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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CLYDE ABEL BOLTER,

Defendant and Appellant.

D061138

(Super. Ct. No. SCN256997)

APPEAL from a judgment of the Superior Court of San Diego County, Aaron H. Katz and Daniel B. Goldstein, Judges. Affirmed.

A jury convicted Clyde Abel Bolter of forcible rape (Pen. Code,¹ § 261, subd. (a)(2)) and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a)). Bolter was sentenced to a determinate term of seven years in prison.

Bolter appeals contending that the trial court erred in denying his request to represent himself in violation of the Sixth Amendment. We will find the trial court

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

properly found that Bolter had not made a knowing waiver of his right to counsel and correctly denied Bolter's request for self-representation.²

DISCUSSION

A few days before the scheduled trial date, Bolter made a request to represent himself consistent with *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). He filled out an appropriate waiver form and was thereafter questioned by the trial court. After a lengthy discussion during which Bolter made a number of rambling, nonresponsive statements, Bolter ultimately expressed the view he wanted a hearing under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to potentially replace his appointed counsel, or to represent himself and have a "private conflicts counsel," with the closing comment that "I would just like to have the ability to speak to a lawyer before trial."

The judge presiding over this particular hearing (Judge Goldstein) had observed Bolter over a two-year period and had previously suspended criminal proceedings under section 1368 in order to determine Bolter's competency to stand trial. After lengthy discussions with Bolter the court denied his motion for self-representation.

Bolter contends the court wrongly considered his ability to effectively represent himself rather than the question of his ability to competently waive his right to counsel, and therefore contends the trial court improperly denied Bolter his Sixth Amendment right to represent himself at trial.

² The facts of the offenses are not relevant to the issues raised in this appeal. Accordingly, we will omit the traditional statement of facts.

Although the trial court did mention Bolter's competency to effectively represent himself, the court's discussion was focused on Bolter's mental state, his rambling and often conflicting comments, and on the exchange the court had with Bolter wherein Bolter ultimately indicated he wanted an attorney. After reviewing the record we are satisfied that Bolter's request was equivocal and that he did not make a knowing, intelligent waiver of his right to counsel and therefore the court properly denied Bolter's request.

A. Legal Principles

A criminal defendant who makes a timely, unequivocal request, has a Sixth Amendment right to self-representation. (*Faretta, supra*, 422 U.S. 806, 819.) In evaluating a request for self-representation, the trial court may consider whether it is timely, that is whether the request is so close to the commencement of the trial as to cause unreasonable delay and disruption. (*People v. Lynch* (2010) 50 Cal.4th 693, 724; overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610.) Where a request is not timely, the trial court has discretion to deny it. We review such decisions under the abuse of discretion standard. (*People v. Windham* (1977) 19 Cal.3d 121, 128-129.)

The trial court must separately determine if the request is unequivocal and whether the defendant has knowingly waived the Sixth Amendment right to counsel. (*Faretta, supra*, 422 U.S. at p. 835; *People v. Burgener* (2009) 46 Cal.4th 231, 241.)

Even where the trial court's stated reasons are improper, the decision to deny self-representation will be upheld "if the record as a whole establishes defendant's request was properly denied on other grounds." (*People v. Dent* (2003) 30 Cal.4th 213, 218.)

B. Procedural Background

Bolter was first charged in this case on January 22, 2009. On May 29, 2009, following the denial of a *Marsden* motion to replace counsel, Bolter entered a guilty plea.

On February 8, 2010, Bolter withdrew his plea and the case was set for trial. Thereafter the case was continued a number of times, including twice to evaluate Bolter's mental competence. On July 13, 2011, the court found Bolter competent to stand trial and set the trial date for July 26, 2011.

On July 20, 2011, Bolter requested permission to represent himself. The court then conducted a lengthy hearing, and reviewed Bolter's written waiver form.

