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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALFREDO SOLORZA,

Defendant and Appellant.

D058184

(Super. Ct. No. RIF132370)

APPEAL from a judgment of the Superior Court of Riverside County, Jean P. Leonard, Judge. Affirmed and remanded with directions.

A jury convicted Jose Alfredo Solorza of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)) and arson (§ 451, subd. (c)). It also found true a special circumstance allegation that the murder was intentional and involved the use of torture. (§ 190.2, subd. (a)(18).) Because Solorza was 15 years old at the time he committed the crime, the court sentenced him to 29 years to life.

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise stated.

Codefendant Anthony Bobadilla pleaded guilty to voluntary manslaughter (§ 192, subd (a)) and other charges, and was sentenced to 23 years in prison in exchange for his truthful testimony against Solorza and Roman Aldana, who were tried together before separate juries. Aldana's jury convicted him of first degree murder (§ 187, subd. (a)), found true a special circumstance allegation of torture (§ 190.2, subd. (a)(18)), and sentenced him to death.

Solorza contends the trial court committed reversible error by (1) denying his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*); and (2) by refusing to instruct the jury with a pinpoint instruction regarding the defense of duress. He also contends (3) the prosecutor committed misconduct during closing argument and (4) the court erroneously calculated his custody credits. The People concede the latter point, and we modify the judgment to award Solorza six additional days of custody credits, but otherwise affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

We rely principally on Solorza's confession to police when he was arrested on September 14, 2006, one month after he had turned fifteen years old. His recorded video interview with police was played for the jury.

Solorza told police that on or about September 8, 2006, he and his cousin, Bobadilla, traveled from Riverside, California to Moreno Valley, California, where they met Solorza's friend, Aldana, who was accompanied by a teenage girl, Kayla Wood. They all needed a place to spend the night; therefore, Solorza took them to an abandoned

duplex where he used to live. Solorza, Aldana and Wood drank a large quantity of vodka and beer, and eventually fell asleep.

The next morning, the same three resumed drinking alcohol. Aldana confided to Solorza that Wood might be pregnant with Aldana's child. Aldana also told Solorza that once, while he was with Wood, Aldana had fired a gun at someone; therefore, Aldana feared Wood might report him to police. Aldana questioned whether he could count on Solorza's support in addressing those problems, and Solorza suggested they could take Wood to a distant place, and knock her out with a pan so that she would not remember her way back to the duplex.

Later that day, while Solorza and Aldana were both having sex with Wood, Solorza urinated on Wood and also partly on Aldana. Solorza described that incident to police, "And then it was like, oh, and then um, I used the restroom and I was like well, you [Aldana] didn't kill her? So I was like fuck it, so I, I pee on her a little bit." When asked why he urinated on Wood, Solorza told police, "Oh, because it, [Aldana] was like oh, he was like, um, he was like oh, my I'm gonna kill her. Oh, whatever, you know I'm about to leave, too." Solorza concluded he had urinated on Wood, "because she was mine."

Aldana became upset that Solorza had urinated on him, and they argued. Aldana hit Solorza in the head, knocking him out momentarily. Solorza dozed off for a few minutes. Aldana was about four years older than Solorza and bigger than him, and had served time at the California Youth Authority, but Solorza challenged him, "fool[,] I ain't scared. You want to do something? (Unintelligible) put me in check you know letting

me know what's going on." At one point, Solorza poked Wood with a screwdriver. Aldana did the same to her. Wood protested and moaned as she lay in a bathtub where they had placed her. Wood hid in a closet, but they found her and returned her to the bathtub. Solorza said that Wood asked "[W]hy [are you] doing this?"

Aldana gave Wood more alcohol to drink as she lay in the bathtub. Solorza and Aldana took turns penetrating Wood's vagina or anus with a bottle. Aldana threw the empty bottle at her, hit her head, and the bottle broke. Both Solorza and Aldana cut her throat with a blade. Aldana continued stabbing her because he wanted to kill her.

