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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY CLARENCE GRISSOM,

Defendant and Appellant.

E054195

(Super.Ct.No. RIF148225)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard and Michael B. Donner, Judges.¹ Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

¹ Defendant filed a motion to represent himself which was granted by Judge Donner on October 30, 2009. He was denied counsel by Judge Leonard on July 29, 2011.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Susan Miller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Anthony Grissom, of driving/taking a car without the consent of the owner (Veh. Code, § 10851, subd. (a)) and found true an allegation that he had been previously convicted of the same offense (Pen. Code, § 666.5, subd. (a)).² The jury further found true allegations that defendant had been convicted of six prior offenses for which he served prison terms (§ 667.5, subd. (b)) and a strike prior (§ 667, subds. (c) & (e)(1)). He was sentenced to prison for 12 years and appeals, claiming the court erred by granting his request to represent himself and by denying his request for appointment of counsel. He also claims that the prosecutor engaged in misconduct justifying reversal of his conviction. We reject his contentions and affirm.

FACTS

Around 9:40 p.m. on January 11, 2009, the victim's locked car was stolen from the place on the street where his brother had parked it. One month later, the victim received in the mail notification that the car had run a red light at 9:48 p.m. on the same day, which had been captured by a red light camera. Defendant was seen in the picture, driving the victim's car. The following day, the stolen car was spotted by a police officer parked outside a house. The officer and his partner set up a surveillance of the car and, eventually, someone got in the car and drove it away. The officer and his partner

² All further statutory references are to the Penal Code unless otherwise indicated.

followed it as it sped up and made several turns until it drove into a cul-de-sac, where it pulled into the parking lot of an apartment complex, while the officer's marked police car had its lights and siren on. Defendant was driving the car. Other facts will be disclosed as they are relevant to the issues discussed.

ISSUES AND DISCUSSION

1. Granting Defendant's Request to Represent Himself

a. Proceedings Below

A female attorney from the Conflict Defense Lawyers represented defendant from January 29, 2009 until June 6, 2009, when a male attorney was asked by that organization to take over representation. During that earlier period, the female attorney had declared a doubt about defendant's competence to stand trial, criminal proceedings were reinstated after the court received reports from two experts and concluded that defendant was competent, and the preliminary hearing was held. The male attorney represented defendant, on behalf of Conflict Defense Lawyers, until August 5, 2009, when he was released due to a conflict and a second male attorney from conflict Defense Lawyers was appointed. During this period, defendant's first motion to represent himself was denied, without prejudice, by the same commissioner who had concluded that defendant was competent to stand trial.³ After making a few appearances for defendant, the second

³ The commissioner stated that her reasons for denying his request to represent himself were, "the information contained in both of [the competency experts'] reports in terms of your background, your level of education, and the issues that you face, just in terms of [the] . . . challenges that you face, and the specific opinion by [one of the competency experts] that you are presently unable to represent yourself without the

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male lawyer informed the court in mid-October 2009, that he would be on vacation until mid-December. At defendant's next appearance, which was on October 30, 2009, the afore-mentioned female attorney from Conflict Defense Lawyers appeared specially for defendant's second male attorney. The court noted that defendant's second male attorney had just completed back-to-back trials and needed a rest, therefore, the court granted the latter's request to continue trial until January 11, 2010. The female attorney informed the court that defendant had been advised of his legal and constitutional rights and, on his behalf, she waived formal arraignment on the amended information the People had just filed and entered pleas of not guilty and denied the enhancements alleged. The court accepted defendant's pleas/denials. She then informed the court that defendant was moving to represent himself and requesting reduction of his bail. She added "this may require the presence of [defendant's second male lawyer.]" The prosecutor pointed out that defendant's previous request to represent himself had been denied by the commissioner. The court told defendant how difficult it would be for him to go up against the trained prosecutor and it informed defendant that he would be held to the same standard as a trained lawyer, would be expected to know what a trained lawyer knew and if he made a mistake, there would be no relief. Defendant said he understood these things. The court asked defendant to fill out a Petition to Proceed in Propria Persona, which defendant did. Defendant told the court that he had had an opportunity to

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assistance of counsel" Defendant had informed the commissioner just before her ruling that he was not taking medication.

discuss his decision to represent himself with the female lawyer before filling out the petition, she had answered all his questions and he understood everything she had said to him and he had no further questions. The court then asked defendant the customary questions and gave him the customary warnings about representing himself. As part of that dialogue, the court informed defendant, “. . . [I]t is the advice and recommendation of this [c]ourt that you at least wait until you meet the attorney who is regularly assigned to your case before you give up your most valuable right to legal representation[.]”

