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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONIA DIXON ESTEEM,

Defendant and Appellant.

D060321

(Super. Ct. No. RIF127068)

APPEAL from a judgment of the Superior Court of Riverside County, Janice M. McIntyre, Judge. Affirmed.

INTRODUCTION

In November 2008, in the guilt phase of the trial proceedings in this case, a Riverside County jury convicted Leonia Dixon Esteem, who was represented by counsel, of the attempted premeditated murder of her former boyfriend, Mitchell Andrews (count 1: Pen. Code, §§ 187, subd. (a), 664 (undesigned statutory references will be to the Penal Code)); and, as to count 1, found true allegations that she personally and intentionally discharged a firearm causing great bodily injury (§§ 12022.53, subd. (d),

1192.7, subd. (c)(8)) and personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e), 1192.7, subd. (c)(8)). The jury also convicted Esteem of assaulting Andrews with a firearm (count 2: § 245, subd. (a)(2)); and found true allegations that, in committing the assault, she personally used a firearm (§§ 12022.5, subd. (a), 1192.7, subd. (c)(8)), a .32-caliber revolver, and personally inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e), 1192.7, subd. (c)(8)).

A. Sanity Phase Mistrial and Retrial

Two days later, during the first sanity phase trial proceeding, the court (Hon. J. Thompson Hanks) declared a mistrial because the jury was unable to reach a verdict. As to count 1, the jury deadlocked 9-3 in favor of finding Esteem was legally sane at the time of her commission of the attempted premeditated murder. As to count 2, the jury deadlocked 10-2 in favor of finding Esteem was legally sane at the time of her commission of the assault with a firearm.

In early September 2009 the court (Hon. Jorge C. Hernandez) granted Esteem's request to represent herself during the sanity phase retrial.

On April 1, 2010—the second day of the sanity phase retrial and the day Esteem realized she could not simply introduce into evidence the report of Dr. Michael E. Kania, a forensic psychologist, but would have to call him as a witness—the court (Hon. Janice M. McIntyre) denied both her request for a continuance and her request for reappointment of counsel on the ground the requests were untimely. The prosecution presented the testimony of the victim, Andrews; Lester Harvey, an investigator with the

Riverside County Sheriff's Department; and Dr. Craig Rath, a clinical and forensic psychologist who opined that, although Esteem suffered from mental illness, she was legally sane at the time she committed the crimes.

1. Retrial jury verdict and sentence

The next day, Esteem rested without presenting evidence. The jury returned a verdict finding Esteem was legally sane at the time she committed the offenses. The court thereafter sentenced Esteem to an indeterminate prison term of life with the possibility of parole, plus 25 years to life.

B. Contention on Appeal

Esteem appeals, contending Judge McIntyre abused her discretion and violated Esteem's federal constitutional right to counsel by denying her request for reappointment of counsel during the second sanity phase jury trial. For reasons we shall explain, we reject this contention and affirm the judgment.

FACTUAL BACKGROUND

A. Sanity Phase Jury Retrial

1. The People's Case

Andrews testified that he had a romantic or dating relationship with Esteem for about five or six years, and they were living together on November 13, 2005. That afternoon, Esteem accused him of seeing another woman. He denied the accusation, they got into an argument in the den of their home, and there was some pushing and shoving.

During the argument, Esteem left the room and returned with a gun, which she fired once at the floor. Andrews jumped up from the reclining chair where he was

watching television. Trying to get out of the house, Andrews walked to the kitchen and turned. Esteem fired the gun at him, hitting him and causing him to slip and fall on the kitchen floor. Esteem followed him from the den to the kitchen and fired the gun a total of four or five times. Esteem said something like, "I know you've been fucking that bitch." In the kitchen, she hit Andrews two or three times with bullets.

Esteem tried to again fire the gun at Andrews, who heard a snap sound, but the gun did not fire. They started fighting on the kitchen floor and he tried to get the gun away from her. The gun slipped out of Esteem's hand as she was preparing to hit him in the head with it. Andrews reached up, grabbed her, and pulled off her wig. He got up and ran to the neighbors' house next door to get help and call the police. Esteem called 911 and reported she had shot her boyfriend. A recording of that call was played for the jurors, each of whom received a copy of the transcript of that call.