Afterwards, Aldana squeezed something on Wood's hair and tried to set it on fire, but she put out the fire. Aldana sprayed some product, and Solorza described the result: "[Aldana] got torching and he went whoosh. And I say, oh, shit. And I did it, too." Aldana told Solorza to set the house on fire, although Wood was still alive. Solorza turned on the water in the bathtub. Wood got out of the bathtub and started walking toward Solorza with a screwdriver. Solorza took the screwdriver from her and "socked her." She fell in the bathtub, which was filling up with water. Aldana tried to light the house on fire, and at first Solorza put it out, telling him that the fire would attract the neighbors' attention and, moreover, since Aldana was homeless, he needed to stay at the duplex. Soon, they both lit mattresses and other items, and left the house while it was on fire. Solorza said he and Bobadilla returned to Riverside by bus.

Before the incident, at Aldana's invitation, Solorza had searched Aldana's father's belongings housed in a shed, and found a gun, which Aldana promised to give Solorza. Solorza wanted to sell it to get money, but Aldana kept stalling him. Solorza told police

in the interview, "The only reason[] that, I, all this happened was because um, I don't know because I went back with [Aldana] to go try to get my gun." Solorza added, "I stayed too long and I should a known he was forcing me into something." Solorza said that during the incident at the duplex, he started thinking that Aldana might harm him too. However, when police asked Solorza if Aldana had a gun with him during the incident, Solorza said he was unsure.

During the interview, after Solorza repeated that Aldana had hit him hard during the incident, police expressed doubt that Solorza was scared of Aldana, telling Solorza, "Doesn't sound like you were afraid of him because you're telling him, hey, fuck this. I'm not doing that. You know what I mean? It doesn't, you're not afraid of the guy. I don't know why you even suggest it. As far as, I mean, you're trying to suggest that, that you're not as, you're not responsible for this. And that's not true, you're responsible." Aldana conceded, "Yeah, I'm responsible. I'm responsible. I could have, you know, you know run out and if [Aldana] find me, you know . . . ."

Police asked Solorza how long the incident lasted from the time they started cutting Wood's hair until they left the duplex, and he said between thirty and forty-five minutes. Police also questioned Solorza, "If I asked you if you thought [there] was torture, what would your answer be?" Solorza responded in apparent reference to photos police had shown him, "Just by looking at her, yes." During a break in the interview, a detective escorted Solorza to the restroom. Solorza asked him, " 'What is it I did?' " The detective told him the crime was murder. Solorza said, " 'No, what's the number?' " The detective said, "[Penal Code, section] 187." Solorza repeated, "187," paused and said,

" 'That's cool.' "

Solorza testified at trial in accord with his police interview on the material issues of his involvement in the murder and arson, his argument with Aldana in which Aldana knocked him out, and how much he and Bobadilla feared Aldana during the incident. Solorza testified that Bobadilla's recollection of the incident likely was better because Bobadilla had not drunk alcohol during that time.

#### *Bobadilla's Testimony*

Bobadilla confirmed that he did not drink alcohol or consume drugs while at the duplex. When counsel asked him on cross-examination if therefore he was "essentially very clearheaded" on the day of the incident, Bobadilla responded, "A little bit. I was tired." He testified that on that next day, Solorza woke him up, called him to the bathroom, and said, " 'Watch this,' " and immediately slit Wood's throat with something like a razor blade. Bobadilla became afraid, and left the bathroom and started pacing.

Aldana and Solorza got into an argument, and Solorza held a blade to Aldana's throat. Aldana told Bobadilla to check on Wood. Bobadilla reported that she had moved. Aldana and Solorza searched for her, and found her in a closet. Solorza told her, " 'Come here, bitch.' " As Solorza was stabbing Wood, Bobadilla heard him tell her, " 'You're gonna die in seven days.' "

Bobadilla was scared for his life and for Solorza because of Aldana. Bobadilla testified he did not leave the duplex after Solorza had slit Wood's throat because "[Solorza] told me [Aldana] was gonna kill us, and I couldn't leave my cousin behind. I mean, I didn't want to run out and leave my cousin here because he would have got

killed." At one point, Aldana called Bobadilla, grabbed him by the arm, and forced him to watch Solorza stab Wood with a screw driver. Aldana threatened to harm Bobadilla if he did not also stab Wood. Aldana handed Bobadilla a tool, and Solorza indicated it was Bobadilla's turn to stab Wood, but Bobadilla refused. Aldana told Bobadilla to throw a toaster at Wood, and Bobadilla complied. Aldana ordered Bobadilla to punch Wood. Bobadilla started questioning Aldana why he should do so, but he saw Aldana reaching for what Bobadilla thought was a weapon; therefore, Bobadilla punched Wood. Bobadilla did not see Aldana punch, stab, cut or restrain Wood; rather, he saw only Solorza do those things.

