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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.

FRANK XAVIER TORRES-ZAMORA,

Defendant and Appellant.

E054458

(Super.Ct.No. FVA028117)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

Michael Bacall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and James D. Dutton and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant Frank Xavier Torres-Zamora appeals from his conviction of three counts of attempted robbery (Pen. Code,<sup>1</sup> §§ 211, 664; counts 2, 10, 11), five counts of robbery (§ 211; counts 3, 4, 7, 8, 12), and escape (§ 4532; count 13) with associated enhancements. Defendant contends his withdrawal of his plea of not guilty by reason of insanity (NGI) was not made knowingly or voluntarily, and he was denied his right to present an insanity defense. More specifically, he argues the trial court erred in (1) failing to inform him (a) of his right to a trial on the issue of sanity and (b) that by withdrawing the NGI plea, he was waiving jury trial of the issue of insanity, and (2) failing to obtain *Boykin/Tahl*<sup>2</sup> waivers before allowing him to withdraw his NGI plea. We find no error, and we affirm.

## II. FACTS AND PROCEDURAL BACKGROUND

### A. Defendant's Crimes

The facts of defendant's crimes are not at issue in this appeal and will therefore be set forth summarily.

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<sup>1</sup> All further statutory references are to the Penal Code.

<sup>2</sup> *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

*1. Count 2*

Using a gun, defendant attempted a robbery at El Romeo Market in San Bernardino on July 31, 2006, and during the incident, he shot a customer, Miguel Rosas.<sup>3</sup>

*2. Count 3*

Using a gun, defendant robbed a gas station in San Bernardino on November 8, 2006, taking almost \$1,000 from a cashier.

*3. Count 4*

Using a gun, defendant robbed a recycling business in Fontana on July 26, 2006, taking \$30 or \$40 from the owner.

*4. Count 7*

Using a gun, defendant robbed a fast food restaurant in San Bernardino on November 21, 2006, taking \$40 to \$50 from a cashier.

*5. Count 8*

Using a gun, defendant robbed another gas station in San Bernardino on October 3, 2006, taking money from a cashier.

*6. Counts 10 and 11*

Using a gun, defendant attempted a robbery of two cashiers at another market in San Bernardino on November 7, 2006.

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<sup>3</sup> The jury was hung on attempted premeditated murder of Rosas as charged in count 1, and the trial court dismissed that count in the interest of justice. The jury acquitted defendant of counts 5 and 6. Count 9 was dismissed for insufficient evidence.

*7. Count 12*

Using a gun, defendant robbed the assistant manager of a fast food restaurant in Colton of about \$125.

*8. Count 13*

On June 6, 2008, defendant, who was in custody, attempted escape while being transported from court to jail.

**B. Defendant's Testimony**

Defendant testified he “[p]artly” remembered the shooting at the El Romeo Market, but he did not remember firing the shot that struck Rosas, and he never would have tried to kill Rosas. He was under the influence of alcohol or methamphetamine. He did not remember where he had acquired the gun. When the police questioned him, he was under the influence of alcohol and methamphetamine. He did not remember committing the crimes, and his memory of that period of his life was a blur. He had been having problems with his family that “drove [him] deep into a depression.” Although he had been prescribed Prozac, he “wasn’t taking [his] medication. [He] was just drinking and using.” He could not remember his own telephone number or where he lived. He speculated he had committed the robberies hoping the police or a clerk would shoot him. He had been on his medication while in jail, and he was able to see things clearly. He was very sorry for what he had done.

**C. Defendant's Competency**

On August 9, 2007, the trial court declared doubt as to defendant's mental competency, suspended proceedings, and appointed Kenneth C. Fischer, Ph.D., to

evaluate defendant's capacity to stand trial under sections 1368 and 1369. Dr. Fischer stated his opinion in a report dated September 13, 2007, that defendant was competent to assist his trial attorney to prepare a defense. The trial court found defendant competent and reinstated proceedings.

#### **D. *Marsden*<sup>4</sup> Motions**

Defendant made a motion under *Marsden* requesting a new attorney on the ground his attorney was ineffective for not raising an insanity defense. Defendant told the trial court, "I have [a] mental history." Defendant complained his attorney was acting as his adversary, and she had said his mental health records from Los Angeles County were irrelevant, and she would not request them. The court told defendant that his attorney had said there was no viable mental defense, and defendant responded, "I do believe I have—I have with my mental records since 1989 since court ordered me to see the psyche, [*sic*] and the psyche started giving me Prozac, and I was having anxiety attacks. And I was taking Xanax." The trial court denied the *Marsden* motion.