Defendant said he understood this advice and he confirmed that he was aware of his rights and the pitfalls of self-representation and he had initialed and signed the Petition. The court then found that defendant’s waiver of his right to counsel had been made, *inter alia*, knowingly and intelligently. The court noted that it was granting defendant’s request “over the objection of [the female] counsel who is . . . here on behalf of [defendant’s second male attorney].” The court noted that defendant appeared to be happy with its ruling, but it added, to defendant, that “. . . there will come a time, I’m fairly confident, that you won’t be happy that you’re representing yourself because it is like bringing a knife to a gunfight” Thereafter, proceedings concerning this case were held before seven different judges.

b. Law on Defendant’s Mental Health for Self-Representation

We begin with the applicable standard for determining whether a defendant’s mental health is such that he or she may self-represent. In *Indiana v. Edwards* (2008) 554 U.S. 164, 174, 177, 178, the United States Supreme Court held that states may, but do not need to, deny self-representation to defendants who, although competent to stand

trial, “suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.” In *People v. Johnson* (2012) 53 Cal.4th 519, 528 (*Johnson*), decided after defendant’s motion to represent himself had been granted, the California Supreme Court concluded that trial courts have discretion to deny self-representation to such defendants. Before *Johnson* was decided, the California Supreme Court had held in *People v. Taylor* (2009) 47 Cal.4th 850, 877, 878 (*Taylor*), that *Edwards* did not mandate a higher standard of mental health for self-representation than is required for competency to stand trial, so long as the defendant’s waiver of counsel was, inter alia, knowing and intelligent. The California Supreme Court also concluded that at the time of trial in the *Taylor* case, i.e., early 1996, “[California had not] set a higher or different competence standard for self-representation than for trial with counsel[,]” therefore, under state law, the trial court’s use of the same standard in granting self-representation was not error. (*Taylor* at pp. 866-868, 878-880.) In *Johnson*, the California Supreme Court held that a trial court has discretion to deny self-representation to defendants who, while competent to stand trial, suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves. (*Johnson, supra*, 53 Cal.4th at pp. 528, 530.) Our high court also concluded, “A trial court need[s to] inquire into the mental competence of a defendant seeking self-representation . . . only if it is considering denying self-representation due to doubts about the defendant’s mental competence.” (*Id.* at p. 530.)

Defendant asserts that the standard enunciated in *Johnson* for the denial of a request for self-representation should have been applied here by the court below in

granting defendant's request for self-representation. He is incorrect. In *Taylor*, the California Supreme Court held that because “*at the time of defendant's trial*, state law provided the trial court with no test of mental competence to apply other than the . . . standard of competence to stand trial” the trial court had not erred in granting defendant's request to represent himself without applying a higher standard than competence to stand trial. (*Taylor, supra*, 47 Cal.4th at pp. 850, 879.) It is noteworthy that *Taylor* was decided after *Edwards*. *Johnson* announced a new standard—*Edwards* did not. In *Johnson*, the California Supreme Court concluded that *Edwards* had not been applied retroactively by the trial court in that case because the latter had relied upon it in revoking defendant's self-representation status four months after it had been decided. (*Johnson, supra*, 53 Cal.4th at pp. 525, 531.) In so concluding, the California Supreme Court noted, “[A] law governing the conduct of trials is being applied “prospectively” when it is to a trial occurring after the law's effective date” [Citation.]” (*Id.* at p. 531.) The high court also noted, ““The court in *Edwards* did not hold . . . that due process mandates a higher standard of mental competence for self-representation than for trial without counsel. The *Edwards* court held only that states *may*, without running afoul of *Faretta*, impose a higher standard” [Citation.] In *Taylor*, the trial court had *permitted* a defendant who was competent to stand trial and waive counsel to represent himself. *Because the Edwards rule is permissive, not mandatory, we held [in Taylor] that Edwards ‘does not support a claim of federal constitutional error in a case like the present one, in which defendant's request to represent himself was granted.’* [Citation.]” (*Id.* at p. 527, italics original and added.) As already stated, the standard enunciated in

Johnson post-dated the granting of defendant’s request for self-representation here.

Therefore, that standard is inapplicable to this case.

In determining whether the court below erred in granting defendant’s request for self-representation, “we must defer largely to the trial court’s discretion. [Citations.] The trial court’s determination . . . must be upheld if supported by substantial evidence.”

(*Johnson, supra*, 53 Cal.4th at p. 531.)

Defendant claims that the court below erred in granting his request to represent himself because the record demonstrates that he was mentally incapable of self-representation. Initially, defendant asserts that the court erred because it did not ask why the commissioner had previously denied defendant’s first request to represent himself. However, defendant’s inference that learning the basis for the commissioner’s ruling would have somehow persuaded the court to deny defendant’s request some three months later is pure speculation. Moreover, as the California Supreme Court cautioned in *Johnson, supra*, 53 Cal.4th at pages 530 and 531, “To minimize the risk of improperly denying self-representation to a competent defendant, ‘trial courts should be cautious about making an incompetence finding without benefit of an expert evaluation’ [Citation.] ¶ Trial courts must apply th[e] standard . . . [that] self-representation . . . may [be] den[ied]” “to those competent to stand trial but who ‘suffer from mental illness to the point where they are not competent to conduct trial proceedings by themselves’[citation] [cautiously]. ¶ . . . ¶ . . . [D]efendants still generally have a Sixth Amendment right to represent themselves. Self-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly.”

