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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KEVIN PORTER, Defendant and Appellant.	C064977 (Super. Ct. No. 09F04344)

Following an 18-day trial, during which defendant represented himself, a jury found defendant guilty of 11 counts of second degree robbery (Pen. Code, § 211)[1] and five counts of second degree attempted robbery (§§ 664/211). In a bifurcated proceeding, the jury found true an allegation defendant had a

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[1] Further unspecified statutory references are to the Penal Code.

prior serious felony conviction that also qualified as a strike. (§§ 667, subd. (a)(1) and (b)-(i); 1170.12.) Defendant was sentenced to an aggregate term of 41 years and 8 months in state prison.[2]

Represented by appellate counsel, defendant appeals, contending the trial court erred in (1) denying his motions to suppress all or at least part of his post-arrest statements to law enforcement, (2) allowing him to represent himself and failing to appoint standby counsel, and (3) calculating his aggregate prison term. Having reviewed the entire record, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged in an amended information with committing or attempting to commit 16 robberies in Sacramento County during a roughly two-week period from May 19 through June 5, 2009. During pre-trial proceedings, defendant requested to represent himself. After advising defendant of the perils of self-representation, the trial court granted the motion. On the seventh day of trial, after 21 witnesses had testified, defendant advised the court that he wanted a lawyer. The trial

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[2] Defendant was sentenced to 10 years (the upper term, doubled for the prior strike) on count 1, a consecutive two years (one-third the middle term, doubled for the prior strike) for each of the 10 additional counts of robbery, a consecutive 16 months (one-third the middle term, doubled for the prior strike) for each of the five counts of attempted second degree robbery, plus a consecutive five years for the serious felony enhancement.

court denied the motion as untimely, explaining that "[t]here's no attorney that [*sic*] is prepared to try your case." Additional facts concerning defendant's request to represent himself and subsequent request for counsel are set forth below.

I

The Prosecution

A. Second Degree Robbery of Wendy's (Count 1)

On May 19, 2009, a man entered the Wendy's restaurant on Watt and El Camino Avenues and handed an employee a note that read, "[G]ive me all the money in your drawer right now, or I'll shoot you." The man lifted up his sweatshirt to reveal the handle of a black gun. The employee opened the register and gave the man roughly $170 in cash. The employee described the man as African American, 23 to 24 years old, 160 to 170 pounds, approximately 5'7", and bald. Two weeks after the robbery, the employee identified defendant from a photographic lineup as the robber. She also positively identified him at trial.

B. Second Degree Robbery of Subway (Count 2)

On May 23, 2009, a man entered a Subway restaurant on El Camino Avenue and threw a note onto the counter that read, "Give me the $. Don't do anything stupid." The employee gave the man $200, and the man ran out of the store. The employee described the man as African American, about 5'7", 170 pounds, and with short hair. The employee was unable to positively identify the man that robbed her from a photographic lineup or at trial. The store manager, who was present during the robbery, also was

unable to positively identify the robber from a photographic lineup but identified defendant as the robber at trial.

C. Second Degree Robbery of McDonald's (Count 3)

On May 24, 2009, a man entered a McDonald's restaurant on Madison Avenue and handed the shift manager a note. The shift manager was unable to read the note and turned to ask a co-worker for assistance. The man said he was not stupid and that he had a gun. The shift manager gave the man about $100 from the register. The shift manager described the man as African American, between 19 and 20 years old, 5'11", and 170 pounds. The robbery was captured on videotape, portions of which were shown to the jury. The videotape showed the robber wearing the same blue shorts defendant was wearing when he was arrested less than two weeks later. The shift manager identified defendant from a photographic lineup and in court as the robber. A customer, who was present during the robbery, identified defendant as the robber on the videotape and at trial.

D. Attempted Second Degree Robbery of Taco Bell (Count 4)

On May 26, 2009, a man entered a Taco Bell on Madison Avenue and gave a cashier a note that read, "Give me all the $ now" and "Don't be stupid." The cashier ran to the back of the restaurant and into the manager's office. The cashier described the man as African American, 20 to 27 years old, between 5'7" and 5'9", and between 200 and 235 pounds. The cashier could not identify anyone in a photographic lineup and could not identify defendant as the man who handed him the note at trial.

E. Second Degree Robbery of Arby's (Count 5)

On May 26, 2009, a man entered the Arby's restaurant on Madison Avenue and Fair Oaks Boulevard and handed a cashier a note that read, "Give me all the $ in the register" and "Don't do anything stupid." The note also indicated the man had a gun. The cashier gave the man between $150 and $200. The man ran out the front door and got into the passenger side of a gold-green Malibu. The cashier described the man as African American, approximately 20 years old, 5'9", 175 to 180 pounds, and with a "little fro." A witness provided law enforcement with a partial license plate number from the Malibu, and following defendant's arrest it was determined that the car was registered to Cynthia Adcock, one of defendant's roommates. The cashier identified defendant from a photographic lineup and at trial as the robber. A witness also selected defendant from a photographic lineup but was unable to identify him as the robber at trial.