Riverside County Sheriff's Deputy Lester Harvey found Andrews lying on his neighbors' porch and observed he had been shot and there was a lot of blood on his body. Deputy Harvey first saw Esteem at the scene after she was detained and seated on the rear seat of a patrol car. Deputy Harvey sat on the front seat of that vehicle and Esteem began talking to him without being asked any questions. Esteem said, "I wanted to hurt [Andrews] but I didn't want to kill him." She asked Deputy Harvey whether Andrews was going to be okay. Deputy Harvey responded that he did not know, but that Andrews was receiving medical treatment.

In a mostly narrative fashion, Esteem told Deputy Harvey that she and Andrews had an argument, he shoved her, and she shoved him back. She said she thought

Andrews had been cheating on her. Deputy Harvey noticed that Esteem's demeanor was very calm and serene, but she became "very, very, very angry" when she was talking about her belief that he was having an affair. Esteem also told Deputy Harvey that she shot Andrews because she was "tired of the bullshit," and she "shot him until there weren't any more bullets."

Andrews was hospitalized for several days. One of the bullets lodged in his back and could not be removed because it was too close to his spine. Another bullet went through his right arm, another lodged near the pinky finger of his left hand, another hit him in his right thigh, and another hit him in his right upper chest.

a. *Expert opinion that Esteem was legally sane*

Dr. Rath testified he was appointed by the court under Evidence Code section 1026 for the purpose of evaluating Esteem. In April 2006, about five months after the shooting, he interviewed Esteem after he reviewed the police reports, the transcript of the 911 call, and statements made by witnesses. Dr. Rath opined that, although Esteem suffered from mental illness, she was legally sane at the time she committed the crime. He opined that Esteem suffered from major depression with psychotic symptoms or features. The term "psychotic features" means "hallucinations, hearing things that aren't there, or delusions." Esteem "seemed to have some paranoia or suspiciousness, which was very depressive in nature." Her mental illness was made worse by her use of alcohol.

Dr. Rath testified that "[m]ost people who are mentally ill are still sane in most situations," and the standard for determining whether a person is legally sane is "does the

person know right from wrong and does the person understand the nature and quality of their acts[?]"

With respect to the first prong of the legal sanity test—that is, whether Esteem knew and understood the nature and quality of her acts at the time of the crime—Dr. Rath opined that, at the time of the crime, Esteem "did understand what she was doing, that she was shooting a human being." He based this opinion on "the totality of the materials [he] reviewed," such as "the nature of [Esteem's] 911 call, statements that were made within the 911 call, a nonpsychotic motivation for what she was doing, meaning her saying that she shot [Andrews] because she had an argument with him," as well as her statement she wanted to hurt him but did not want to kill him.

With respect to the second prong of the legal sanity test—whether Esteem knew right from wrong at the time of the crime—Dr. Rath opined that she was able to, and did, distinguish between right and wrong at that time. He based his opinion on "all the materials [he] reviewed" and his interview of Esteem. The fact that she used the firearm, which was equipped with a safety, in the manner in which it was designed to be used indicated "considerable awareness and planning" and was an indicator she knew the nature and quality of her act. Her statement during her 911 call that she had just shot her boyfriend was significant in that it showed her awareness of what happened, who she shot, and what was going on. Also, her statement during that call that she and Andrews got into a fight showed that "her motive [was] nonpsychotic" and she knew and understood the nature and quality of her act. Dr. Rath also found significant the fact that Esteem asked during her 911 call that an ambulance be sent "pretty soon." This showed

"clear thinking" and "abstract reasoning" that there was a problem and the solution was to call 911 and ask that an ambulance be sent. It showed her understanding that the victim was grievously injured and required immediate medical assistance. Dr. Rath testified that Esteem's statement she wanted to hurt Andrews but not kill him showed clear abstract reasoning, awareness of what was going on, and the lack of psychosis. Esteem's statement to Deputy Harvey that she shot Andrews because she was "tired of the bullshit" was an expression of a "long lingering resentment towards the victim, which provides the motive, which doesn't have anything to do with mental illness." This motive, Dr. Rath opined, was unrelated to mental illness.