Next, defendant points to a report written by one of the experts who had been appointed to determine whether defendant was competent to stand trial as demonstrating that he was mentally incapable of representing himself, therefore, the court abused its discretion in granting his request. The report was authored on April 30, 2009, which predated the court's granting of defendant's request by six months. In the report, the expert, who was a female, noted that there had been a prior interview between her and defendant. In a previous report, she had commented that defendant had refused to participate in that interview.⁴ She also said in her second report that during the interview with defendant that eventually took place, he "resisted legitimately participating in the [Competency Assessment Instrument]" She concluded that defendant was then not competent to represent himself without the assistance of counsel⁵ because he was "presently hypomanic." She said that defendant had a personality disorder, which likely included antisocial and narcissistic features, and a mood disorder, i.e., bipolar affective disorder, "characterized by hypomania." She went on, "The issue is that he has chosen to

⁴ The other expert who examined defendant also noted that defendant had refused to participate in his first interview with defendant. Defendant told the court that he did not like the way the female expert had talked to him and that was why he refused to participate in her first interview of him. He said he did, however, like the male expert, but he had no explanation for not cooperating with him.

⁵ We note that the male expert did not address this issue in his report. Penal Code section 1369 does not require an expert examining a defendant for purposes of determining the defendant's competency to stand trial to address such an issue. (Pen. Code, § 1369.) In *Johnson, supra*, 53 Cal.4th at page 533, the California Supreme Court criticized the trial court in the case before it for allowing the jury, who was determining defendant's competency to stand trial, to consider his ability to "conduct his own defense in a rational manner."

terminate the medication he admitted controls him [(Depakote, a mood stabilizer)], a volitional and considered behavior. However, the manipulation, petulance and entitlement characteristics of these [p]ersonality [d]isorders would mightily contribute to this kind of decision-making. This is consistent with reports in the medical record that indicted periodic refusals [by defendant] of blood sugar testing [(defendant is diabetic)—and] insulin and then reporting he had eaten ‘*lots of sweets.*’ The apparent manipulative quality of this very dangerous behavior is consistent with the impairment of these [p]ersonality [d]isorders. While it is unlikely that medication will ameliorate these symptoms, he is in need of a mood stabilizer for his hypomanic symptoms. As he has chosen not to take this, an involuntary order is warranted. [¶] [Defendant] was considered purposefully uncooperative with treatment and has put himself at risk of diabetic events. . . . His hypomania is fueling the destructive tendencies inherent in the [p]ersonality [d]isorder and rendering him unable to rationally participate in treatment or judicial decisions presently.” This expert also noted that defendant had said that it was possible for him to go to Patton or Atascadero State Hospitals as a not guilty by reason of insanity inmate, but he insisted that this was not the motivation for his behavior. Still, he asserted that he needed counseling, which he claimed he was not receiving while on parole, but he admitted that he had refused to take his medications and participate in programs his parole agent had offered him. She concluded that there was no documentation of defendant having a psychiatric disorder or a history of psychiatric symptoms, although defendant had told the other expert that he had bipolar disorder and was paranoid schizophrenic, claims he reasserted later, shortly before he was sentenced.

The other expert concluded that defendant was competent to stand trial and the commissioner, in reinstating criminal proceedings, obviously accepted this over the female expert's conclusion that he was not. The male expert found that defendant was "difficult to evaluate because of the selective nature of his cooperation It is apparent that at least some of his noncooperation is elective in nature and under his control He has a antisocial personality disorder The situation has been made worse by significant substance abuse when [he is] not incarcerated. He obviously wants to affect the ultimate placement, reporting his first choice is the hospital and secondly [drug treatment] in prison. . . . [D]efendant does appear to have some underlying mental issues, which may or may not exacerbate as time goes on."

Even if we assume the correctness of the female expert's opinion that defendant was not, *six months before undertaking to represent himself*, capable of doing so, it does not mean that he was not at the time of his request. Moreover, there is nothing in the record before us suggesting that defendant was not on a mood stabilizer at the time of his successful request for self-representation. In fact, on August 18, 2010, the day motions in limine were heard and trial began, defendant represented to the trial court that he "take[s] psyche medication. I have been on psyche medication since [19]92 and I have the records showing the type of medication I take." He later stated that he took lithium. This would seem to resolve the biggest concern voiced by the female expert in her report.

Certainly, the cold record before us does not otherwise suggest that defendant behaved in a manner that was inconsistent with him being able to represent himself around the time of his request. Evidently, his female attorney, who was fairly familiar

with him, having represented him for five months earlier in the year, including during the time she had declared a doubt about his competency, felt that he was mentally sound enough to enter pleas and denials of the allegations in the amended complaint the same day he asked for self-representation and she never stated on the record the nature of her objection to the latter. Therefore, contrary to defendant's assertion, the record *does not* demonstrate that defendant was mentally incapable of representing himself at the time of his request. This is the case even if the stricter standard enunciated in *Johnson*, i.e., that defendant suffered from severe mental illness to the point where he was not competent to conduct trial proceedings, is applied.