Solorza used a lighter and hairspray to set a T-shirt on fire and said, " 'We need to hide the evidence so let's burn the house down.' " Solorza also said he was trying to burn Wood's face. Bobadilla decided to leave, and he and Aldana went to a swap meet. According to Bobadilla, Solorza said he would stay behind, kill Wood, and "finish the job." About fifteen to twenty minutes later, Solorza met them at the swap meet. Solorza told them he had burned Wood and drowned her.

The medical examiner who conducted the autopsy determined the cause of Wood's death was 133 sharp-force injuries she received on different parts of her body. Some injuries indicated Wood had struggled with her assailants.

*Solorza's Early Motions Under People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)

On October 3, 2008, Solorza brought his first *Marsden* motion before Judge Paul Zellerbach, explaining that over a year earlier he had hit his appointed attorney in court, and therefore he did not think defense counsel could adequately represent him. The court

pointed out that after that incident, Solorza had apologized and defense counsel had accepted his apology. The court recalled it had appointed separate counsel to assist Solorza to independently determine whether defense counsel should be replaced, and both Solorza and the appointed attorney had agreed defense counsel would continue representing Solorza. The court pointed out defense counsel was one of the best attorneys around, and saw no reason to replace him. Accordingly, the court denied the motion.

On December 18, 2009, Solorza brought a second *Marsden* motion before Judge Zellerbach, alleging defense counsel was not sharing police reports and other documents with him, and he again brought up the incident in which he had assaulted defense counsel. Defense counsel promised to produce most of the documents Solorza sought. The court noted it had addressed the assault incident in the past and it denied the motion.

#### *Solorza's First Faretta Motion*

At a January 15, 2010 pretrial hearing, Judge Zellerbach postponed the trial date from January 25 to February 16, 2010. Defense counsel told the court Solorza might seek to represent himself at trial: "[T]his morning Mr. Solorza asked me for the paperwork to proceed pro per status [*sic*]. I indicated I wanted him to think about that, read that paperwork. He is going to take that back with him. He is asking if he can come back this coming Tuesday, the 19th, so that he can let me know if he still wants to go pro per, then address the Court, and the Court talk to him; or if he changed his mind."

The court set a January 19, 2010 hearing date to address any possible motion for self-representation, but notified Solorza he would not get a continuance: "[I]f you want

to represent yourself, you know, ultimately I will decide that issue. But let's assume that I agree that you should be allowed to represent yourself, we are still going to proceed to trial on the dates we set today. I am not going to agree to continue your case simply to allow you to represent yourself in this matter. [¶] So you would have to be prepared to proceed to trial, really, with the motions that [defense counsel] has filed, or any additional motions that you would want to file on your own before [February 16, 2010]. And you would have to be ready to begin jury selection on [February 22, 2010]. So you should keep that in mind as well in determining whether or not you want to represent yourself."

At the scheduled hearing, the court denied Solorza's motion to dismiss his appointed attorney under *Marsden*. Solorza had complained his counsel had failed to provide him certain documents for his review. The court asked Solorza how much time he needed for that review, and Solorza said "[m]ore than a week." The court granted him more than two weeks for that review, and scheduled another hearing for February 4, 2010 to discuss Solorza's progress with the document review. The court pointed out to Solorza a challenge in his case that no change of counsel could overcome: "And the problem is, whether it's you representing yourself or [defense counsel] representing you, or some other attorney representing you, they have to deal with [the confession] you gave law enforcement. They can't—no one can change that. And so you have to try and work with that."

In what he regards as a *Faretta* motion, Solorza stated, "That's why I was *considering* going pro per, because then I can have all the things I need and stuff."

(Italics added.) The Court responded, "Well, I indicated what I would do before I allow you to go pro per and that is I would appoint a psychologist to evaluate you, because I am not confident that you are capable—I am not—[.]" Accordingly, the court postponed further consideration of that issue pending completion of a psychologist's evaluation of Solorza and his preparation of a confidential report to help the court determine whether Solorza was competent and qualified to represent himself at trial. The court clarified the issue was not Solorza's competence to stand trial (§ 1368); rather, the court sought a psychologist's expert opinion under Evidence Code section 730.