On July 7, 2008, the trial court relieved the public defender and appointed an attorney from the conflict panel, Daniel Faulhaber. On June 12, 2009, defendant again asked for a new attorney. At the *Marsden* hearing, defendant complained that Faulhaber was not pursuing defendant's mental health records. The attorney responded, "There may be potentially a mental health defense. The defendant has indicated that he's previously seen mental health professionals in the past. [¶] I did request that our

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<sup>4</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

investigators go out to see him . . . and particularly that was after our last appearance on May 1st . . . I don't doubt [defendant] for a moment that they didn't come out and see him[;] however I am surprised that that was not accomplished. I will be calling him today to make sure that that is done . . . ." The trial court denied the motion.

On March 18, 2010, defendant entered a plea of not guilty and NGI to all charges. The trial court appointed two psychologists to examine him (§ 1026). Chuck Leeb, Ph.D., opined that defendant was sane when he committed the crimes. The second psychologist declined to render an opinion because she had not received records of defendant's current crimes or previous history.

#### **F. Jury Verdict**

The case proceeded to trial, and the jury found defendant guilty of three counts of attempted robbery (§§ 211, 664; counts 2, 10, 11), five counts of robbery (§ 211; counts 3, 4, 7, 8, 12), and escape (§ 4532; count 13). As to count 2, the jury found true firearm discharge and firearm use allegations. As to counts 3, 4, 7, 8, 10, 11, and 12, the jury found true firearm use allegations (§ 12022.53, subd. (b)). In bifurcated proceedings, the jury found two prior strikes true.

#### **G. Posttrial Proceedings**

On June 17, 2011 the trial court relieved Faulhaber because defendant complained that Faulhaber was ineffective for not pursuing his sanity defense. The trial court appointed another conflicts panel attorney, Julian Ducre.

On June 24, 2011, the trial court appointed Haig J. Kojian, Ph.D., to determine whether defendant was insane at the time of the offense. (§ 1368.) Dr. Kojian stated his

opinion that defendant knew his conduct was wrongful and thus would not appear to qualify for an NGI defense.

On September 2, 2011, the trial court stated it had appointed Ducre to represent defendant “based on a request for a motion for new trial,” and the court had continued the matter to allow Ducre to visit defendant “to see whether or not the defendant does have a desire to continue this plea [of NGI] now that he was found guilty by way of a jury and have a new and different jury decide whether or not he was insane at the time of the commission of the offenses, which he is entitled to, regardless of the fact that there’s absolutely no evidence to support his claim of being insane at the time of the commission of the offenses based on the facts of the case and based on the psychological evaluations.” Ducre represented that defendant was going to withdraw his NGI plea. The trial court asked defendant if he wished to withdraw his NGI plea, and defendant made no audible response. When the trial court inquired again, defendant asked to talk to his attorney. A discussion was held off the record, and then the following dialogue ensued:

“THE COURT: Okay. [¶] So, again, for the record, just so it’s very clear, [defendant], you are making your own decision and you are requesting—which will be granted—you are requesting that your not guilty by reason of insanity pleas be withdrawn; is that correct?

“THE DEFENDANT: Yes.

“THE COURT: Counsel join?

“MR. DUCRE Yes, your Honor.

“THE COURT: And obviously, Mr. Ducre, that’s based on your knowledge of the fact that there’s no supporting evidence whatsoever to substantiate those pleas; is that correct?”

“MR. DUCRE: That is correct, your Honor.” The trial court granted defendant’s request to withdraw his NGI plea.

Ducre then argued defendant’s motion for new trial: “[Defendant] is requesting that the Court grant him a new trial based on ineffective assistance of counsel based upon the failure of trial counsel to have meaningful conversations with him to discuss the facts of the case, to discuss the strategies, also the failure of trial counsel to request of the Court that an advocate be appointed for him so that he could prepare and go forward with the NGI plea.” Ducre continued, “And because of these failures by trial counsel, this deprived [defendant] of the ability to have a meaningful and uniform strategy to defend his case and to be able to—to present a meaningful defense by having an advocate for his NGI plea.” The trial court denied the motion for new trial.