Additionally, nothing that occurred after the granting of defendant's motion for self-representation alters our conclusion that the record does not demonstrate that he was unable to represent himself. Between this time and the conclusion of this case, defendant filed *many* motions and engaged in hearings on almost all of them. We have read each of those motions and the transcripts of the hearings on them. What our reading reveals is that defendant was not, under either of the above-discussed standards, mentally unable to represent himself. Some of defendant's written motions were a bit difficult to understand as to certain points, but he clarified those points during argument of the motion to the court. Some of his motions and requests were granted. The seventh and final judge before which defendant appeared over the course of this case commented to defendant concerning post-verdict written motions, which she reviewed, "I've received two or three written motions from you that make me believe that you understand exactly what you're doing." She also said of defendant, ". . . [I]n many respects, he's argued [his motions] as

well or better than some attorneys that I've met. . . . [¶] . . . [¶] [Defendant] understands the law better than some attorneys I know, and he's argued it well." Concerning whether defendant should be allowed to represent himself for a post verdict new trial motion, she also said, "It does appear [the defendant] does have the ability to research and properly prepare motions." Finally, she said, ". . . [A]fter reading all of the motions that [defendant] has filed in this case, the court would find that the defendant's developmental and emotional issues did not rise to the level contemplated by Rule 4.423(b)(2)" which concerns mitigation due to defendant's mental state. The fifth judge, who denied defendant's request for a continuance on the morning defendant had agreed, after many delays, to begin trial, concluded that defendant was "capable of writing his [own] motions and arguing his case and representing himself" ⁶ Indeed, as the seventh judge observed, "[I]f at any point any of [the seven judges defendant appeared before] felt that [he] could not properly represent himself, we could have stopped the entire process [but we did not]." We agree with these assessments as to defendant's conduct throughout the course of this case.

The record before us contains evidence that defendant was thinking quite clearly during these proceedings—so clearly, in fact, that he might have had an exacting strategy. On May 17, 2010, seven months after he began representing himself, the prosecutor commented concerning the numerous motions and requests defendant had filed to that

⁶ There is no Reporter's Transcript for these proceedings. These are representations made by the prosecutor at a subsequent hearing concerning what the fifth judge said when he denied defendant's motion for a continuance.

point, “The People feel that [defendant] is basically using the system and filling up his C[redit for] T[ime] S[erved] time for a paper commitment.” This followed defendant’s request that trial be put over until the next year. Two months later, after the defendant was counseled for the third time by the same judge who granted his motion for self-representation that he had to served his motions on the prosecutor in a timely fashion, the court said, “. . . [T]he more this happens, the more I think there’s another reason [defendant] want[s] to represent [himself]” On the eve of the much delayed trial, when defendant asked for yet another continuance, the fifth judge accused defendant of “attempting to continue the case by claiming . . . that he didn’t understand what was happening. . . . [Defendant is] just trying to delay.”⁷ The sixth judge, who presided over the trial, accused defendant twice of trying to “game the system.” During trial, defendant refused to have his fingerprints rolled so they could be compared to the prints on his 969b packets. During a *Marsden*⁸ motion following the verdict,⁹ defendant admitted to the seventh judge that “[m]y whole strategy was not to go to trial.”¹⁰ During a hearing on

⁷ See footnote six, *ante*, page 13.

⁸ *People v. Marsden* (1970) 2 Cal.3d 118

⁹ Defendant’s request to be appointed counsel to handle his *Romero* motion was granted and he then brought a *Marsden* motion, complaining about this attorney on the basis that they disagreed about strategy.

¹⁰ The first day of trial, when he requested counsel, defendant also said that he wanted to represent himself so the defense investigator could put money on his books at jail so he could shop at the jail commissary. He appeared to be claiming, in connection with this, that he paid the fellow inmate who had written his motions for him, in graham crackers so we assume that he needed the money for that. The same day, he also said that

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several of defendant's post-verdict motions, the prosecutor asserted that defendant "has, in fact, informed me while he was pro per, . . . that he just wanted to stay in the county as long as he could, so he was trying to continue the case and continue the case." When defendant attempted to have sentencing continue so he could retain counsel (after successfully requesting to represent himself at sentencing), the seventh judge observed, on the long-delayed day of sentencing (July 29, 2011), "There has already been a great deal of disruption and delay in this case and some of that has been caused . . . by [defendant] and . . . he's done that on purpose. He's used the system to continue this matter out, and . . . he's done a good job of it. [¶] . . . [O]ne of the jobs [of] a good defense attorney . . . is to use the system to get what they want and where they want, and [defendant] has done that." The same judge also cited the male competency expert's opinion that defendant was "obviously want[ing] to affect the ultimate placement" as a reason for her denial of defendant's request to be evaluated under Penal Code section 1368 for purposes of arguing his mental state as a factor in mitigation of his sentence.

