s reasoning. Pursuant to these cases, “any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.” (*Cunningham*, at p. 281.) These cases have no bearing on whether, for a given offense, knowledge must be established to expose a defendant to a greater sentence, and thus are not relevant to this discussion. The jury instruction regarding knowledge was not in error.

V. *Opinion Testimony*

Subdivision (a) of Health and Safety Code section 11370.1, which penalizes the possession of certain illegal drugs “while armed with a loaded, operable firearm,” provides that “ ‘armed with’ means having available for immediate offensive or defensive use.” During trial, immediately after a police officer testified the handguns found in Smith’s apartment could be fired after moving the slide back and forward, the prosecutor asked, “In your opinion, is the firearm in that condition available for offensive or defensive use?” Appellant’s counsel lodged several objections, including lack of

relevance and foundation, and the prosecutor laid a foundation for the officer's expertise in the use and functioning of firearms. The trial court allowed the officer's response: "Yes, I do believe they were available for offensive and defensive use."

Appellant argues the requirement of Health and Safety Code section 11370.1 that the firearm be available for offensive or defensive use does not hinge on whether the firearm contains bullets in the chamber or an attached magazine, but rather has to do with the firearm's proximity to the defendant and/or the illegal drugs. Appellant's characterization of the appropriate issue in this case is "whether a gun in a closet is available for such use." Appellant contends the officer's expert testimony was therefore irrelevant and admitted in error because it was not sufficiently beyond common experience to require expert opinion, it was an impermissible legal opinion on an element of the offense, and the legal opinion was erroneous.

We need not decide whether the admission of the testimony was in error because any such error was harmless. Although appellant claims the appropriate standard is whether the error was harmless beyond a reasonable doubt, "[t]he erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" [Citation.] (*People v. Pearson* (2013) 56 Cal.4th 393, 446.)

In the context of a statute with substantially similar relevant language, the California Supreme Court has broadly construed the proximity required for a firearm to be available for offensive or defensive use to a defendant possessing illegal drugs. "[W]hen . . . the evidence at trial shows that a firearm was found in close proximity to the illegal drugs in a place frequented by the defendant, a jury may reasonably infer (1) that the defendant knew of the firearm's presence, (2) that its presence together with the drugs was not accidental or coincidental, and (3) that, at some point during the period of illegal drug possession, the defendant was present with both the drugs and the firearm and thus that the firearm was available for the defendant to put to immediate use to aid in the drug possession. These reasonable inferences, if not refuted by defense evidence, are sufficient to warrant a determination that the defendant was 'armed with a firearm . . .'

...” (*People v. Bland* (1995) 10 Cal.4th 991, 1002-1003, fn. omitted [construing Pen. Code, former § 12022, subd. (a)(2)].)

In this case, the jury found appellant guilty of being a felon in possession of a firearm (Pen. Code, former § 12021, subd. (a)(1)), and thus clearly found appellant possessed the handguns in question. There was no dispute the handguns were found in the closet of the same room in which the illegal drugs were found. During closing arguments, appellant’s counsel argued the prosecution had failed to prove the handguns and the drugs were appellant’s; no argument was made the handguns were not found sufficiently near the drugs to satisfy the requirement they be available for offensive or defensive use. In light of these circumstances, it is not reasonably probable, absent the challenged testimony, the jury would not have found the firearms available for appellant’s offensive or defensive use.⁵

VI. *Sentencing Counsel*

A. *Background*

After the jury verdicts issued in February 2011, appellant’s sentencing was continued several times at the request of appellant’s counsel. In October 2011, appellant filed a *Faretta* motion. The trial court granted this motion on February 3, 2012, and continued the trial on the priors and sentencing to February 17 at appellant’s request.

At the February 17, 2012 hearing, appellant requested a continuance and the appointment of an investigator to help him investigate various issues. The trial court found that the issues identified by appellant had already been resolved at or after trial, but nonetheless granted a brief continuance to allow time for appellant to file a motion for a new trial. The court informed appellant that it would appoint counsel if he wished. In response, appellant asked if he could retain his own counsel. The court replied, “you’re certainly free to hire your own counsel. But I’ll give you a limited period of time, and if you don’t do that within that limited period of time . . . [t]hen you’ll have to proceed because I think I’ve been pretty liberal with you in terms of giving you continuances.”

⁵ In light of our conclusion that the only possible trial error was harmless, we reject appellant’s contention that cumulative error prejudiced his right to a fair trial.