Dr. Rath concluded that the totality of the circumstances showed Esteem "was not functioning as a result of a psychosis", and her mental illness "[did] not result in her believing what she did was right or not knowing what she did." Esteem knew the nature and quality of her acts, and she knew the difference between right and wrong.

2. The defense case

Esteem did not cross-examine any of the prosecution's witnesses. Esteem rested without presenting evidence.

DISCUSSION

I. DENIAL OF REQUEST FOR REAPPOINTMENT OF DEFENSE COUNSEL

Esteem contends the court (Judge McIntyre) abused its discretion and violated her federal constitutional right to counsel by denying her request for reappointment of counsel during the second sanity phase jury trial. We reject this contention.

A. *Applicable Legal Principles*

Under the Sixth and Fourteenth Amendments to the United States Constitution, "a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he [or she] can be validly convicted and punished by imprisonment." (*Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*).

In *Faretta*, the United States Supreme court recognized that a criminal defendant also has a right under the Sixth Amendment to conduct his or her own defense without assistance of counsel. (*Faretta, supra*, 422 U.S. at pp. 807, 835-836; *People v. Welch* (1999) 20 Cal.4th 701, 729.) This federal constitutional right to self-representation is not limited to the conduct of a defense during the guilt phase of the trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1364.)

A criminal defendant's Sixth Amendment right to self-representation is not an absolute matter of right in every instance. "A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial." (*People v. Stanley* (2006) 39 Cal.4th 913, 931-932, quoting *People v. Welch, supra*, 20 Cal.4th at p. 729.) However, "[w]hen a [*Faretta*] motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion." (*People v. Bradford, supra*, 15 Cal.4th at p. 1365.)

Although a criminal defendant whose *Faretta* motion for self-representation has been properly granted ultimately may conduct the defense to his or her own detriment, the defendant's choice must be honored. (*Faretta, supra*, 422 U.S. at p. 834; *People v. Bradford, supra*, 15 Cal.4th at p. 1364.) However, "[a] defendant's asserted ineffectiveness at self-representation does not demonstrate an abuse of discretion." (*People v. Lawrence* (2009) 46 Cal.4th 186, 196 (*Lawrence*).)

A criminal defendant who has elected to act in propria persona has no automatic, presumed or even preferential right to appointed counsel. (See *Lawrence, supra*, 46 Cal.4th at p. 188.) The California Supreme Court has explained that, "[w]hen a criminal defendant who has waived his right to counsel and elected to represent himself under *Faretta*[, *supra*, 422 U.S. 806] seeks, during trial, to revoke that waiver and have counsel appointed, the trial court must exercise its discretion under the totality of the circumstances." (*Lawrence*, at p. 188.) In exercising its discretion, the trial court should consider, along with any other relevant circumstances, the defendant's prior history in the substitution of counsel and changing from self-representation to representation by counsel, the reasons for the request, the length and stage of the proceedings, disruption or delay that might result from the granting of the motion, and the likelihood of defendant's effectiveness in defending against the charges by continuing to act as his or her own attorney. (*Id.* at p. 192.) "The standard is whether the court's decision was an abuse of its discretion under the totality of the circumstances [citation], not whether the court correctly listed factors or whether any one factor should have been weighed more heavily in the balance." (*Id.* at p. 196.)

B. *Analysis*

We conclude, under the totality of the circumstances presented in the record, that the court acted well within its legal discretion and did not violate Esteem's federal constitutional right to counsel by denying her untimely request for reappointment of counsel on April 1, 2010, the second day of the sanity phase retrial. The following record establishes that (1) three judges (Judges Hernandez, Luebs, and McIntyre) repeatedly warned Esteem about, and she clearly understood, both her lack of experience in criminal defense and the danger involved in self-representation; (2) Judge Luebs made, and Esteem refused, multiple pretrial offers to reappoint counsel to represent her; and (3) her request for reappointment of counsel on the second day of the sanity phase retrial was untimely.

