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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ANTHONY WILEY,

Defendant and Appellant.

B232186

(Los Angeles County  
Super. Ct. No. KA090905)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
George Genesta, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Lance E. Winters, Assistant Attorney General, Scott Taryle and Stacy S.  
Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Paul Anthony Wiley appeals his convictions for unlawful sex with a minor. He makes a single argument: The trial court erred when it denied his motion to represent himself at trial. We find no error and affirm.

### **PROCEDURAL AND FACTUAL BACKGROUND**

Defendant was charged with two counts of unlawful sexual intercourse with a minor (Pen. Code, § 261.5 subd. (c)),<sup>1</sup> one count of unlawful oral copulation with a minor (§ 288a, subd. (b)(i)), and one count of contact with a minor with intent to commit a sexual offense (§ 288.3, subd. (a)). On February 17, 2011, the jury found defendant guilty on all counts. The trial court sentenced defendant to a term of imprisonment of 3 years, 8 months. Additional post conviction orders, fines and assessments were imposed.

In light of the limited issue on appeal, we need not recite in detail the underlying facts. It is sufficient that on November 4, 2009, defendant, then 42 years old, met the 16-year-old victim on a chat website. There ensued a series of texts, messages and phone calls that eventually turned sexual in nature. Over the next few weeks, they met several times and engaged in sexual intercourse and oral copulation. At trial, the prosecution also introduced evidence under Evidence Code 1108 attesting to defendant's sexual crimes with another minor.

### **DISCUSSION**

The only claim of error raised by Defendant is that the trial court improperly denied his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806. We set out below the facts relevant to the court's ruling, followed by our analysis.

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

1. *Facts Related to Faretta Motion*

On several occasions prior to trial, defendant expressed displeasure with the manner his trial counsel was handling the case and requested new counsel. The trial court held appropriate *Marsden* motions on December 16, 2010, February 10, 2011, and February 14, 2011.<sup>2</sup> On each occasion the trial court denied the *Marsden* motion, and defendant does not challenge those rulings. In the midst of the hearing on the *Marsden* motion of February 10, 2011, during an exchange between the court and defendant, the court asked defendant if he had anything else to add. Defendant replied: “Yes. If I can’t get a new attorney, I want to exert my *Faretta* rights.” The trial court did not immediately acknowledge defendant’s remark. Instead it turned to defendant’s attorney and asked her to reply to what defendant had said in conjunction with his *Marsden* motion. Counsel responded to the points that defendant had raised. After formally denying the *Marsden* motion, the court revisited the self representation issue, and the following exchange occurred:

“THE COURT: [¶] You did volunteer something in the midst of this motion that you wanted to waive your *Faretta* rights and represent yourself, if I denied it.

“THE DEFENDANT: Uh-huh.

“THE COURT: Is that what you are requesting at this time?

“THE DEFENDANT: Yes.

“THE COURT: Are you ready to proceed?

“THE DEFENDANT: With?

“THE COURT: For Trial?

“THE DEFENDANT: No, I’m not.

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<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

“THE COURT: So if I were to grant you the right to represent yourself, then you would be moving to continue this case because you are not ready to proceed to trial when the jury appears tomorrow (sic)?<sup>3</sup> Is that what you’re saying?

“THE DEFENDANT: Yes.

“THE COURT: Anything else, Mr. Wiley?

“THE DEFENDANT: No, Sir.

“THE COURT: How much time would you be requesting?

“THE DEFENDANT: Calendar month.

“THE COURT: Calendar month.

“The court finds the defendant’s motion for self-representation is not timely; that his counsel and all counsel have announced ready in the master calendar court for trial. The case has come before the court for trial. All pretrial matters have been heard. Counsel has indicated her status is still ready for trial and jurors have been ordered for tomorrow morning.

“The court now having heard all pretrial motions, the defendant is not ready to commence trial and has indicated that he would be requesting a 30-day – calendar days continuance to get ready for trial. The court denies the defendant’s right – request to represent himself as not timely made and that he is not ready to proceed in this matter. The motion is denied.”

## 2. *The Trial Court Did Not Err in Denying Defendant’s Faretta Motion*

The legal standards for ruling on a *Faretta* motion are in large part a function of whether the motion is timely or untimely. “[W]hen a motion to proceed *pro se* is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such

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<sup>3</sup> The court appears to have misspoken about the next court date, prompting the Reporter to add the “sic” to the transcript. The date of the reported hearing, February 10, 2011, was a Thursday. The Clerk’s Transcript does not contain an entry for the next court day, February 11, which was a court holiday, and it appears the initial jury panel was called to the courtroom on Monday February 14, 2011.

a choice might appear to be.” (*People v. Windham* (1977) 19 Cal.3d 121, 128.) The rule is different if the motion is untimely. In such a case we review the trial court’s ruling for abuse of discretion.<sup>4</sup> (*People v. Horton* (1995) 11 Cal.4th 1068, 1110; *People v. Bradford* (2010) 187 Cal.App.4th 1345, 1354.)

The trial court expressly found that defendant’s *Faretta* motion was untimely, stating that counsel had announced ready for trial; the parties were before the judge who was to try the case; all pretrial matters had been heard, and jurors had been ordered. The record also showed that witnesses had been subpoenaed or their attendance arranged. We agree with the trial court. Charges were originally filed against defendant on November 9, 2010; the underlying crimes had taken place a year earlier. There had been numerous court appearances, and the *Faretta* motion was made virtually on the eve of trial. (All the intervening days between the motion and the start of trial were either weekend days or a court holiday.) These facts are in keeping with the holdings in a number of cases upholding the denial of a *Faretta* motion as untimely. (See *People v. Valdez* (2004) 32 Cal.4th 73, 102 [day of trial]; *People v. Horton, supra*, 11 Cal.4th at p. 1110 [day of trial]; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1204-1205 [four days before trial]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790-792 [six days before trial].) That defendant had made only a few court appearances does not change the analysis. He had earlier opportunities to ask for self representation and did not.

Even if a *Faretta* request is untimely, the trial court retains discretion to grant self-representation. (*People v. Windham, supra*, 19 Cal.3d at pp. 127-129.) We conclude that the court did not abuse its discretion. Not only was the trial set to start the next court day, defendant expressly stated that if his *Faretta* request were granted, he would not be ready for trial and would be asking for a 30 day continuance. The case involved sexual assaults, the relevant events took place over a year earlier, and the key witnesses were

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<sup>4</sup> Whether we review the timeliness issue de novo or by the abuse of discretion standard (see *People v. Marshall* (1997) 15 Cal.4th 1, 25; *People v. Moore* (1988) 47 Cal.3d 63, 80), our conclusion would be the same.

minors. The trial court acted within his discretion in denying defendant's untimely *Faretta* motion.

The record also shows that there was a separate ground to have denied defendant's *Faretta* request – it was not unequivocal. (*People v. Scott, supra*, 91 Cal.App.4th at pp. 1205-1206.) Defendant's *Faretta* request came immediately on the heels of the court's denial of his *Marsden* motion. Coupled with defendant's request for a 30 day continuance, defendant appears to have been motivated as much by “buying time” as by a sincere desire to represent himself.

### **DISPOSITION**

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.