When the court began to inquire of Bolter about his reasons for wanting to be "proper," Bolter said, in part that his charges kept changing and apparently he thought someone was lying to him. He then commented, apparently about the victim: "I'm here so that I can represent myself. [¶] And she [the victim] went ahead and said she doesn't want to testify to this; she wants to drop the case."

"THE COURT: How do you know that?

"THE DEFENDANT: My Aunt--

"THE COURT: I don't want to ask anything further on that.

"THE DEFENDANT: And the other thing is I wanted to drop it as well. I'm the one who called the police."

The court then inquired about the charges and Bolter's understanding of them. The court also inquired about Bolter's knowledge of the court process and Bolter noted he had been to court many times. The court responded:

"THE COURT: You have been here for quite a long time.

"THE DEFENDANT: You have ripped me from my family. You have destroyed my family's name. [¶] My father is currently in death row. My mother was--I don't know. Some people say it was a police officer that killed her, but others say it was somebody else."

As the discussion continued, the court tried to focus Bolter on the issues about self-representation and not the facts of the case. Bolter continued:

"THE DEFENDANT: I don't have a problem with that.

"THE COURT: Okay. All right.

"THE DEFENDANT: As long as I keep talking the truth, I don't have a problem and I walk. And if somebody wants to assassinate me or murder me because of my opinions then it has to be done. I don't have a problem with that."

The court's efforts continued for some time to focus Bolter on the problems of self-representation for him, particularly since Bolter seemed to have difficulty communicating with others, to which Bolter responded:

"THE DEFENDANT: Well, I have been here in San Diego for a while. And I feel that as a homeless guy going to school and coming back from the military, risking injury, all I have is the truth. [¶] My name as a general contractor is pretty good. I have built my reputation off my name, and because of that I feel that if I speak the truth and nothing but the truth under God, right--that is what this whole thing is about through Jefferson--that I should be able to walk clean as well as a man with integrity. That is all."

When the court inquired about Bolter's psychological issues Bolter said:

"THE DEFENDANT: I have about a half-a-million dollars worth of psychological testing. So, I can work on D5 intercontinental ballistic missiles [sic], which is nuclear I.C.B.M.'s intercontinental ballistic missiles [sic]. That is where my training was in the military, I did my time; signed up. [¶] And I don't feel like killing the world. So now that I'm out--I try to be crazy. I try to say 'you know what? I really don't want to do this.' But all of the testing that we have done under Harvard and Stanford and even Princeton, I'm the same person."

As the court pursued the issue of waiver of the right to counsel, the following discussion occurred:

"THE COURT: You understand that the court system is willing to give you a lawyer for free? You understand that?"

"THE DEFENDANT: Uh-huh.

"THE COURT: Is that a yes?"

"THE DEFENDANT: What he just said--I wanted to state and say that he [defense counsel] did tell me 'you are crazy'. Those three words were stated to me. And just right now he said 'no.'

"THE COURT: I was here.

"THE DEFENDANT: That to me is-- there is reason for me to say, you know, maybe I should go on my own.

"THE COURT: Okay. [¶] You understand though that the court will provide you a lawyer, and you don't want a lawyer.

"THE DEFENDANT: Not this lawyer.

"THE COURT: So now we are moving to *Marsden* territory.

"THE DEFENDANT: Yes actually, I want a *Marsden*. I want a *Marsden* hearing."

As the discussion ended, Bolter indicated he wanted to "first represent [himself] and have the right to a private-conflict attorney." When the court told him he could not do that, Bolter tried to negotiate with the court about getting appointed counsel of his choice. Bolter apparently then turned to the deputy sheriff and asked who he would recommend to represent Bolter.

Finally Bolter told the court, "I would just like to have the ability to speak to a lawyer before this trial."

In its ruling the court discussed that Bolter had been found competent under section 1368. But, the court noted Bolter's ambivalence between self-representation and a *Marsden* hearing. The court noted that Bolter was not tracking during much of the discussion and that he did not seem to be responsive to the questions that the court was asking.