F. Second Degree Robbery of Baskin Robbins (Count 6)

On May 27, 2009, a man entered a Baskin Robbins store on Sunrise Boulevard and handed a cashier a note that read, "Give me all the $ now. I have a gun. Don't be stupid." The cashier gave the man about $80. She described him as African American, approximately 20 years old, with black hair, and wearing white and blue basketball shorts. The man was caught on video surveillance leaving the store, and that portion of the videotape was shown to the jury. The cashier identified defendant as the robber at trial. She also identified the

shorts he was wearing at the time of the robbery as the same shorts he was wearing at the time he was arrested. A co-worker who was present during the robbery identified defendant from a photographic lineup and at trial as the robber.

G. Second Degree Robbery of K-Mart (Count 7)

On May 28, 2009, a man entered a K-Mart store on Sunrise Boulevard and handed a cashier a note that read, “Give me your money,” and “I have a gun.” The cashier gave the man about $260. She described the man as African American and wearing dark jeans with designs on the pockets and a white shirt. The robbery was captured on video surveillance, portions of which were shown to the jury. The cashier identified defendant from a photographic lineup and at trial as the robber.

H. Attempted Second Degree Robbery of Taco Bell (Count 8)

On May 28, 2009, a man entered a Taco Bell on Sunrise Boulevard and handed a cashier a note that said, “Give me all your money now! I have a gun.” The cashier told the man he would have to order something first, and the man told her to give him a “Gordita.” The cashier then ran to the back of the restaurant, and the man ran out the door. The cashier described the man as African American, in his mid-twenties, with “trim” hair, about 5’9” to 5’10”, and 180 to 185 pounds. The attempted robbery was captured on video surveillance, portions of which were shown to the jury. The cashier identified defendant from a photographic lineup and at trial as the attempted robber.

I. Second Degree Robbery of Round Table (Count 9)

On May 30, 2009, a man entered a Round Table Pizza on Manzanita Avenue and handed a supervisor a note that read, “I have a gun. Give me all the money.” The supervisor gave the man about $100, and the man ran out the side door. The supervisor described the man as African American, between 20 and 25 years old, about 5’9” to 5’10”, and 180 pounds. The robbery was captured on video surveillance, portions of which were shown to the jury. The supervisor was not able to identify the robber from a photographic lineup but identified defendant as the robber at trial. The supervisor’s boyfriend, who observed the robbery, also identified defendant as the robber at trial.

J. Attempted Second Degree Robbery of Metro PCS (Count 10)

On May 30, 2009, a man entered the Metro PCS store on Sunrise Boulevard and Madison Avenue and handed an employee a note that read, “[G]ive me all the money in the register or you’ll die.” The cashier asked the man if he was serious, and when he said that he was, she threw up her hands and told him he would have to get the money himself. She then walked the man outside, and he left. She described the man as African American, in his twenties, with a “low haircut,” 5’7” to 5’8”, 170 pounds, and wearing blue jeans with designs on the back pockets. She identified defendant from a photographic lineup and at trial as the attempted robber. She also testified that the jeans he was wearing at the time of the attempted robbery

were the same jeans defendant was wearing when he was arrested a week later.

K. Second Degree Robbery of Togo's Eatery (Count 11)

On May 31, 2009, a man entered a Togo's Eatery on Madison Avenue and handed an employee a note that read, "Give me all the money now. Don't be stupid. I have a gun." The cashier deliberately opened the register so that the drawer would fly open and the change would spill onto the ground. The man took $420, ran out of the store, and got into a black car. Witnesses described the man as African American, between 18 and 21 years old, between 5'8" and 6', 160 to 165 pounds, with short hair, and wearing a black "Mac Dre" t-shirt.[3] The employee identified defendant from a photographic lineup and at trial as the robber. Two co-workers and the store manager also identified him as the robber at trial.

L. Second Degree Robbery of Dairy Queen (Count 12)

On June 2, 2009, a man entered a Dairy Queen on Fruitridge Avenue and passed an employee a note that read, "Give me all your money. I have a gun." The employee gave the man approximately $180, and the man told the cashier to get on his knees and then left. The employee described the man as African American, in his early twenties, about 5'10", between 160 and 170 pounds, and with a "short Afro." The employee identified defendant from a photographic lineup and at trial as the robber.

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[3] Mac Dre was a famous Bay Area rapper who died.

M. Second Degree Robbery of McDonald's (Count 13)

On June 4, 2009, a man entered a McDonald's restaurant on Florin Road and gave the supervisor a note that read, "Don't be stupid. I have a gun. Give me all the money." The supervisor gave him $100. She described the man as African American, between 5'5" and 5'8", 150 pounds, with very short hair, and wearing a black Mac Dre t-shirt. The robbery was captured on video surveillance, portions of which were shown to the jury. The supervisor was unable to identify the robber from a photographic lineup or at trial.