*Solorza's Second Faretta Motion*

On February 11, 2010, the case was transferred to Judge Leonard, who heard Solorza's renewed *Marsden* motion. She asked Solorza why he wanted to replace his attorney and Solorza said he was bothered because his attorney was talking to the District Attorney in court that day. Solorza added, "And I wanted to know, too, like who could explain to me how can they set trial dates, then set dates in between them? And then what if those aren't ready or prepared, or whatever dates they are, and then coming up to the trial date, those days were in between them aren't, you know, like—you know what I mean—[.]" Solorza clarified, "How are they able to have court days in between your trial dates if your trial date was already set? You know what I mean? Like, I'm noticing they were saying court dates, like, in between those. What are those about? The court responded, "Well that's—that concerns me that you asked that question. Because what we just did was a very simple kind of procedure, basically setting trial dates and setting court dates. Because you don't just go to trial. You have motions heard. You have to

talk to the judge about scheduling. You have to talk to the judge about questions that are going to be asked the jury." Solorza also said he had not received some documents from his attorney. The court denied the *Marsden* motion, stating, "there's nothing that I've heard you say or have heard from [defense counsel] or read that makes me think that [he] is not doing an excellent job for you."

Defense counsel briefed Judge Leonard regarding Solorza's *Faretta* motion: "We had set today's date . . . to come before Judge Zellerbach on the issue of whether or not Mr. Solorza would be allowed to go pro per if that's, in fact, what he still wants to do, and after communicating with him this afternoon, he would prefer that." The court denied the *Faretta* motion, stating, "Now my concern is this, Mr. Solorza: First of all, based on the report from [the psychologist], I do believe that you are competent to stand trial within the meaning of Penal Code section 1368. . . . ¶] Now, as far as you representing yourself, I do not think you are capable of representing yourself. I do think that you have some issues as far as your educational background. I am concerned that you cannot read the documents that you need to read, the cases you need to read. I am concerned about your ability to understand abstract concepts. I am concerned about your ability to focus, to question jurors. You're very young. You're only 18. You have little or no life experience. And I do think that representing yourself would be a huge mistake. . . . This is your life we have to consider here."

The court noted that for purposes of avoiding a dismissal of Solorza's case under section 1382, his time waiver would expire on February 26, 2010. However, the court

did not anticipate reaching that deadline because it planned to start motion hearings on February 22, 2010.

*Solorza's Third Faretta Motion*

On February 22, 2010, the court denied Solorza's renewed *Faretta* motion, noting that the psychologist had stated Solorza's knowledge of the law was "very, very superficial." The court explained to Solorza, "[Y]ou are not able to grasp the nuances or the abstract understanding—issues regarding the law. You are in no way able to go up against the experienced lawyers in this case. The court cannot assist you and would not assist you because that would not be fair, wouldn't be right . . . . ¶ I have considered your education, your familiarity with the legal process. I have read a psychiatric or psychological examination . . . . I have advised you that you have the right to counsel at no cost."

The court also noted the *Faretta* motion likely was untimely: "Probably I could even have denied your motion as untimely because we are [o]n the eve of trial now. But I have not done that yet because I wanted to hear your point. I had never heard your point before. And I—as I said, I could have denied your request outright. But I don't think that would have been fair because you needed a chance to talk to me and you needed a chance to tell me your side of the story. ¶ I've explored the nature of the proceedings and the outcome with you, and I don't think you understand either. I've explained to you that your right to self-representation can be terminated for disruptive behavior. I've also advised you that you may not claim inadequate counsel on appeal

after representing yourself at trial. Do you understand that?" Solorza indicated he understood.

Solorza renewed his *Marsden* motion at that hearing, stating he was not ready for trial, although his attorney was ready. The court denied that motion, stating, "Based on what I've seen and heard so far, I do think [defense counsel] is very effective counsel. . . . And we are, again, on the eve of trial. And it appears that, although there are some disagreements between . . . the attorney and [Solorza], I don't see that there's enough to relieve him of his duties at this point."

#### *Solorza's Last Marsden Motion*

On March 8, 2010, the day trial was scheduled to start, Solorza informed the court he sought to replace appointed counsel with new, hired counsel. Solorza said he had not agreed to start trial because he was not ready; therefore, he needed a continuance. The court denied both Solorza's *Marsden* motion and his request for a continuance as untimely. Jury selection started that day.