Defendant was given opportunities to change his mind about self-representation, but he refused to do so. On August 2, 2010, the same judge who granted his request for self-representation offered to appoint him an attorney because defendant was "making some points [in his motions] which [defendant] thinks are very valid" and if defendant had an attorney, defendant's motions "could be fully vetted and heard." Defendant said

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he requested self-representation because his attorney at the time would not file motions he wanted filed. (See text preceding fn. 13, *post*, p. 17.)

no. On September 30, 2010, with defendant having previously agreed to start trial on October 18, 2010, the third judge reminded defendant that he had been warned about the pitfalls of self-representation when defendant complained that he could not get what he wanted without an attorney, following the court's denial of defendant's motion to challenge the judge for cause because it had not been properly done. After defendant asked the court what the time requirement was for serving a *Pitchess* motion, the court told defendant if he did not observe that requirement, it would not likely delay trial, and, "That is why I would give you a lawyer and a lawyer would be prepared. But you're choosing to do it yourself"

To the extent that any possible mental problems by defendant may have been caused, as the female expert opined in April 2009, by defendant's failure to be medicated, defendant asserted the day trial began that he had "been taking psyche meds while I am here right now."

Defendant behaved appropriately during all the proceedings. However, as many of his motions were denied and the much delayed time for trial approached,¹¹ a sense of panic on his part appeared to surface. During an in-camera hearing concerning defendant's request for additional funds for his court-appointed investigator on September 30, 2010, defendant, for the first time since beginning to represent himself, averred that he was a drug addict, had memory problems and could not recall what the

¹¹ Almost three months prior, the judge who had granted his self-representation motion observed that the case was then 419 days old and 41 continuances had already been granted.

court had said during its most recent rulings on his motions. On the day defendant had agreed to start trial, the fifth judge denied defendant's motion for a continuance.

Defendant then unsuccessfully moved to have counsel appointed to represent him. As stated before, the judge concluded that defendant was merely trying to delay trial and he was capable of representing himself. Later that day, before the sixth judge, who presided over the trial, defendant reiterated his request for counsel, asserting that he takes "psyche medication."¹² The trial judge pointed out that the fifth judge had denied defendant's request earlier that day and the former refused to hear the renewed request. Thereafter, defendant coherently discussed the People's motions in limine. The trial judge then attempted to negotiate a deal with defendant, during which defendant behaved in an entirely rational and appropriate manner. During this discussion, defendant represented to the court that he had asked to represent himself because the attorney who was then representing him had refused to bring the motions defendant wanted brought.¹³ The trial

¹² He apparently did not reveal this to the judge who had denied his motion for appointment of counsel earlier in the day. (See the first paragraph of p. 12.)

¹³ However, as stated before, defendant was informed before his request for self-representation that it had not yet been settled who would be his permanent lawyer. Moreover, as already stated, the court urged defendant to have an attorney appointed for him long after this attorney ceased representing defendant and, even at that point, defendant turned the court down.

Finally, this is one of four reasons defendant gave for requesting self-representation. As stated before, during a post-verdict *Marsden* motion, he said his entire purpose was to delay proceedings. (See text preceding fn. 10, *ante*, p. 14.) Later the same day, he claimed the reason was because his attorney at the time would not bring the motions he wanted brought, he asserted he did it so his investigator would put money on the books at jail so he could purportedly buy graham crackers in the commissary to pay the fellow inmate whom defendant claimed was writing his motions for him (see text

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court offered defendant four years with no credit for time served, which defendant ultimately rejected, after rationally dickering with the court.¹⁴ When the prosecutor asserted that defendant was competent and had filed numerous motions, defendant represented to the court that someone else had written them for him.¹⁵ Defendant also asserted that he had been told that his motions were “stupid”¹⁶ and the third judge before whom he appeared “wouldn’t even read them” and denied all of them.¹⁷ Defendant again asserted that he was incompetent and asked to have counsel appointed to represent him.

A transcript of voir dire is not part of the record before this court. However, apparently, during voir dire, defendant told the venire, more than once, that he was being denied his right to appointed counsel. Outside the hearing of the venire, the prosecutor expressed concern that the People would not get a fair trial due to defendant’s

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following fn. 19, *post*, p. 19). The following day, he claimed he represented himself so his investigator could put money on “his books” so he could hire an attorney to represent him or pay this inmate to help him (see text on p. 20, *post*). That same day, he also reverted to his original claim that he asked for self-representation because his then-attorney would not file motions he wanted brought (see text on p. 21, *post*).

¹⁴ Before the preliminary hearing, defendant had been offered four years by the prosecutor. Thereafter, and up to the day before trial (October 17, 2010), the prosecutor’s offer was seven years. Defendant had also rejected a court-indicted sentence of four years in June 2009, a month after the preliminary hearing. The prosecutor asserted that defendant had insisted on probation with local time.

¹⁵ If this was the case, defendant exhibited an astounding comprehension of the contents of the written motions and ability to argue them appropriately to the court.

¹⁶ The record does not support this assertion.