N. Second Degree Robbery of Subway (Count 14)

On June 5, 2009, a man entered a Subway on Fair Oaks Boulevard and ordered a sandwich. Instead of paying, he handed the employee a note that said, "Give me all your money. Don't be stupid. I have a gun." The employee gave him approximately $100. She described the man as African American, between 19 and 20 years old, 5'8" to 5'9", between 140 and 150 pounds, and with very little hair. She could not recognize the man again. Her co-worker, who witnessed the robbery, identified defendant from a photographic lineup and at trial as the robber.

O. Attempted Second Degree Robbery of Dairy Queen (Count 15)

On June 5, 2009, a man entered a Dairy Queen on Arden Way and handed an employee a note that instructed the employee to give him all the money in the cash register and advised the employee that he had a gun and not to be stupid. The "$" symbol

was used for the word money. The employee “freaked out” and attempted to talk to his manager about the note. The manager read the note, said she did not “have time for this,” and pushed the panic button to call the police. The man grabbed his note and ran out the door. The employee described the man as African American, in his twenties, approximately 5’10”, between 160 and 170 pounds, and wearing a black shirt and blue jeans. The manager identified defendant from a photographic lineup as the attempted robber but was unable to do so at trial. The employee identified defendant from a photographic lineup and at trial as the attempted robber. A co-worker identified defendant as the attempted robber at trial.

P. Attempted Second Degree Robbery of Subway (Count 16)

On June 5, 2009, defendant entered a Subway on Fair Oaks Boulevard and handed one of the store owners a note that read, “Give me all your money. Don’t be stupid. I have a gun.” The owner asked, “Are you robbing me?” When defendant responded, “Give me your money,” she told him, “No.” She said, “I work too hard. I work 12 hours a day. My whole family’s working over there.” She told him, “Just shoot me. I’m not giving you my money.” When defendant started to leave, the owner called 9-1-1. Meanwhile, her husband, who had been washing dishes in the back, ran after defendant. A car pulled up and defendant tried to get in, but he fell out. He then squeezed through a fence and into a residential back yard. The resident telephoned 9-1-1 after seeing defendant in his yard. Defendant was found

hiding behind a trash can and was placed under arrest. Minutes later, the store owner and her son identified defendant as the attempted robber.

At approximately 10:15 p.m. that evening, defendant was interviewed by a Sacramento Sheriff's detective. Following the denial of defendant's motions to suppress all or part of his statements, jurors were given copies of the transcript and shown a videotape of the interview. The substance of the interview is detailed below.

The jury also heard audio tapes of four telephone conversations between defendant and girlfriend Sharlie Donaldson following defendant's arrest. During those conversations, defendant admitted doing "one a day" and said "they got me for all of em [*sic*] right now" and that "they" could charge him with 12 robberies. He instructed Donaldson to have his brother go to his grandmother's house and get rid of all the evidence. He also asked Donaldson if she knew "what incompetent to stand trial is" and whether she thought he "should do that[.]" He told her "I can get out . . . in three years from now, if I take that route."

II

The Defense

Defendant did not testify in his defense at trial. During his closing argument, he acknowledged the evidence against him was "compelling" and stated that he was "not saying that . . . [he was] not the one who committed these robberies." Rather, he

argued that he lacked "the specific intent" to commit robbery because he had "a valid reason" for what he did. He also emphasized that he did not harm anyone.

DISCUSSION

I

The Trial Court Properly Denied Defendant's Motions To Suppress His Post-Arrest Statements, And Any Possible Error In Admitting His Statements Was Harmless

Defendant contends that under the totality of the circumstances he did not knowingly, intelligently, and voluntarily waive his *Miranda*[4] rights before being interrogated by law enforcement, and thus, the trial court erred in refusing to suppress statements made by him during the interrogation. Alternatively, he asserts the trial court erred in admitting his "pre-*Miranda*" statements because they were the product of an interrogation. As we shall explain, defendant forfeited his claim that he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights, and his claim that the pre-*Miranda* questioning amounted to interrogation lacks merit. In any event, any error in admitting his post-arrest statements was harmless beyond a reasonable doubt.

"Pursuant to *Miranda*, *supra*, 384 U.S. 436, 'a suspect [may] not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

silent, to the presence of an attorney, and, if indigent, to appointed counsel.' [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) "The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence." (*Ibid.*)

"As is well known, *Miranda* . . . and its progeny apply to exclude certain evidence obtained during custodial interrogation." (*People v. Thornton* (2007) 41 Cal.4th 391, 432.) Interrogation "refers to questioning initiated by the police or its functional equivalent, not voluntary conversation." (*Ibid.*) Moreover, "not all questioning of a person in custody constitutes interrogation under *Miranda*." (*People v. Ray* (1996) 13 Cal.4th 313, 338.) "The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response. [Citations.]" (*People v. Clark* (1993) 5 Cal.4th 950, 985, disapproved of on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In considering a claim on appeal that a statement is inadmissible because it was obtained in violation of a defendant's *Miranda* rights, we independently review the trial court's legal determinations and accept its resolution of disputed facts and inferences and evaluations of credibility if supported by substantial evidence. (*People v. Dykes, supra,* 46 Cal.4th at p. 751.)