## DISCUSSION

### I.

Solorza contends his convictions must be reversed because the court denied his first *Faretta* motion, despite it being unequivocal; and, it also was timely because he brought it seven weeks before jury selection and eight weeks before opening statements. He alternatively argues that if the motion was untimely, the trial court abused its discretion when it failed to address the factors outlined in *People v. Windham* (1977) 19 Cal.3d 121 (*Windham*).

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself." (*People v. Marshall* (1997) 15 Cal.4th 1, 20 (*Marshall*), citing *Faretta, supra*, 422 U.S. at p. 819.) The right of self-representation is not self-executing. Rather, the defendant must make a knowing, voluntary and unequivocal assertion of the right of self-representation "within a reasonable time prior to the commencement of trial." (*Windham, supra*, 19 Cal.3d at p. 128; *People v. Marshall, supra*, 15 Cal.4th at pp. 20-21.)

"The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." (*Marshall, supra*, 15 Cal.4th at p. 23.) "Equivocation of the right of self-representation may occur where the defendant tries to manipulate the proceedings by switching between requests for counsel and for self-representation, or where such actions are the product of whim or frustration." (*People v. Lewis* (2006) 39 Cal.4th 970, 1002.)

"A reviewing court, in determining whether a motion for self-representation is unequivocal, is not bound by the trial court's apparent understanding that the defendant was making a motion for self-representation." (*People v. Barnett* (1988) 17 Cal.4th 1044, 1087.)

In California, there is no bright-line test for determining the timeliness of a *Faretta* motion (*People v. Clark* (1992) 3 Cal.4th 41, 99); rather, the "reasonable time" requirement is to ensure that a defendant does not "misuse the *Faretta* mandate as a means to unjustifiably delay a scheduled trial or to obstruct the orderly administration of justice. . . . When the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted. When, on the other hand, a defendant merely seeks to delay the orderly processes of justice, a trial court is not required to grant a request for self-representation without any ability to test the request by a reasonable standard." (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5; *People v. Burton* (1989) 48 Cal.3d 843, 852-853 (*Burton*).)

An untimely *Faretta* motion is addressed to the trial court's discretion. In exercising its discretion, the court should consider certain criteria, including "the quality of counsel's representation . . . 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." (*Windham, supra*, 19 Cal.3d at p. 128; *People v. Jenkins* (2000) 22 Cal.4th 900, 959; *People v. Marshall* (1996) 13 Cal.4th 799, 827.) The erroneous denial of a timely *Faretta* request is reversible per se. (*People v. Butler* (2009) 47 Cal.4th 814, 824.) An

erroneous denial of an untimely *Faretta* motion, however, is reviewed under the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Nicholson* (1994) 24 Cal.App.4th 584.)

In *People v. Lynch* (2010) 50 Cal.4th 693 (*Lynch*), overruled on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 636–643, the California Supreme Court held that a *Faretta* motion filed two weeks before trial was untimely. (*Lynch*, at pp. 719, 726.) The court held: "[A] trial court may consider the totality of the circumstances in determining whether a defendant's pretrial motion for self-representation is timely. Thus, a trial court properly considers 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.) A trial court need not explicitly rely on the *Windham* factors, but may do so implicitly. (*People v. Marshall, supra*, 13 Cal.4th at p. 828.)

"[T]imeliness 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 fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent. Similarly, the defendant's pretrial delays, in conjunction with a motion for continuance for the purpose of self-representation, would be strong evidence of a purpose to delay. [Citation.] In

most of the cases finding a motion timely as a matter of law, no continuance would have been necessary." (*Burton, supra*, 48 Cal.3d at p. 854.) "Even when the trial court does not state it is denying a *Faretta* motion on the ground of untimeliness, we independently review the record to determine whether the motion would properly have been denied on this ground." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 433, fn. 15.)

*Solorza's Faretta Motion was Not Unequivocal*

Solorza claims that on January 15, 2010, he made a *Faretta* motion that was unequivocal, and that the trial court improperly relied on "irrelevant criteria" like Solorza's lack of education, training in the law, and life experience.