¹⁷ The record does not support either of these assertions.

representations to the venire. The trial court twice asserted that defendant was “gaming the system.” Defendant countered, saying a doctor had said that he had delusional thoughts and speech.¹⁸ The prosecutor asked the court to inform the jurors that defendant chose to represent himself and had been extensively questioned about it and it was not until the day of trial that he first requested appointed counsel. The trial court offered to read Judicial Council of California Criminal Jury Instruction, CALCRIM No.107, the standard jury instruction on self-representation. After defendant claimed that he needed a 1368 evaluation because he “couldn’t take” what was occurring, defendant appeared to become irrational, accusing those present of working against him, “trying to consume [his] soul” and being “under the Klu Klux Klan.”¹⁹ Defendant then said he had requested self-representation so his investigator could put money on the books at jail so he could supposedly buy graham crackers at the commissary for the fellow inmate he claimed was writing his motions for him. Thereafter, the trial court told the venire, “From time to time, it appears that we will have outbursts. The defendant has a right to be represented by an attorney at this trial He has decided instead to exercise his constitutional right to act as his own attorney in this case.” The court then instructed the venire to not allow defendant’s decision to represent himself to affect its verdicts. After the jury was chosen,

¹⁸ If defendant was referring to the 1368 evaluation done in April 2009, by the female expert, she stated concerning defendant’s claims of persecutory beliefs, auditory hallucinations and mind controlling symptoms in the past, “. . . I considered that the defendant was exaggerating his symptoms for secondary gain” No other report stating that defendant then suffered from delusional thoughts and speech or did so in the past is part of the record before this court.

¹⁹ Defendant is African American.

outside its presence, defendant successfully sought advice from the trial judge about what he should do during his opening statement and he and the trial court had a reasonable discussion about it. At the conclusion of this discussion, defendant said, “Thank you, guys, for your patience”

The following day, defendant refused to “dress out” for trial and again insisted on being appointed an attorney. Defendant agreed with the trial court’s statement that he had “chosen not to dress out” The trial judge warned defendant that if he continued this, trial would proceed in the latter’s absence. Defendant agreed to this, asked to be taken back to jail and indicated that he was about to leave. After the prosecutor asserted that defendant was merely trying to delay trial and had not requested counsel because he felt incapable of representing himself, defendant reverted to his previous claim that he had requested self-representation because his then attorney refused to file motions he wanted brought. However, he also added that he was representing himself so his investigator could put money “on his books” so he could hire an attorney to represent him or pay a jailhouse lawyer to help him. Saying, “You got me,” defendant then left the courtroom. The jurors were brought in and told by the trial court, “The defendant has decided to excuse himself from the trial and you are not to consider . . . for any reason his decision or absence.” Defendant later stated that the trial court did not remove him from the courtroom—instead, he refused to stay for trial because he did not have an attorney. During trial, another deputy district attorney testified for the prosecution that defendant

had executed a *Faretta*²⁰ waiver, and she briefly explained what that meant and what occurs during a hearing that follows such a waiver and precedes the court granting a defendant's request for self-representation. A copy of defendant's *Faretta* waiver was introduced into evidence.

Defendant appeared in the courtroom for the rendering of the verdicts on October 20, 2010, and, thereafter, asked an appropriate question about the jury making findings as to truth of the allegations of his priors. In mid-December 2010, defendant filed a number of motions, none of which were irrational, and some of which were granted. The trial court also granted defendant's motion for appointment of counsel to represent him in filing a *Romero* motion²¹ and a motion for a new trial. Defendant told the court that he wanted a sentencing date that was "far, far away." The court responded, "Yeah. You like to stay in Riverside." Defendant retorted, "Yeah. I love Riverside." Defendant again moved under 1368, asserting that the female expert had asserted in her April 2009 report that there was insufficient evidence of defendant's mental history, and he had requested his records from prison and the county jail. The trial court offered to send defendant for an evaluation pursuant to Penal Code section 1203.03²² but defendant put off discussing it until the next scheduled hearing, about two months later.

²⁰ *Faretta v. California* (1975) 422 U.S. 806.

²¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

²² That section provides in pertinent part, "(a) In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment

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By May 2011, defendant had filed a written *Marsden* motion, claiming his appointed counsel had told him that there was no grounds for a new trial motion and defendant had no history of mental problems. At the hearing on this motion, the seventh, and final, judge in front of which defendant appeared in this case presided. Once again, the basis for defendant's complaint against his attorney was due to a difference in opinion over strategy, and the motion was denied. However, the court allowed defendant to represent himself on his new trial motion, while his appointed attorney continued to represent him on the *Romero* motion. The court found that defendant had the ability to research and properly prepare the motion and to "handle" it. Thereafter, defendant again moved for a 1368 evaluation, which the judge denied, finding, based on two or three motions defendant had written that she reviewed, that defendant "understands exactly what [he is] doing."