Following defendant's arrest, he was taken to the centralized investigation office and interviewed by a Sacramento County Sheriff's detective. The interview began as follows:

"Det. You alright dude?

"No answer.

"Det. I know you've said this a million times, but I've got to hear it myself. What's your name?

"K.P. Kevin.

"Det. Say it again.

"K.P. Kevin Lamar Porter.

"Det. Lamar?

"K.P. Porter.

"Det. What's your date of birth?

"K.P. 11-6-85.

"Det. Say it again.

"K.P. 11-6-85.

"Det. Where do you live?

"K.P. Right now?

"Det. Uh-huh.

"K.P. Off of Fair Oaks. You know where Country Village Apartments is at? It's by Valero and GameStop, country village.

"Det. Who do you live there with?

"K.P. My girlfriend.

"Det. Who is she?

"K.P. Sharlie Donaldson.

"Det. Spell that for me.

“K.P. S-h-a-r-l-i-e, D-o-n-a-l-d-s-o-n.

“Det. You know her date of birth?

“K.P. I know she’s 32, she be turning 33 on August 8th.

“Det. That’s your girlfriend?

“K.P. Her birthday’s August 8th, yeah.

“Det. Okay. So, if you’re not living with her, who do you live with?

“K.P. If I’m not living with my girl?

“Det. Yeah.

“K.P. That’s where I’m staying the whole time.

“Det. That’s who you always stay with?

“K.P. Yeah.

“Det. At this address on Fair Oaks?

“K.P. Is my face fucked up?

“Det. No, you’re fine.

“K.P. Fuck, I feel like shit.

“Det. No you’re fine dude. Here’s the deal. You’re sitting here, the police brought you in here, you’re in handcuffs or at least a leg shackle.

“K.P. They brought me here to question me about all the robberies?

“Det. Right.

“K.P. About all the fast food robberies, right?

“Det. Right.

“K.P. I already know.

“Det. Okay.

“K.P. And I had something to do with it, but I’m not about to take all this shit like this because right now, I mean I don’t care, like I don’t know the whole thing, but about being blackmailed and stuff, I really don’t know the whole scope of that, but like me, as far as me here, I admit that the first robbery I did was at Subway.

“Det. Uh-huh.

“K.P. And uh --

“Det. Okay, hold on, hold on.

“K.P. I mean, I just saying for you like right now ---

“Det. I know, but there’s [*sic*] rules we have to go by.

“K.P. I know, the *Miranda* Rights.”

At that point, the detective advised defendant of his *Miranda* rights. Defendant asked questions concerning his rights, which the detective answered, and defendant ultimately indicated he understood his rights. In the process of advising defendant of his rights, the detective asked him if he was “high,” and defendant said he smoked marijuana earlier that day. The detective also asked him if he was on any “mental health medication,” and defendant said he took various medications[5] twice a day -- at breakfast and at dinner -- “for depressions, schizophrenia, bipolar.” The last time he had his medication was that morning at breakfast.

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[5] Defendant said he took “Rispah (sp), Sera quill (sp), and Depicote.”

After being advised of his *Miranda* rights, defendant admitted robbing or attempting to rob a Subway and another fast food establishment earlier that day (June 5, 2009) and made various non-specific statements about being forced to rob fast food restaurants every day by two white women.

Prior to trial, defendant moved to suppress his post-arrest statements on the ground he "told the detective that [he] didn't understand the *Miranda* rights." He claimed that when he was asked if he understood his rights he responded "nuh-huh," which meant "no," and asked the trial court to review the videotape of the interview along with the written transcript to confirm that he told the detective he did not understand his *Miranda* rights. After reviewing the videotape, the trial court denied the motion to suppress, finding defendant "clearly knowingly, intelligently and voluntarily waived his rights. He understood them. He was the person that actually brought up his *Miranda* rights, and the Court can certainly consider the Defendant's level of criminal sophistication when the detective says, there are rules we need to go by, and the Defendant said, I know, *Miranda* rights. The officer then clearly, carefully went though the rights, and there is no question in this Court's mind that the Defendant understood these rights, the rights were given appropriately, and he knowingly, intelligently, and voluntarily waived these rights."

During trial, defendant moved to suppress the statements he made before he was advised of his *Miranda* rights on the ground

they were the product of an interrogation. The court denied the motion, finding the detective did not ask defendant any questions; rather defendant started "volunteering things," and the detective stopped him.

We turn first to defendant's claim that under the totality of the circumstances, he did not knowingly, intelligently, and voluntarily waive his *Miranda* rights. Defendant relies on the following circumstances in support of his claim: evidence he was mentally impaired when questioned by law enforcement; the detective impermissibly "soften[ed] him up for further confessions"; and the detective's advisement that defendant would not be appointed an attorney for four days.[6] The People respond that defendant forfeited this claim because he failed to raise any of the circumstances upon which he bases his claim below. The People are correct.