We disagree. On January 15, 2010, Solorza did not formally make a *Faretta* motion. Rather, defense counsel said Solorza had requested documentation regarding such a motion, and would communicate his decision to defense counsel on January 19, 2010. Defense counsel merely informed the court a request might be forthcoming. On January 19, 2010, Solorza still did not make an unequivocal *Faretta* motion. After the court denied his *Marsden* motion, Solorza limited himself to saying, "I was *considering* going pro per." (Italics added.) This comment appears to be Solorza's rash reaction, borne out of frustration because minutes earlier the court had rejected his *Marsden* motion. In any event, Solorza accepted the trial court's decision to appoint a psychologist to evaluate Solorza before ruling on any *Faretta* motion. It was not until February 11, 2010 that defense counsel, on Solorza's behalf, articulated an unequivocal *Faretta* motion. But by then, the request was untimely, as we discuss below. Therefore, we need not address the trial court's comments regarding Solorza's inadequate education. "Even

though the trial court denied the request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling." (*People v. Dent* (2003) 30 Cal.4th 213, 218.)

*Solorza's Faretta Motion was Not Timely*

As noted, Solorza's first unequivocal *Faretta* motion was made on February 11, 2010, less than two weeks before the start of jury selection. By this time, the psychologist had evaluated Solorza. The trial court addressed the merits of the *Faretta* motion and denied it. Judge Leonard stated that she could have denied the motion on the ground it was untimely, but she declined to do so because she had wanted to hear Solorza's point of view.

Solorza said he needed a continuance at the January 19, 2010 hearing. He sought another continuance as late as February 22, 2010, saying he still was not ready for trial, despite his attorney being ready. He claimed he wanted to delay the trial partly to improve his knowledge of the law. But although the court did not inquire regarding the anticipated length of the continuance he sought, we can infer he would have needed a lengthy time because he showed he did not understand a simple matter like the court's ability to schedule pretrial motions. Case law makes clear the request for a continuance that accompanies a *Faretta* motion is strong evidence that the defendant has a purpose to delay the trial. (*Burton, supra*, 48 Cal.3d at p. 854.)

Other factors weighing against granting Solorza's *Faretta* motion include that when he made the motion, over three years had passed since the crime was committed. Despite having previous opportunities to raise the motion, including at the preliminary

hearing in April 2008 and his previous *Marsden* motions, Solorza had not previously sought to represent himself. In these circumstances, we conclude a trial delay would have been disruptive to the witnesses and others, and was not reasonably justified.

Further, the court noted Solorza's appointed counsel was doing an excellent job. This case involved complex issues, including the possibility of conflicts of interest among the three defendants, one of whom pleaded guilty in exchange for his testimony against the other two. Two juries were chosen, one each for Solorza and Aldana. The charges involved murder with a special circumstance allegation regarding torture, and a separate charge of arson. Solorza's defense was that he was placed under duress from codefendant Aldana's conduct. Experts at trial included the coroner who had performed the autopsy. Finally, we note that Solorza was 18 years old at the time of trial, and had been incarcerated since he was 15 years old. He did not show he was minimally capable of handling his own defense in this complex trial. In light of the above complicating factors, we conclude that the trial court did not abuse its discretion in denying the *Faretta* motion as untimely.

"It is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1051-1052.) Here, the evidence against Solorza was overwhelming. He confessed to participating in the murder and arson, and detailed his actions, which he admitted involved torture. Solorza urinated on Wood, knowing she would soon be killed. He slit her throat. He and Aldana stabbed her, inserted a bottle in her vagina and anus, and set her on fire. Solorza ignored her plea of, "Why are you doing

this to me?" When she tried to escape into a closet, he and Aldana found her and returned her to the tub. Solorza hit her when she tried to defend herself. In his police interview, he also accepted responsibility for his role in the crimes. He undermined the duress defense by saying he could have run out and not participated in the crimes. Solorza also testified in accord with his confession.

Bobadilla's testimony showed Solorza was aware of what he was doing and was deliberate about his actions. Solorza woke up Bobadilla for him to witness his act of murder. Bobadilla said of Solorza's and Aldana's actions, "[I]t was like they were inflicting torture." During the incident, Solorza held a blade to Aldana's throat, thus further undermining Solorza's claim of duress. At the end of the incident, Solorza decided to stay behind and "finish the job" by burning Wood's face and drowning her. A detective testified Solorza specifically asked what his crime was, and when he was told the specific statute he had violated, he replied, "That's cool." Therefore, we conclude that any error in denying Solorza's motion for a continuance for him to prepare to represent himself at trial was harmless beyond a reasonable doubt under the more stringent standard set forth in *Chapman v. California* (1967) 386 U.S. 18.