In July 2011, defendant's *Romero* motion was denied. The same day, and a week later, defendant filed seven motions, including two for a new trial, and one each for judgment notwithstanding the verdict and for modification of his convictions to ones for lesser crimes. The latter four were denied following a hearing during which defendant rationally argued the merits of some of them. When defendant complained that he did not understand his motion notwithstanding the verdict, because he had merely copied

[footnote continued from previous page]

services as can be provided at a diagnostic facility of the Department of Corrections, may order that defendant be placed temporarily in such facility . . . with the further provision . . . that the Director . . . report to the court his diagnosis and recommendations concerning the defendant"

what the jailhouse lawyer had written for him, the court reminded defendant that it had offered defendant counsel to prepare all his post-verdict motions, but defendant had insisted on representing himself except as to the *Romero* motion. Later, defendant pointed out to the court that it failed to have him sign a *Faretta* waiver in connection with his motion for a new trial and he unsuccessfully asked for a 30 day continuance to file another new trial motion.²³ The court offered to appoint for sentencing the attorney who represented defendant in his *Romero* motion, but defendant said he did not want him. The court said defendant would get whatever attorney the conflicts panel sends, and, if that was the attorney who represented defendant for his *Romero* motion, that was who defendant would get and if defendant did not like it, he could bring another *Marsden* motion.²⁴ On the next day of proceedings, defendant announced that he was retaining counsel to represent him at sentencing. A week later, defendant appeared in court without his retained attorney and defendant said he wanted to hire yet another attorney, but that attorney was also not in the courtroom. The court refused defendant's request to continue sentencing. Defendant unsuccessfully moved for appointment of counsel to represent him at sentencing and concerning two other motions he said he had sent to the court²⁵ and to make another motion for a new trial. Defendant asked for another 1368 evaluation, which the court denied, saying it had no doubt that defendant was competent.

²³ As it turned out, defendant had the motion and submitted it to the court.

²⁴ Defendant did.

²⁵ The court said it had not received them.

The court denied defendant's last brought motion for a new trial, then sentenced defendant.

As we stated at the beginning of this lengthy discourse, we see nothing in what transpired after defendant's request to represent himself was granted that shows, under either standard, that defendant was not capable of representing himself.

In so concluding, we necessarily have already covered much of the ground defendant addresses in his second contention that the trial court abused its discretion (*People v. Lawrence* (2009) 46 Cal.4th 186, 188) in denying his request for the appointment of counsel the day trial began. Among the factors the court is to consider is defendant's prior history in the substitution of counsel and the desire to change from self-representation to representation by counsel, the reason for the request, the length and stage of the trial proceedings, disruption or delay that might be expected to be caused by the granting of the request and the likelihood of the self-representing defendant being effective in trial. (*People v. Gallego* (1990) 52 Cal.3d 115, 163, 164.) A request for appointment of counsel is properly denied where the trial court concludes that it is part of defendant's deliberate attempt to manipulate the system. (*People v. Trujillo* (1984) 154 Cal.App.3d 1077, 1087.) Consideration of each of the *Gallego* factors leads us to the conclusion that there was no abuse of discretion.

As stated before, defendant had been given a second chance to have counsel appointed nine months after he was allowed to represent himself, at a time when some of his motions were being denied and the same judge who granted his request for self-representation felt that defendant having counsel might result in more of his motions

being granted. However, defendant refused. In fact, as we have already stated, there was no sign of difficulty until just before the long-delayed trial in October 2010.²⁶ We have set forth above those portions of the record that supply evidence as to defendant's motivation for his midnight request for counsel and they support the reasoning of the court that denied it. It is beyond dispute that granting defendant's request the day of trial would have delayed matters considerably. Finally, as we have already stated, both before and after the request, with the exception of defendant's brief panic when confronted with the reality that he was not going to be successful in delaying this trial into the next decade, he behaved appropriately, filed motions that were not the apparent product of an incapable mind and argued them rationally. As we stated before, we are not persuaded by the female expert's gratuitous statement, made almost eighteen months before trial began, that defendant was not able to represent himself as persuasive. Moreover, as is clear from her report, her main concern was that defendant be medicated to relieve his hypomania, and, as we have already stated, according to defendant's representations to the court, he was at the time of trial. The fact that defendant did not understand a particular intricacy of trial, i.e., the bifurcation of priors so the jury determining guilt does not hear about them, is not unusual and does not mandate a conclusion that defendant cannot represent himself. We note that at this juncture, defendant was not so intimidated

²⁶ In his brief, defendant asserts that he "continuously informed the trial court that he was incompetent to represent himself." However, that did not start until the day trial began. Thereafter, defendant made a number of representations along these lines, but the court below and this court is able to decipher defendant's true intention in making them. Certainly, each such statement, and its context, has been included in our recitation of the facts.

by the prospect of going to trial that he was willing to forego his credit for time served in order to accept the court's offer of a four year sentence. The fact that defendant, apparently, engaged in several outbursts during voir dire about his lack of an attorney can, as defendant here insists, be an indication that he cannot control himself—it can also be an indication that he is trying everything he can think of to get a mistrial and delay proceedings further. The court below was entitled to accept the latter reasonable inference and so are we, especially, considering the fact that for almost eighteen months before and for ten months thereafter defendant was able to comport himself in a reasonable fashion in court.

2. *Conducting Trial in Defendant's Absence*

Defendant here contends that his convictions should be reversed because the trial court erred in conducting trial in his absence in that he did not voluntarily absent himself—that “[h]is mental disorders so negatively impacted his rationale [*sic*] thinking that he could not competently choose to be absent.” However, because we have already concluded that the record does not support defendant's premise, we necessarily reject his claim of error.

