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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SHANE M. FITZSIMMONS,

Defendant and Appellant.

D060980

(Super. Ct. No. SCD234587)

APPEAL from a judgment of the Superior Court of San Diego County, Kerry Wells, Judge. Affirmed.

A jury convicted Shane Fitzsimmons of assault with a deadly weapon and by means of force likely to cause great bodily injury (Pen. Code,¹ § 245, subd. (a)(1)) and found true an allegation that he personally used a deadly weapon (§ 1192.7, subd. (c)(23)). The court sentenced Fitzsimmons to prison for three years.

¹ All statutory references are to the Penal Code unless otherwise stated.

Fitzsimmons claims the trial court erroneously denied his right to self-representation under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We affirm the judgment.

BACKGROUND

On August 15, 2011, a hearing was held twelve days before the scheduled preliminary hearing, and the public defender representing Fitzsimmons informed the court Fitzsimmons had sought to replace her, stating: "[Fitzsimmons] has also made some comments relative towards having advisory counsel and representing himself, but he has declined to speak to me at all so it is difficult to determine what exactly he wants to do other than not have me as his attorney." Defense counsel also pointed out Fitzsimmons had been found competent to stand trial, and the court reviewed a psychological evaluation upon which the competency determination was based.

The court responded by holding a hearing to replace the public defender under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Fitzsimmons explained his disagreement with his counsel and requested to represent himself: "And I want pro per for this case. I want to go pro per and have an advisory counsel to defend myself." The court replied: "Well, it doesn't quite work that way. What you need to do though is give me specific reasons why you want [your attorney] replaced." Fitzsimmons stated his understanding of the matter: "It is reasonable to assume that to have [the public defender] displaced [*sic*], I will go pro per and ask for—to be placed in central jail to where I will have at least three days in the law library. . . . [¶] . . . I will have more time to study the case and be able to represent myself."

After the court decided sufficient basis existed to replace the public defender with an alternate public defender, Fitzsimmons stated, "I am requesting judicial counsel. I do not want another representative to help me, assist in my trial case." But the court reiterated: "Mr. Fitzsimmons, it doesn't work that way in California. . . . [W]e don't do advisory counsel under these circumstances." However, Fitzsimmons again requested to be allowed to go pro per. The court denied his request as untimely, but added, "You can bring that up in the future if you deem it to be appropriate."

At the August 26, 2011 preliminary hearing, the alternate public defender represented Fitzsimmons. Following arraignment on that day, Fitzsimmons entered not guilty pleas, and requested continued appointment of the alternate public defender. Trial call was scheduled for October 14, 2011.

At an October 6, 2011 *Marsden* hearing, Fitzsimmons sought to replace his alternate public defender, but the court denied the motion. At this hearing, Fitzsimmons did not renew his request to represent himself.

At a third *Marsden* hearing held on October 19, 2011, the day before trial started, Fitzsimmons told the court, "[W]ithout going pro per[,] I want a representative appointed to my case." After reviewing the record of Fitzsimmons's *Marsden* motions, the court denied the *Marsden* motion, noting, "It does appear to me that there is a general just inclination [for Fitzsimmons] to be unhappy with counsel's representation, and to make these motions." The alternate public defender represented Fitzsimmons during trial.

DISCUSSION

Fitzsimmons contends his conviction must be reversed because the court denied his first *Faretta* request, and therefore his commitment on the complaint was invalid because the error occurred before his preliminary hearing. We disagree.

" 'A criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.] 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 (*Stanley*).

Courts have found requests for self-representation to be equivocal when it is conditioned on a request for co-counsel or advisory counsel. (*Stanley, supra*, 39 Cal.4th 913 at p. 932 ["defendant's request to represent himself was not knowingly and intelligently made in that he did not fully understand or appreciate that the court would be under no further obligation to appoint counsel for him if his *Faretta* motion for self-representation was granted"]; *People v. Marlow* (2004) 34 Cal.4th 131, 147.)

When discerning whether an unequivocal request has been made, the court "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." (*People v. Marshall* (1997) 15 Cal.4th 1, 23.) Courts must draw every inference against supposing that the defendant wishes to waive the right to being represented by appointed counsel. (*Brewer v. Williams* (1977) 430 U.S. 387, 404.)

Fitzsimmons contends, and the People concede, that his first *Faretta* motion was timely, as it was made almost two weeks before the preliminary hearing. We agree. However, we conclude the motion was equivocal. Fitzsimmons requested to represent himself at his first *Marsden* hearing, during which he vacillated between asserting, erroneously, that the only option to being represented by the public defender was self-representation and stating he required assistance from advisory counsel. Specifically, after the court had relieved the public defender, Fitzsimmons made this confusing request: "I am requesting judicial counsel. I do not want another representative to help me, assist in my trial case." He maintained this position even at the third *Marsden* hearing on the eve of trial. The court interpreted this as a request for advisory counsel, denied it, and instead appointed an alternate public defender.

We conclude that the court did not err in so doing. "Here, the trial court correctly told defendant, in essence, that a defendant in a criminal case who elects self-representation is not entitled to the appointment of cocounsel. In other words, as the court made clear, a defendant does not have a right both to be represented by counsel and to participate in the presentation of his own case." (*People v. Marlow, supra*, 34 Cal.4th at p.147.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.