## II.

Solorza contends the court committed reversible error by declining to instruct the jury with his pinpoint instruction regarding duress, thus violating his federal due process rights.

The court instructed the jury with a modified version of CALCRIM No. 3402 regarding duress: "The defendant is not guilty of Arson as alleged in Count 2 if he acted

under duress. The defendant acted under duress if, because of threat or menace, he believed that his or someone else's life would be in immediate danger if he refused a demand or request to commit the crime. The demand or request may have been express or implied. [¶] The defendant's belief that his or someone else's life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of Arson. This instruction does not apply to the crime of murder as alleged in Count 1."

Solorza's proposed pinpoint instruction would have eliminated the last sentence in the above instruction, replacing it with this sentence: "However, evidence of duress may be relevant to determining whether the defendant acted with the required mental state for murder." The court denied Solorza's proposed pinpoint instruction, but it permitted defense counsel to argue to the jury that duress may be relevant to a determination of mental intent necessary for murder, ruling: "[I]t is not appropriate to give [CALCRIM No. 3402] regarding the mental state necessary to form the intent as to the special circumstance—because the special circumstance is really tied to the murder. [¶] . . . it is the special circumstance itself which makes the murder a capital offense, not a crime of

torture. And so I think I've made my ruling on that. Although I do agree that you can certainly argue that point to the jury. And we'll probably get a [jury] question."

But following a break in the proceedings, defense counsel explained he had been mistaken regarding his proposed modification of CALCRIM No. 3402:

"[Defense counsel:] Actually, Your Honor, I don't know what I was thinking. Let me see if I can make this easy on us all. We agreed duress is a defense to arson. And I did a modification and I gave that to your clerk. She made the changes, and it was correct. Then I started talking to the Court about allowing me to argue great bodily harm, and *I was not asking the court to modify any of the instructions*, and somehow—I must be tired. It's Friday or something—*I modified the arson instruction which should not have been modified*.

"[Prosecutor:] The duress instruction?

"[Clerk:] The duress instruction.

"[Defense counsel:] The duress instruction for arson. So I'm not asking the Court to insert any language about great bodily harm in any instruction. I'm just letting everybody know that it's my intent to argue that." (Italics added.)

Preliminarily, we may treat this contention as forfeited, because Solorza withdrew his proposed pinpoint instruction. At any rate, his claim also fails on the merits. In *People v. Anderson* (2002) 28 Cal.4th 767, the California Supreme Court interpreted section 26 and held that "duress is not a defense to any form of murder." (*Anderson, supra*, at p. 780.) Therefore, the court correctly instructed the jury with CALCRIM No. 3402 that although duress was applicable to the charge of arson, it was not a defense to

the murder charge. Solorza's proposed pinpoint instruction contradicted the law by stating "duress may be relevant to determining whether the defendant acted with the required mental state for murder."

We conclude that even if the court had committed instructional error, there was no prejudice to Solorza. To the contrary, he arguably benefitted from being able to argue to the jury regarding duress, despite the clear law that duress is not a defense to murder. In any event, the jury convicted him of arson, notwithstanding the availability of the defense of duress for that charge. Therefore, it is unlikely he would have received a more favorable result on the murder charge if the court had instructed with his proposed pinpoint instruction. (Accord, *People v. Coffman* (2004) 34 Cal.4th 1, 99 and fn. 31.) Further, as noted, the evidence against Solorza was overwhelming, and any error would have been harmless beyond a reasonable doubt.

### III.

Solorza contends the prosecutor committed misconduct during his closing argument by refuting defense counsel's closing argument to the jury about the law regarding duress.

During defense counsel's closing argument, he had argued that Solorza and Bobadilla were afraid of Aldana: "[Solorza] said [Aldana] kept getting mad at him because he wasn't doing it right. [Solorza] would do it a little bit. He'd do it on—cut [Wood] on her leg, and [Aldana] would get mad. [Solorza] said they would argue the whole time. . . . [Bobadilla] said that too. . . . [¶] Throughout [Solorza's] interview he kept telling the officers, 'I just wanted to leave. I just wanted to get out of there.' That's

what [Bobadilla] was saying. [']I just wanted to leave.['] But they were so afraid, these 15-year-old boys, of this 19-year old man [Aldana], that they wouldn't leave. And they didn't leave. They even went so far as to throw a toaster and hurt [Wood]. [¶] They acted under fear. Fear is a powerful motivator. Okay? That's what's happening here. [Aldana] is using fear to get these two boys to do what he wants them to do. And [Solorza] says, you know, [Aldana] was doing a lot of it too. He's cutting, throwing the bottle at [Wood], he's stabbing her."

