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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.

FRED ALLEN NASH,

Defendant and Appellant.

E054553

(Super.Ct.No. FSB904048)

OPINION

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Affirmed.

Jean Matulis, 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, Peter Quon, Jr., Anthony Da Silva, and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Fred Allen Nash appeals his conviction on multiple counts arising out of a home-invasion robbery. He contends that the court's erroneous admission of irrelevant evidence deprived him of his due process right to a fair trial and to his constitutional right to confront an adverse witness, and that the trial court violated his rights to counsel and to self-representation. We find no prejudicial error, and we affirm the judgment.

PROCEDURAL HISTORY

In a first amended information filed on July 29, 2011, the San Bernardino County District Attorney charged defendant with three counts of residential robbery (Pen. Code, § 211; counts 1-3)¹ and first degree burglary (§ 459; count 4). As to all counts, it was also alleged that defendant personally used a firearm (§ 12022.53, subd. (b)); had three prior strike convictions (§§ 1170.12, subds. (a)-(d) and 667, subds. (b)-(i)); was a habitual criminal who committed three prior first degree burglaries (§ 667, subd. (a)(1)); and had served four prior prison terms (§ 667.5, subd. (b)).

A jury found defendant guilty of all the charged crimes and found it true that he personally used a firearm in the commission of the crimes. In a bifurcated proceeding, the trial court found the prior conviction special allegations true.

On September 15, 2011, the trial court sentenced defendant to an indeterminate term of 93 years to life and a consecutive determinate term of 75 years.

Defendant filed a timely notice of appeal.

¹ All statutory citations refer to the Penal Code unless another code is specified.

FACTS

Mike Skidmore owned a tow truck company with his brother Rodney. Mike and Rodney owned homes about three or four blocks from each other in Highland. Rodney rented his house to their employee, Frank Cote, who was living with Rodney's daughter, Ashley Skidmore.² Cote and Ashley were married at the time of the trial. Ashley's three-year-old son, Zachary, Frank's seven-year-old daughter, Jasmine, and their roommate, Joseph Martinez, also lived in the house. The house had a two-car garage, which was used by the residents. There was also a separate so-called "tandem" garage where Rodney kept a safe, tools and items related to the business. The tandem garage was locked, and the residents of the house did not have a key.

On the evening of September 9, 2009, Cote, Ashley, Zachary and Martinez were in the living room watching a movie. Cote, Ashley and Zachary were on a couch, and Martinez was sitting in a chair next to the couch. Jasmine was sleeping on a couch in the game room.

About 8:30 p.m., there was a noise at the front door. Martinez went to see if someone was there. He was confronted by two armed and masked men who were already inside the house. The taller of the two men wore a black ski mask; the shorter man wore a white mask popularized by the movie "Scream." Both men were armed with handguns.

² Because several witnesses share the last name "Skidmore," we will sometimes refer to those witnesses by their first names for clarity.

The intruders made the residents, except for Jasmine, get down on the floor, striking Cote on the head to make him comply. (Jasmine apparently slept through the entire incident.) The taller man did most or all of the talking. He was primarily interested in gaining access to the safe in the locked tandem garage. When the men learned that the garage was locked and that Cote did not have a key, they apparently tried to break through the adjoining wall between the house and the garage.

Later, the taller man ordered Cote to call Mike Skidmore and ask him to come to the house on a pretext. Cote called Mike and said he needed the battery in his tow truck jump-started. When Skidmore arrived, he was confronted by the masked men. He fled and called 911 as soon as he reached a location where he felt safe. While he was on the phone with the 911 operator, he saw a vehicle without headlights coming toward him. He followed the vehicle for a short distance, but it eluded him.

Sheriff's deputies arrived at the house within a few minutes. The robbers had fled, taking items of personal property belonging to each of the adult victims.

Cote and Ashley reported that the taller robber lifted his ski mask up to his forehead to smoke a cigarette. However, neither of them recognized him. They both described him as tall, or at least taller than the other man, and thin, with blond hair and blue eyes. Cote described him as having a tattoo on his neck and one on his arm. Neither of them knew defendant before the robbery.

Sheriff's Detective Peterson testified that the license plate of the vehicle that was seen leaving the crime scene was registered to Victor Malaro. Peterson produced a six-pack photographic lineup that contained a prior booking photograph of Malaro. Cote and

Ashley both picked out Malaro's photograph, not as one of the robbers but as someone they knew. Ashley could not identify Malaro as one of the robbers, but said that the shorter robber's body structure was similar to Malaro's. Malaro was the brother of Rodney Skidmore's best friend, and Malaro had previously worked for the Skidmore brothers' towing company. He had also assisted in placing the safe in the tandem garage. Both Cote and Ashley said that Malaro was not the person who lifted up the ski mask during the robbery. Cote said that Malaro had a distinctive high pitched voice.