Under Evidence Code section 353, subdivision (a), a judgment can be reversed because of an erroneous admission of evidence only if "[t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the *specific ground* of the objection or motion . . . ." (Italics added.) More particularly, "unless a defendant asserts in the trial court a specific ground for suppression of his or her statements to

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[6] The interview took place on a Friday night. When defendant asked how soon he would be appointed an attorney, the detective responded, "Probably Tuesday at 1:30 is my guess."

police under *Miranda*, that ground is forfeited on appeal, even if the defendant asserted other arguments under the same decision." (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

Here, defendant argued below that he did not knowingly, intelligently, or voluntarily waive his *Miranda* rights because he told the detective he did not understand them. At no point, however, did he raise any of the grounds he asserts on appeal -- that he was mentally impaired when questioned by law enforcement, the detective impermissibly softened him up, or the detective impermissibly or erroneously advised him that he would not be appointed an attorney for four days. Accordingly, defendant forfeited his claim that he did not knowingly, intelligently, or voluntarily waive his *Miranda* rights. (See *People v. Polk*, *supra*, 190 Cal.App.4th at pp. 1194-1195.)

Next we turn to defendant's claim that the trial court erred in failing to suppress statements he made before he was given his *Miranda* warnings. While this claim was preserved for appeal, it fails on the merits. Defendant was asked a series of preliminary questions before he was given his *Miranda* warnings -- his name, date of birth, and where and with whom he lived. Defendant asserts that because the detective "knew there was a female getaway driver, his question about who [defendant] lived with was directed at ascertaining a possible accomplice." Defendant, however, fails to explain, and we are unable to ascertain, how the detective's question reasonably could be construed as calling for a response that would incriminate

defendant. As previously mentioned, "not all questioning of a person in custody constitutes interrogation under *Miranda*." (*People v. Ray, supra*, 13 Cal.4th at p. 338.) "'The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response. [Citations.]" (*People v. Clark*, *supra*, 5 Cal.4th at p. 985.)

Defendant further asserts that under the circumstances the detective's statement, "Here's the deal," was intended to be interpreted as "what's the deal" and was taken as such. Defendant's assertion is not supported in the record. When considered in context, it is clear the detective was responding to defendant's concern regarding his physical condition, and defendant's subsequent statements concerning "all the robberies" and his involvement in the same were voluntary. (See *People v. Thornton, supra,* 41 Cal.4th at pp. 432-433; *People v. Clark, supra,* 5 Cal.4th at p. 985.) "Nothing in the substance or tone of [the detective's preliminary] inquiries was reasonably likely to elicit information that defendant did not otherwise intend to freely provide." (*People v. Ray*, *supra*, 13 Cal.4th at p. 338.)

This case is unlike *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), relied upon by defendant. There, prior to advising the defendant of his *Miranda* rights, an officer "engaged defendant in a half-hour unrecorded discussion" concerning "unrelated past events and former acquaintances and, finally, the victim." (*Id.* at p. 158.) "Although [the officer]

stated that he did not expect defendant to talk about the offense, [the officer] testified that 'It was my duty to continue the efforts to try to get him to talk. And I was successful in it.'" (*Ibid.*) The court found the officer's pre-*Miranda* questioning improper because "the conversation-warning-interrogation sequence was intended to elicit a confession from the inception of the conversation." (*Id.* at p. 159.)

The instant case differs from *Honeycutt* in that the pre-*Miranda* questioning lasted maybe a minute, as opposed to half an hour, and was limited to defendant's name, date of birth, and where and with whom he lived. As the court acknowledged in *Honeycutt,* "It is clear that routine booking questions and responses as to a defendant's identity and other statistical information do not render involuntary a later waiver of constitutional rights." (20 Cal.3d at p. 159.)

The trial court did not err in admitting defendant's post-arrest statements. In any event, any possible error in admitting defendant's statements was harmless beyond a reasonable doubt. (*People v. Davis* (2009) 46 Cal.4th 539, 598.) The evidence of defendant's guilt was overwhelming as to each and every crime charged. Defendant concedes that counts 3, 6, 9, 11, and 16 were "slam dunks." The modus operandi in each of the 16 robberies and attempted robberies was identical: the perpetrator entered an open business and used a handwritten note demanding money. In five of the robberies and attempted robberies (counts 2, 4, 5, 6, and 15) the "$" symbol was used in

place of the word “money”, and in nine of the robberies and attempted robberies (counts 2, 4, 5, 6, 11, 13, 14, 15, and 16) the note instructed the recipient, “Don’t be stupid,” or words to that effect. In 11 of the robberies or attempted robberies (counts 1, 3, 5, 6, 7, 8, 10, 11, 12, 14, 15) one or more witnesses identified defendant from a photographic lineup as the perpetrator, and in all but two (counts 4 and 13) one or more witnesses identified defendant as the perpetrator at trial.