The prosecutor refuted that claim in his closing argument: "[Defense counsel] spent a lot of time up here telling you that you should consider duress in deciding . . . whether the defendant is guilty of murder. But [CALCRIM No. 3402 states:] 'The defendant is not guilty of arson as alleged in Count 2 if he acted under duress.' 'Arson.' You notice what's not in there? Murder, the special circumstance of torture. [¶] And then it goes a step further because at the end of that instruction it says, 'this instruction does not apply to the crime of murder as alleged in Count 1.' So even if that story that the defendant took that witness stand and told you were true, even if you threw out everything that he said to the police ahead [*sic*] or in September of 2006, everything his cousin testified to, everything that his cousin told the police, and took his testimony, duress would not apply to murder."

Defense counsel objected to the prosecutor's argument on the ground it misstated the law, but the trial court overruled the objection. The court asked defense counsel what relief he sought, and he replied, "I would have loved it if the Court would have instructed initially. . . . If the Court does instruct the jurors they can use circumstantial evidence of

duress as it applies to somebody's intent, I think that's the law. And, I mean, obviously you allowed me to argue it so it has to be correct. It does run a risk of highlighting an area of my argument, but that was pretty much my entire argument."

The trial court again declined to instruct the jury regarding duress as defense counsel sought, telling him, "You explained how [the jurors] can use the duress in their deliberations. And, obviously, [the prosecutor] disagrees, and he made his argument, and now [the jurors are] gonna have to decide what they're gonna do."

Solorza unsuccessfully moved for a mistrial on the same grounds: that the prosecutor in closing argument had misrepresented defense counsel's argument regarding duress. Outside the presence of the jury, the prosecutor contended he had not committed misconduct. Defense counsel agreed and disavowed any claim of prosecutorial misconduct, telling the court, "[The prosecutor] did nothing wrong. There's no prosecutorial misconduct. [The prosecutor] argued to the jury based on the jury instructions that the Court ruled it was gonna give. [The prosecutor] did nothing wrong. My issue is the way the Court ruled on how it was gonna instruct on duress as it relates to murder and whether it's a defense—that, in fact, is not a defense to murder, but it's something the Court would allow me to argue to the jury. I feel like I've had my legs cut out from underneath because so much of what I do with the argument during closing argument is they have to believe me."

"Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.] To establish prosecutorial misconduct, it is not necessary to show the prosecutor acted in bad faith, but it is

necessary to show the right to a fair trial was prejudiced. [Citation.] If the defendant fails to object to the asserted misconduct and does not request an instruction or admonition to lessen any possible prejudice, then the asserted objection is thereby waived." (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36.)

Solorza did not object on the specific ground of prosecutorial misconduct, and in fact disavowed any such claim. Thus, the contention is arguably forfeited. Further, the relief he sought was instruction of the jury with the same erroneous and confusing instruction regarding duress, which we concluded the court properly declined to give. Like defense counsel did at trial, we conclude the prosecutor did not commit misconduct by correctly pointing out that duress is not a defense to murder under California law.

#### IV.

Solorza contends he is entitled to six additional days of custody credits because the start date for calculating his custody credits was his September 14, 2006 arrest date. By contrast, the court had adopted a later date based on the probation office's view that when Solorza was arrested, he had been "subject to arrest" on a bench warrant for an unrelated matter, which was not dismissed until September 20, 2006. Relying on *In re Marquez* (2003) 30 Cal.4th 14, 20, the People concede the point, and we agree that the operative date for calculating Solorza's custody credits was his arrest date. Further, because the charges against Solorza in the unrelated matter were dismissed, there was no possibility of him getting a windfall in the form of duplicate credit. (*Id.* at p. 23.)

DISPOSITION

The matter is remanded and the superior court is directed to amend the abstract of judgment to grant Solorza six additional days of custody credits and forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

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O'ROURKE, J.

WE CONCUR:

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McCONNELL, P. J.

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BENKE, J.