Specifically, in late November 2008, during the first sanity phase trial, Judge Hanks declared a mistrial because the jury was unable to reach a verdict. About 10 months later, in early September 2009, Judge Hernandez granted Esteem's request to represent herself during the upcoming sanity phase retrial, but only after cautioning her that representing herself was "fraught with peril," she "would be held to the same standard as an attorney," and he was "recommending that [she] not represent herself." Esteem acknowledged that she would be facing an experienced prosecutor, she was not experienced, and she would be held to same standard as an experienced attorney in making pretrial motions, picking a jury, making opening statements, cross-examining witnesses, *subpoenaing witnesses*, making appropriate objections and motions, making final arguments, and discussing jury instructions.

Judge Hernandez asked Esteem whether she understood that, "if she [had] the misfortune of going to trial and losing, [she could not] claim [she] had an incompetent attorney," and Esteem indicated she did. Finding that Esteem was "competent to go forward as her own attorney" and she understood and was giving up her rights under *Faretta, supra*, 422 U.S. 806, Judge Hernandez observed that Esteem "appears to be fairly verbal in her responses, and she appears to understand the Court's inquiry, and is able to answer in a coherent manner."

When Esteem appeared in propria persona at the January 4, 2010 trial readiness conference, the court (Hon. Robert A. Luebs) told her, "[I]t is almost always a bad idea to represent yourself. Have you heard that before?" Esteem replied, "Yes, I have." When Esteem asked about a "motion to dismiss" she had filed, Judge Luebs noted the court file contained a "Notice of Dismissal, Release of Lien on Real Property, Release of Lien of Real Property from Escrow, Affidavit of Individual Assurity, Performance Bond, Payment Bond and Bid Bond, File on Demand." The court informed Esteem that her motion "[did not] make much sense" and it was "not a motion I would entertain or find in a criminal case."

At that same January 4, 2010 hearing, Esteem requested certain medical records from the Robert Pressley Detention Center, and Judge Luebs explained that, "[i]f you want to subpoena the records . . . you have to act like a lawyer." Esteem asked, "How do I subpoena my records?" Judge Luebs replied he could not give her legal advice but indicated she could go to the law library and use a subpoena format, and he was willing

to provide her a lawyer if she was unable to represent herself. He then said he "strongly recommended" that she obtain counsel.

On January 25, 2010—the date set for the retrial—Esteem asked Judge Luebs for a continuance until February 16 because she had not received discovery she claimed she had subpoenaed from the Robert Pressley Detention Center. When Esteem told the court, "My family has no more money for counsel," Judge Luebs informed her he could appoint counsel to represent her at no cost to her. Esteem replied that she understood, but indicated she wanted to represent herself. Noting that Esteem's mental health was at issue in the retrial, Judge Luebs again offered to appoint counsel, stating, "Don't you think it would make much more sense for me to give you a good and competent lawyer to help you?" After suggesting her attorneys had not done a good job, Esteem stated, "I might as well represent myself." Judge Luebs replied that Esteem's last attorney "did a pretty good job because he got . . . the jury to disagree as to whether . . . you were sane or not. That's a pretty good accomplishment." Esteem, however, indicated she was not satisfied and wanted a jury finding she was legally insane at the time of the offense.

Judge Luebs again expressed concern about Esteem's refusal to accept reappointment of counsel, stating, "I'm just troubled that you would think you're in a better position [to put on appropriate psychological testimony of experts] than a lawyer I can appoint for you without any cost to you." Citing her subpoena paperwork regarding the jail records, Judge Luebs candidly told her she was "not getting the job done so far," noting that the paperwork was "not completed appropriately." The court suggested that the jail medical records Esteem was seeking were not relevant to the issue of her state of

mind when she committed the crimes in 2005. The court granted Esteem's request for a continuance and set a new trial date.