The court concluded its comments focusing on Bolter's mental condition and that it doubted Bolter could effectively represent himself. The court denied the *Faretta* motion.

C. Analysis

Bolter specifically contends the trial court erred in focusing on Bolter's competence to represent himself, rather than the question of the validity of his waiver of the right to counsel. Bolter argues the trial court was implicitly relying on *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*). He further argues that there is no evidence in the record to support a finding of mental incompetence under *Edwards*, thus the trial

court violated the rule of *Faretta* in concluding Bolter could not effectively conduct a trial.

Here the trial court did not refer to *Edwards, supra*, 554 U.S. 164,³ and appeared to mix a number of principles in its ruling. Under *Edwards* a court could deny self-representation where there is sufficient showing of mental impairment to conclude that because of such impairment a defendant could not meaningfully engage in self-representation.

Here the record is unclear as to the trial court's reasoning. Bolter had been evaluated under section 1368 and ultimately found competent, which would not preclude application of *Edwards, supra*, 554 U.S. 164, because the defendant in that case had also been found to be competent to stand trial. The *Edwards* court discerned a difference in being competent to "assist counsel" in one's defense, as contrasted with being mentally competent to actually conduct a criminal trial.

Certainly Bolter's rambling, semicoherent answers to the court's questions, together with the trial court's observation of Bolter over a two-year period lends some support to the notion that the trial court ruled Bolter mentally incompetent under *Edwards, supra*, 554 U.S. 164, although it did not specifically cite to that case. In any event the Attorney General does not attempt to justify the trial court's decision on

³ The California Supreme Court adopted the rule of *Edwards, supra*, 554 U.S. 164 in *People v. Johnson* (2012) 53 Cal.4th 519.

Edwards grounds.⁴ Rather the response contends that even if the trial court's reasons are not valid, we can nonetheless uphold the decision if supported by the record. (*People v. Dent, supra*, 30 Cal.4th 213, 218.) The response argues the request was untimely and equivocal.

Turning first to timeliness, the request was made about a week before the scheduled trial date. However, the trial court made no mention of whether the request was timely, and, in fact, the case was continued, without objection following the hearing on the *Faretta* motion. Accordingly, we decline to consider the timeliness argument as a basis to uphold the trial court.

We then turn to the remaining argument that the request by Bolter was equivocal. We agree with that argument and find it persuasive in this case.

As *Faretta* indicates, the request for self-representation must be unequivocal. (*People v. Marshall* (1997) 15 Cal.4th 1, 25-26; *Faretta, supra*, 422 U.S. at p. 835.) Further, the waiver of the right to counsel must be knowing and intelligent. (*People v. Burgener, supra*, 46 Cal.4th 231, 241.)

The record in this case demonstrates very clearly that Bolter's request for self-representation was equivocal, and that the trial court could very well find the waiver attempt was neither knowing nor intelligent. Bolter's rambling, irrelevant statements demonstrate he could not focus on the issue at hand. He had mixed views on what he wanted. Alternatively he wanted self-representation because his lawyer called him

⁴ The respondent's brief does not even mention *Edwards, supra*, 554 U.S. 164.

"crazy"; because the charges kept changing; or he wanted a different lawyer; or he wanted to represent himself with a "private-conflict" lawyer; or that he wanted to negotiate with the court for getting his choice of appointed counsel. Whatever Bolter's true feelings may have been from moment to moment, it is plain from the record that Bolter's request was anything but unequivocal. Given his strange, stream-of-consciousness answers, we think it would have been entirely unreasonable for a court to believe Bolter was making a knowing, or intelligent waiver of the right to counsel. Therefore, we are satisfied that although the trial court's stated reasons are not completely appropriate, the decision to deny the *Faretta* motion was correct and is well supported by the record on appeal.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

NARES, J.

O'ROURKE, J.