The trial court set a filing date for appellant's new trial motion and set it for hearing on March 23. The court informed appellant that, if the new trial motion was denied, he would be sentenced on March 23.

On March 23, 2012, appellant appeared at the hearing, without retained counsel, and filed a motion for a continuance but no motion for a new trial. The matter was continued to March 27, and appellant's retained counsel appeared and requested a continuance to investigate a motion for a new trial, which the court denied because the issues identified by appellant's newly retained counsel had already been litigated and resolved. Appellant himself then attempted to argue for more time, citing several issues he was pursuing. The trial court informed appellant that the issues he raised either had been previously litigated or were not proper bases for a new trial motion.

The court proceeded to sentencing. Appellant's counsel stated he had been retained only for the purpose of a new trial motion and would not be representing appellant for sentencing. Appellant then stated, "I'd like to fire myself as my own attorney. I'm incompetent." The court refused, stating that "this is an obvious play on your part to continue this, and it's not going to be continued." The court proceeded to sentence appellant.

B. *Analysis*

Appellant argues the trial court erred in denying him new appointed counsel for sentencing purposes. The People claim appellant never in fact requested appointed counsel. We need not decide whether the request was sufficiently clear because, assuming it was, the trial court did not err in denying it.

"In considering whether to grant a defendant's request to withdraw from self-representation and have counsel appointed, we consider the 'totality of the facts and circumstances,' 'including [the] defendant's prior history in substitution of counsel, the reasons for the request, the stage of the trial proceedings, the disruption that might ensue, and the likelihood of [the] defendant's ability to defend against the charges if he proceeds in propria persona. [Citation.] The trial court need not review on the record each factor: 'The standard is whether the court's decision was an abuse of its discretion under the

totality of the circumstances’ [Citation.]” (*People v. Gonzalez* (2012) 210 Cal.App.4th 724, 743 (*Gonzalez*) [reviewing request for withdrawal made at sentencing hearing].)

More than a year had passed since the jury verdict. Appellant previously delayed sentencing with his *Faretta* motion, and had been properly warned of the risks of self-representation when the trial court granted it. “ ‘That [appellant] was told of — and affirmed his understanding of — the risks and disadvantages of self-representation before he waived counsel reflected on his reasons for later seeking to revoke the waiver.’ [Citation.]” (*Gonzalez, supra*, 210 Cal.App.4th at p. 743.) At the February 17, 2012 hearing, the trial court warned appellant that no further continuances would be granted. There is support for the trial court’s conclusion that the purpose of appellant’s request for counsel was delay, in light of appellant’s apparent desire to pursue issues the trial court found (and appellant does not now contest) were already decided or not proper bases for a new trial motion. Given the totality of these circumstances, the trial court’s denial of appellant’s request for counsel was not an abuse of discretion.

VII. *Presentence Credits*

At sentencing, the trial court did not award appellant any presentence credits for time served prior to sentencing. Appellant urges this court to calculate and award such credits. The People do not dispute that appellant is entitled to credits but claim we should remand the matter because the record on appeal is not sufficiently clear regarding the number of presentence days in custody attributable to this case. We find the record sufficiently clear and, in the interest of judicial efficiency, we resolve the matter without remand. (See *People v. Flores* (2009) 176 Cal.App.4th 1171, 1182.)

The probation report provides that appellant was in custody from December 19-28, 2006, and from August 7, 2007 through the date of sentencing. However, with the exception of December 20-28, 2006, all of this time was either credited to appellant’s sentence on the murder case or took place after appellant’s sentencing in the murder

case.⁶ Appellant is thus entitled to nine days of credit for actual custody. (Pen. Code, § 2900.5, subds. (a)-(b).) Because the time served took place prior to January 25, 2010, his conduct credits are governed by the statute in place at that time, which provided two days of credit for every four days of actual time served. (*People v. Brown* (2012) 54 Cal.4th 314, 318.) Accordingly, appellant is entitled to four days of conduct credit, for a total of 13 days of presentence credits.

DISPOSITION

The judgment is modified to provide for 13 days of presentence credits. As so modified, the judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

⁶ We take judicial notice of the unpublished opinion issued in the appeal from appellant's murder conviction (*People v. Jones* (Mar. 27, 2012, A126023)) for the limited purpose of identifying the days in custody for which appellant received credit against his sentence on that conviction.