As defendant correctly observes, “no identifications had been made by anyone in counts 4 and 13 and there was no surveillance evidence in count 4.” Nevertheless, the evidence supporting defendant’s conviction on those counts is overwhelming. The attempted robbery charged in count 4 was committed on the same street as and within an hour of the robbery charged in count 5, and two witnesses identified defendant as the perpetrator in count 5. In both robberies, the perpetrator was described as an African American man, in his twenties, and approximately 5’9”. Both robberies involved the use of a note, and the phrasing in the note used in the attempted robbery charged in count 4 is identical in key respects to that used in the notes employed in many of the other robberies and attempted robberies, including the robbery charged in count 5, namely the note states, “Don’t be stupid,” and uses the “$” symbol in place of the word “money.”

The second degree robbery charged in count 13 was captured on video surveillance, portions of which were shown to the jury.

As in the other robberies, the perpetrator used a note, and like the notes employed in many of the other robberies and attempted robberies, the noted stated, “Don’t be stupid.” Perhaps most significantly, the man who committed the robbery charged in count 13 was wearing a black Mac Dre shirt just like the perpetrator of the robbery charged in count 11, which defendant acknowledges was a “slam dunk.”

On the record before us, we have no trouble concluding that any error in admitting defendant’s post-arrest statements was harmless beyond a reasonable doubt. That the jury deliberated 10 hours does not convince us otherwise where, as here, the case involved 16 separate robberies and attempted robberies and a substantial amount of evidence.

II

The Trial Court Did Not Err In Allowing Defendant To Represent Himself Or In Failing To Appoint Standby Counsel

Defendant next contends the trial court erred in granting his *Faretta*[7] motion and in “proceeding to trial without revoking [his] pro per status.” He also asserts that the trial court’s “[f]ailure to appoint standby counsel at the outset [or] to appoint an attorney during trial or declare a mistrial deprived [him] of his Sixth and Fourteenth Amendment rights to counsel, due process, and a fair trial.” We are not persuaded.

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

“A trial court 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.” (*People v. Lynch* (2010) 50 Cal.4th 693, 721, abrogated in part on other grounds as stated in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.) However, the right of self-representation is not absolute. (*Indiana v. Edwards* (2008) 554 U.S. 164, 171 [171 L.Ed.2d 345, 353] (*Edwards*).) “[A] *Faretta* motion may be denied if the defendant is not competent to represent himself [citation], is disruptive in the courtroom or engages in misconduct outside the courtroom that ‘seriously threatens the core integrity of the trial’ [citations], or the motion is made for purpose of delay [citation].” (*People v. Lynch*, *supra*, 50 Cal.4th at pp. 721-722.)

“When a criminal defendant who has waived his right to counsel and elected to represent himself under *Faretta* . . . seeks, during trial, to revoke that waiver and have counsel appointed, the trial court must exercise its discretion under the totality of the circumstances, considering factors including the defendant’s reasons for seeking to revoke the waiver, and the delay or disruption revocation is likely to cause the court, the jury, and other parties.” (*People v. Lawrence* (2009) 46 Cal.4th 186, 188.) “The trial court possesses much discretion when it comes to [granting or] terminating a defendant’s right to self-representation and the exercise of that discretion ‘will

not be disturbed in the absence of a strong showing of clear abuse.' [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 735.)

On December 11, 2009, prior to trial, defendant advised the trial court that he wished to represent himself. The court provided defendant with the requisite warnings, both orally and in writing, and defendant indicated he understood each of them. Among other things, defendant was orally advised: "If you are disruptive, you're going to be removed from the courtroom. During your trial, if you don't follow all of the rules of etiquette and decorum, you can be removed from the actual courtroom during your trial and an attorney will be brought in to finish the case for you."[8] In ascertaining whether defendant's waiver of counsel was knowing, intelligent, and voluntary, the court stated that it had been advised that defendant "may be on some type of medication." Defendant responded that the only medication he was taking was Tylenol and "a supplemental for the Tylenol for pain." The trial court granted defendant's request to represent himself. Standby counsel was not requested or appointed.

Trial commenced on February 22, 2010. On the seventh day of trial, immediately after the trial court denied defendant's

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[8] In addition, defendant received the following written warning: "If you are disruptive you will be removed from the courtroom and an attorney will be brought in to finish your case."

motion to strike a witness's testimony and dismiss the case because the prosecutor met with witnesses before trial, defendant advised the court that he was "getting a lawyer" because he was not receiving a fair trial. Outside the presence of the jury, the trial court explained that it was not improper for the prosecutor to speak to witnesses prior to trial and denied defendant's request for an attorney as untimely, explaining that "there is no attorney that [*sic*] is prepared to try your case." Defendant responded, "Well, then I'm going to be rude, and I'm not going to follow no laws in the court. So you either give me an attorney or I'm going to just act rude for the whole time, because I know that you're not treating me fair. So I'm not about to just sit here and just listen to you all the time if you're not going to treat me fair in court."