On March 2, 2010, Esteem again appeared before Judge Luebs in propria persona and reported she was still seeking production of records. Judge Luebs granted Esteem's request for another continuance of the sanity phase retrial, but commented that, although she seemed to understand the proceedings and was able to communicate clearly, she was "making a foolish decision representing herself."

On March 30, 2010—the day the retrial commenced—the trial judge, Judge McIntyre, reminded Esteem she had the right to testify, but Esteem informed the court she was not going to testify. Judge McIntyre found Esteem's waiver of her right to testify was "knowingly and intelligently and voluntarily made," but asked Esteem to inform the court if she changed her mind.

The next day, April 1—the second day of the retrial—Judge McIntyre again reminded Esteem she had the constitutional right to testify, and Esteem again informed the court of her decision not to testify and that she was "only going to do a closing statement." Judge McIntyre again found Esteem's waiver of her right to testify was knowingly, intelligently, and voluntarily made. Regarding her insanity defense, Esteem told the court she had "doctors' statements" that she was psychotic, schizophrenic, paranoid, and delusional. When the Judge McIntyre asked whether she intended to call any witnesses, Esteem replied, "No, I just have the papers." Judge McIntyre then indicated the papers were inadmissible and told Esteem, "You would need the witnesses." Esteem replied, "Oh, really?" and "Oh, wow." After discussing jury instructions, Esteem

and the prosecutor stated they were ready for the jury. Before the jury entered the courtroom, Esteem requested a continuance in order to present Dr. Kania as a witnesses. The prosecutor objected to the request, and, although Judge McIntyre denied a continuance, stating it was "too late now to recess the trial to allow you to get a witness in here," she told Esteem she would be allowed to bring Dr. Kania in the next morning for the purpose of determining, outside the presence of the jury, whether he could testify as a rebuttal witness. Thereafter, Esteem requested reappointment of counsel, and Judge McIntyre denied the request, stating that "[w]e are at the conclusion of trial" and "it would be too late to ask for an attorney."

The foregoing record establishes that Judges Hernandez, Luebs, and McIntyre all warned Esteem about her lack of experience in courtroom procedures and the presentation of an insanity defense, and about the danger that her decision to represent herself presented. Judge Hernandez told her, and she clearly understood, that she would be held to same standard as an experienced attorney in, among other things, subpoenaing witnesses. The record also shows Judge Luebs made several pretrial offers to reappoint counsel to represent her, which she knowingly and willfully refused; and her inexperience in conducting discovery resulted in continuances of the sanity phase retrial date. Esteem's request for reappointment of counsel on the second day of the sanity phase retrial was untimely, and the granting of that request would have caused additional delay and disruption in the administration of justice. When Judge Hernandez granted her request to represent herself, Esteem acknowledged she understood that if she had the "misfortune of going to trial and losing," she could not claim she had "an incompetent

attorney." Esteem's ineffectiveness at self-representation does not demonstrate an abuse of discretion. (See *Lawrence, supra*, 46 Cal.4th at p. 196.)

Based on the totality of the circumstances, we conclude Judge McIntyre acted well within her legal discretion and did not violate Esteem's federal constitutional right to counsel when she denied Esteem's untimely request for reappointment of counsel. Esteem's reliance on *People v. Elliott* (1977) 70 Cal.App.3d 984 is unavailing as the decision in that case was limited to the circumstances presented therein.

Even if we were to assume the court abused its discretion in denying Esteem's untimely request for reappointment of counsel, we would conclude any such error was harmless because she has failed to meet her burden of showing a reasonable probability she would have obtained a more favorable outcome following the sanity phase retrial in the absence of the assumed error. (See *People v. Elliott, supra*, 70 Cal.App.3d at p. 998, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 & other case authorities.) In her appellant's reply brief, Esteem acknowledges that Dr. Kania, the expert witness she belatedly wanted to call to the stand with the assistance of appointed counsel, "would testify that she was sane at the time of the offenses."

DISPOSITION

The judgment is affirmed.

NARES, Acting P.J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.