#### **H. Sentence**

The trial court sentenced defendant to consecutive terms of 25 years to life for each of counts 2 through 4 and 7 through 13. The court imposed a consecutive term of 20 years for the section 12022.53, subdivision (c) allegation as to count 2, and a consecutive term of 10 years for the section 12022.53, subdivision (b) allegations as to each of counts 3, 4, and 7 through 12. Finally the trial court imposed a five-year consecutive term as to each of counts 2 through 4, 7, 8, and 10 through 12 for the prior

serious felony. (§ 667, subd. (a)(1).) The trial court dismissed count 1 pursuant to section 1385. The total sentence was 130 years plus 225 years to life.

### III. DISCUSSION

Defendant contends his withdrawal of his plea of NGI was not made knowingly or voluntarily, and he was denied his right to present an insanity defense. More specifically, he argues the trial court erred in (1) failing to inform him (a) of his right to a trial on the issue of sanity and (b) that by withdrawing the NGI plea, he was waiving jury trial of the issue of insanity and (2) failing to obtain *Boykin/Tahl* waivers before allowing him to withdraw his NGI plea. He argues that he withdrew the NGI plea only because he believed he would receive a new trial in which he could pursue his insanity defense.

A defendant has a fundamental right to present an insanity defense. (*People v. Frierson* (1985) 39 Cal.3d 803, 812-813, 818 (*Frierson*); *People v. Medina* (1990) 51 Cal.3d 870, 899.) To establish an insanity defense, the defendant must prove that when he committed the offense, he was incapable of knowing or understanding the nature and quality of his act or of distinguishing right from wrong. (§§ 25, 25.5; *People v. Skinner* (1985) 39 Cal.3d 765, 768-769.) When a defendant pleads not guilty and NGI, the trial takes place in two phases. First, the issue of guilt is tried, and the defendant is presumed sane. (§ 1026, subd. (a); *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 542-543.) If the defendant is found guilty, the issue of insanity is then tried to the same jury or to a different jury, in the discretion of the trial court. (§ 1026, subd. (a); *People v. Phillips* (1979) 90 Cal.App.3d 356, 363.)

The decision to plead NGI or to withdraw that plea is a personal choice for the defendant, not his counsel. (*People v. Gauze* (1975) 15 Cal.3d 709, 717-718; *People v. Clemons* (2008) 160 Cal.App.4th 1243, 1251.) The trial court must find that the defendant is making an intelligent and voluntary choice to withdraw an NGI plea. (*Frierson, supra*, 39 Cal.3d at pp. 813-818.) It has long been settled that the trial court is not required to inform a defendant of the rights he forgoes by withdrawing an NGI plea. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1214; *People v. Guerra* (1985) 40 Cal.3d 377, 384; *People v. Redmond* (1971) 16 Cal.App.3d 931, 939 [stating that no recitals of constitutional rights are required before accepting the withdrawal of an NGI plea “where there is no doubt of a defendant’s sanity in the mind of the trial court and the reports of examining psychiatrists unanimously indicate that such defendant was sane at the time of the offense”].) The California Supreme Court has also held, “No *Boykin-Tahl* advisements concerning the rights being relinquished are required. [Citations.] In the absence of doubt about a defendant’s competence, a trial court has no sua sponte duty to inquire further into the reasoning behind the defendant's decision.” (*People v. Gamache* (2010) 48 Cal.4th 347, 376-377, fn. omitted.)

Here, two experts examined defendant and concluded he was sane. (A third did not provide a report because she did not receive defendant’s records.) Defense counsel agreed there was no evidence whatsoever to support an insanity defense, and neither counsel nor the court expressed any doubts as to defendant’s competency at the time he withdrew his plea.

Finally, contrary to defendant’s assertion, the trial court did in fact refer to defendant’s right to have a jury determine the issue of sanity, even though no advisal of that right was required. As recounted above, at the outset of the hearing, the trial court stated it had previously continued the matter “to see whether or not the defendant does have a desire to continue his plea [of NGI] now that he was found guilty by way of a jury *and have a new and different jury decide whether or not he was insane at the time of the commission of the offenses, which he is entitled to*, regardless of the fact that there’s absolutely no evidence to support his claim of being insane at the time of the commission of the offenses based on the facts of the case and based on the psychological evaluations.” (Italics added.) The trial court did not err in accepting defendant’s withdrawal of his NGI plea.

IV. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

RICHLI

J.