Thereafter, the trial court contacted the Conflict Criminal Defenders Panel and requested the assistant director speak to defendant. She did so and advised defendant that the trial was too advanced to have an attorney step in and represent him. Defendant told her "that he knew that an attorney would come in if he was disruptive" and asked her to tell the court that he intended to "do everything he ha[d] to do to stop the trial," including throw a chair at the judge. Defendant denied stating that he intended to throw anything at anyone. Rather, he told the assistant director that when he waived his right to counsel, he was told "that if there's disruption . . . in the courtroom by me, then it would be that an attorney would be placed in to

finish the case." He then asked the assistant director, "[W]hat do I have [to do] to be, disruptive? Do I have to throw things for everyone to see in court?"

The court advised defendant that it was in his best interest to conduct himself in a professional manner and observed that he had been "making some good points with some of these witnesses." The court credited the assistant director's version of her conversation with defendant and ordered that defendant be "attached" to his chair for the remainder of the trial to insure the safety of those in the courtroom. When the jurors returned, the court advised them that they "must consider only the evidence from the witness stand and . . . not . . . [the] personalities of either attorney or person representing themselves as an attorney."

Thereafter, the trial was delayed on those occasions when defendant refused to come to court and special transport had to be arranged. The proceedings were never conducted in defendant's absence. When defendant refused to come to court on March 16, 2010, the court requested defendant's investigator go to the jail and read defendant a statement from the court advising defendant, among other things, that if he chose not to come to court, the trial would continue in his absence. In doing so, the trial court made the following findings: "The court has observed [defendant] in trial and makes a finding that he does not suffer from any physical or mental problems that render him incapable of representing himself. [Defendant]

understands his role and understands the issues. [¶] The court finds he's engaging in manipulative behavior." The investigator read the court's message to defendant, and defendant returned to court.

On appeal, defendant claims he did not knowingly, intelligently, or voluntarily relinquish his Sixth Amendment right to counsel because his waiver was conditioned upon the false representation that he would be provided with counsel if he was disruptive in court. Defendant misconstrues the court's warning, which plainly stated that he would be provided with counsel *if* he was removed from the courtroom. The court's warning is consistent with case law that provides that "the involuntary exclusion from the courtroom of a defendant who was representing himself, without other defense counsel present," constitutes error. (*People v. Carroll* (1983) 140 Cal.App.3d 135, 142; see also *People v. Soukomlane* (2008) 162 Cal.App.4th 214, 234-235.)

Here, defendant was never excluded from the courtroom. On those occasions when he refused to come to court, the trial was delayed and a special transport was sent to bring him to court. Defendant's suggestion that he was advised that he could unilaterally revoke his waiver of counsel and have counsel appointed at any time during trial simply by being disruptive is not supported by the record, the law, or common sense.

We also reject defendant's assertion that "after *Edwards* a reasonable trial court must make a reasonable inquiry into the

mental health status of a defendant requesting to represent himself or herself." In *Edwards*, *supra*, 554 U.S. at page 178 [171 L.ed.2d at p. 357], the United States Supreme Court held that "the Constitution *permits* States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [*v. United States* (1960) 362 U.S. 402 [4 L.Ed.2d 824]] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves." (Italics added.) As our Supreme Court explained in *People v. Taylor* (2009) 47 Cal.4th 850, 878, "'*Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent.' [Citation.]"

As discussed above, defendant's waiver of counsel was voluntary, knowing, and intelligent, and defendant has never asserted in the trial court or on appeal that he was not competent to stand trial. Thus, the trial court did not err in allowing defendant to represent himself. (*People v. Taylor, supra,* 47 Cal.4th at pp. 866-867 ["In the absence of a separate California test of mental competence for self-representation, the trial court had no higher or different standard to apply to the question. In that circumstance, the court did not err in

relying on federal and state case law equating competence for self-representation with competence to stand trial."]

While this case was pending on appeal, our Supreme Court held that "[c]onsistent with long-established California law, . . . trial courts may deny self-representation in those cases where *Edwards* permits such denial." (*People v. Johnson* (2012) 53 Cal.4th 519, 528.) In deciding whether to exercise their discretion to deny self-representation, trial courts should apply the following standard: "whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Id.* at p. 530.) The court also observed that a trial court need only inquire into the mental competence of a defendant seeking self-representation "if it is considering denying self-representation due to doubts about the defendant's mental competence." (*Ibid.*) The court further cautioned that "[s]elf-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly." (*Id.* at p. 531.)

Assuming without deciding that *Johnson* applies in cases such as this one where the trial court grants a defendant's request to represent himself and the trial court proceedings pre-date *Johnson*, we note that here there is no indication the court considered denying or revoking defendant's self-representation due to doubts about his competence to represent himself. To the contrary, having observed defendant in trial,

the court specifically found that “he does not suffer from any physical or mental problems that render him incapable of representing himself. [He] understands his role and understands the issues.” There is ample support for the trial court’s findings in the record.