People v. Carroll (1983) 140 Cal.App.3d 135, which defendant cites in support of his position is distinguishable. In *Carroll*, the self-represented defendant *was* repeatedly removed from the courtroom by the trial judge. (*Id.* at pp. 137-140.) The holding of *Carroll* was dependent on the fact that the defendant there was “involuntary[ily] exclu[ded]” from the courtroom. (*Id.* at pp. 142-143.) Here, in contrast, defendant removed himself, as already described. *People v. Parento* (1991) 235 Cal.App.3d 1378,

1380-1382 held that a defendant who absents himself from trial cannot claim the trial court erred in proceeding without him.

3. *Prosecutorial Misconduct*

Prosecutorial misconduct violates federal due process when it comprises a pattern of conduct so egregious that it renders the trial fundamentally unfair. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) Conduct other than this violates state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Ibid.*) Defendant asserts that the latter occurred in this case. We review his claim de novo. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 860.)

a. *Testimony of a Deputy District Attorney*

As we have already stated, a deputy district attorney other than the prosecutor testified for the prosecution. She was shown a copy of the *Faretta* form defendant had filled out, which was marked as an exhibit. She testified that it was a petition to represent one's self. She said, "Generally, . . . [w]hat will happen is the form is given to the defendant first to look over, to read, to think about and to sign. And after [the defendant has] signed it, it's given to the judge. The judge goes through each of these rights and each of these waivers orally in open court at a hearing." Finally, she testified that the form appeared to be signed by one Anthony Grissom. Her testimony covered just over one page of Reporter's Transcript. The prosecutor successfully sought judicial notice that the form was in the court's records for the date it was executed, that the exhibit was an exact copy of what the court had in its records and that the person who was

representing himself in this case was Anthony Clarence Grissom, the same person pictured in another exhibit, which was defendant's driver's license photo.

Defendant here contends that the presentation of the deputy district attorney's testimony constituted prosecutorial misconduct because it lacked foundation and was irrelevant. Putting aside the matter of waiver for failure to object below, defendant is incorrect that the testimony lacked foundation because the witness had no personal knowledge of what admonitions had been to defendant. This witness did not testify that defendant was given any specific admonitions. She testified only as to what routinely happens after a defendant signs a *Faretta* form. In his reply brief, defendant asserts that this evidence was irrelevant because the trial court had informed the jury that defendant had exercised his constitutional right to represent himself and had admonished the jury not to consider defendant's decision to absent himself from the trial. The first directive followed defendant's outbursts during voir dire, which, as we have already said, are not part of the record before this court. The second directive occurred the next day, after defendant elected not to be present during trial. The evidence at issue was relevant only to the former. Because we have no idea what defendant said during voir dire, we cannot speculate that the evidence was irrelevant.

b. *Argument to the Jury*

A police officer who pulled the stolen car over testified that in the trunk was a black leather organizer that contained a number of items, including credit cards and driver's licenses, that bore names other than defendant's. He also testified that inside defendant's wallet, which had been removed from defendant's pocket when he was

accosted outside the stolen car, were similar items. In arguing to the jury that the evidence showed that defendant was driving the stolen car with the intent to deprive the owner of it, the prosecutor called the jury's attention to the fact, inter alia, that defendant had stolen property in his wallet and in the black leather organizer when he was stopped. While the prosecutor pointed out that defendant had not been charged with possession of those items, the fact that he had them "shows . . . that [defendant] has that mind set. . . . [¶] . . . No person who is driving around in a car missing part of the ignition, using a shaved key to drive it and has a whole bunch of stolen property on them is borrowing this car innocently and returning it to . . . where he picked it up from."

First, defendant asserts that no evidence was presented to support the argument. He is incorrect. The above-discussed evidence supports the argument. In his reply brief, defendant asserts that the items in the black leather organizer cannot be tied to him. He is mistaken. Some of the items in the organizer were in defendant's name and others were in the name of the same people as some of the items in defendant's wallet, *which was in his pocket*. In his reply brief, defendant asserts, without citation to authority, that his possession of credit cards, debit cards and driver's licenses in other people's names is not *proof* that these items were stolen.²⁷ However, certainly, it was *evidence* that they were—evidence sufficient to allow the jury to make a determination.

Next, defendant asserts that the prosecutor "improperly" argued that defendant's possession of other stolen items could not demonstrate his intent regarding the stolen car.

²⁷ In his opening brief, he appears to concede that the property was stolen.

He cites no authority holding that using other acts evidence to prove intent is either “deceptive or reprehensible” as he alleges it was. He also cites no authority holding that other acts must have been charged as crimes and convictions rendered in order for evidence of them to be used to show intent. In fact, Evidence Code section 1101, subdivision (b) permits the introduction of evidence of “other *ac[t]s*” to show, inter alia, intent, even if those acts have not resulted in charges or convictions. (*People v. James* (1976) 62 Cal.App.3d 399, 407; *People v. Harris* (1978) 85 Cal.App.3d 954, 958.)

Having concluded that the prosecutor did not commit misconduct in either aspect as alleged by defendant, we necessarily conclude that there was no cumulative error requiring reversal of defendant’s conviction.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.