Defendant next contends the trial court “abused its discretion and violated [his] right to due process and a fair trial by granting [his] *Faretta* request without appointing standby counsel and by failing to appoint counsel after serious courtroom disruption had occurred and [he] had requested appointment of an attorney to represent him.” In support of his contention, he asserts that “the trial court was on notice before trial regarding the potential for disruption” insofar as it had reviewed the transcript of his post-arrest questioning by law enforcement during which defendant stated he was taking anti-psychotic medications for bipolar disorder, schizophrenia, and depression. Having been so informed, defendant argues the trial court should have made “[an] inquiry on the record into [defendant’s] jail conduct or his potential for disruption.” He further argues that having been informed of defendant’s need for “medication for psychiatric disorders, and observing [his] inability to restrain his conduct during trial,” defendant claims “the trial court further abused its discretion by refusing to appoint counsel or declare a mistrial.” Again, we are not persuaded.

There is no constitutional right to standby counsel. (See *People v. Stanley* (2006) 39 Cal.4th 913, 932-933.) Rather, the decision whether to appoint standby counsel is within the discretion of the trial court. (*Ibid.*) As we shall explain, there was no abuse of discretion here.

Defendant's behavior at the hearing at which he requested to represent himself and waived his right to counsel was impeccable. Having reviewed the transcript of the hearing in its entirety, we discern nothing that would have put the trial court on notice that defendant might be disruptive at trial. He answered each of the court's questions politely. He indicated he understood each of the warnings he was given and made no extraneous or rude comments. When asked what medication he was taking, defendant responded "Tylenol." When the court followed up by asking whether he was taking "any prescriptive medication of any kind," he responded, "Ultram," which he described as "a supplemental for the Tylenol for pain." Even assuming the trial court knew defendant may have had mental health issues, the trial court did not abuse its discretion in failing to inquire into defendant's conduct in jail or in not appointing standby counsel when it granted defendant's request to represent himself given defendant's conduct before the court and his

representation that he was not taking prescription medication of any kind.[9]

Nor did the trial court abuse its discretion in failing to revoke defendant's pro per status and appoint counsel after defendant became disruptive at trial. Defendant's own statements at trial show that his disruptive and rude behavior was a ploy to get the court to appoint counsel or declare a mistrial. As previously discussed, the trial court, which is in the best position to evaluate defendant's behavior and mental state, found that "he does not suffer from any physical or mental problems that render him incapable of representing himself" and that "he's engaging in manipulative behavior." Again, there is ample support for the court's finding in the record, and we have no trouble concluding that the court acted well within its discretion in not appointing standby counsel.

III

The Trial Court Correctly Sentenced Defendant to 16 Months on Each of His Attempted Second Degree Robbery Convictions

Finally, defendant contends, and the People concede, the trial court miscalculated his sentence on the five counts of attempted robbery. More particularly, he asserts that the trial

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[9] Defendant's reliance on references contained in the probation report in support of his assertions that he was not competent to waive his right to counsel and that the trial court erred in not appointing standby counsel is not well taken where there is nothing in the record that indicates the trial court was aware of such information.

court erred in sentencing him to 16 months rather than one year for each conviction because under section 664, attempted second degree robbery is punishable by one-half of the otherwise designated term. According to defendant, the subordinate term for attempted second degree robbery should be calculated using one-third of the three-year middle term for second degree robbery, divided in half pursuant to section 664, and then doubled for the prior strike (1 year/2 = 6 months x 2 = 1 year). As we shall explain, section 664 is inapplicable to convictions for attempted second degree robbery, and the trial court correctly sentenced defendant to a consecutive term of 16 months in state prison on each of his five attempted second degree robbery convictions.

Section 664 provides in pertinent part: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished *where no provision is made by law for the punishment of those attempts*, as follows: [¶] (a) If the crime attempted is punishable by imprisonment in the state prison . . ., the person guilty of the attempt shall be punished by imprisonment in the state prison for one-half the term of imprisonment prescribed upon a conviction of the offense attempted." (Italics added.) As we explained in *People v. Moody* (2002) 96 Cal.App.4th 987, 990, "section 213, subdivision (b) specifically provides for the punishment of attempted second degree robbery, stating: '*Notwithstanding Section 664*, attempted robbery in violation of

paragraph (2) of subdivision (a) [robbery of the second degree] is punishable by imprisonment in the state prison.' (Italics added.) Section 18 further provides that '[e]xcept in cases where a different punishment is prescribed by any law of this state, every offense declared to be a felony, or to be punishable by imprisonment in a state prison, is punishable by imprisonment in any of the state prisons for 16 months, or two or three years . . . .' [¶] Thus, the appropriate triad for . . . attempted second degree robbery offense is . . .: 16 months, two years, or three years."

Here, the trial court correctly sentenced defendant to one-third the middle term of two years (or eight months), doubled to 16 months pursuant to section 667, subdivision (e)(1) on each of his attempted second degree robbery convictions.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

HULL, J.

BUTZ, J.