Detective Peterson testified that he contacted law enforcement officers in Arizona to find known associates of Malaro in the hope that Cote and Ashley might be able to identify the person whose face they saw. Arizona authorities informed Peterson that James Adcock, Travis Clapp and Waylon Wilson were known associates of Malaro. A couple of days after the incident, Peterson compiled a lineup that included Adcock's photograph, but neither Ashley nor Cote identified anyone in that lineup. Later, Peterson produced a lineup that contained the photographs of Clapp and Wilson. Ashley did not identify anyone in that lineup. Cote indicated that Wilson's photograph "might be possibly" the person who lifted his mask.

On September 30, 2009, Peterson showed Ashley and Cote a photographic lineup which included the photograph of Michael Fultz. Peterson had obtained records for Malaro's prepaid cellular telephone which listed Fultz as the registered subscriber. Neither Ashley nor Cote was able to identify anyone in that lineup.

On October 22, 2009, Peterson presented Ashley and Cote with a lineup that contained defendant's photograph. Cote did not identify him as the robber, but Ashley did. However, she said she was only "between six and seven" out of 10 certain that defendant was the taller robber.

A portion of a latex glove was recovered from the house and a "Scream" mask was found nearby, as were two handguns. Buccal swabs were taken from both defendant and Malaro after their arrest. DNA analysis found that Malaro was the primary contributor of DNA found on the mask and that defendant was the primary contributor of DNA found on the glove fragment.³ Latent fingerprints found on the handguns were not suitable for comparison.

LEGAL ANALYSIS

1.

ANY ERROR IN THE ADMISSION OF OUT-OF-COURT STATEMENTS WAS NOT PREJUDICIAL

Defendant contends that the trial court erroneously admitted irrelevant hearsay evidence which linked him to Malaro. The issue arose as follows: During the prosecution's case, Detective Peterson testified that as part of his investigation, he put together a number of photo lineups that included people who had some connection to

³ There was some controversy at trial concerning the accuracy of the reporting as to which person was the donor on the glove and the mask. No issue is raised on appeal concerning the DNA evidence, however.

Malaro. When he ultimately put together a lineup which included defendant's photograph, Ashley identified defendant as the taller robber who had lifted his ski mask.

The prosecutor asked Peterson how he had come to include defendant's photograph. He asked if Peterson had generated the lineup because he had a particularized suspicion of defendant. Peterson said he had. Over defendant's objections for lack of foundation and hearsay, Peterson began to explain that he had examined Victor Malaro's cellular phone records. The court overruled the objections, but stated, "I'm going to give the same limiting instruction to the jury that I did for the prior statement.^[4] The statements that this witness may refer to in this . . . are only to be considered by you to explain why this witness undertook certain actions, in particular, regarding the photo lineup. [¶] Is that your question that you are asking about, Mr. [Prosecutor]?" The prosecutor confirmed that it was. The court then instructed the jury, "So only consider them to explain why this witness constructed the photographic lineup that he did and give the answer whatever weight you [feel] is appropriate."

Detective Peterson then testified that Malaro's cellular telephone records showed that, on the day after the robbery, he called only one number in the 909 area code. Peterson determined that the telephone number belonged to the Quality Inn on Waterman Avenue in San Bernardino. Peterson testified that he went to the hotel, spoke to the assistant manager, and asked if Malaro had checked into that hotel on the date of the

⁴ We do not know what prior statement the court was referring to. It does not appear to be relevant to this issue, however.

incident, September 9, 2009. Defense counsel objected that Detective Peterson lacked foundation to testify about statements made by persons at the hotel.

The trial court overruled the objection and repeated its admonition to the jury: “Well, those statements, as with any prior statements, are not to be considered for their truth, only to explain why this witness—basically, why he ended up assembling the lineup that he did, not that these statements are actually true.”

Detective Peterson testified that the hotel assistant manager told him that Malaro had not checked in. He then inquired whether anyone had checked in and registered Malaro’s vehicle, a black Toyota 4Runner. The assistant manager checked her records and told Peterson that a Fred Allen Nash (i.e., defendant) had checked into the hotel and registered a 1992 Toyota 4Runner. Peterson testified that the assistant manager told him that she had asked for valid identification.⁵ At that point, Peterson considered defendant to be a suspect and decided to include him in a photographic lineup.

Defendant contends that Detective Peterson’s testimony concerning the process he went through to determine that defendant was a suspect was inadmissible because the information Peterson related was not within his personal knowledge, because it was hearsay, and because there was no nonhearsay use for which the evidence was relevant. The Attorney General counters that the evidence was not hearsay because it was not admitted for its truth but rather to explain Detective Peterson’s actions, i.e., his decision to create a photo lineup which included defendant’s photo.

⁵ The trial court sustained defendant’s hearsay objection, but defendant did not ask that the answer be stricken.

Hearsay evidence is evidence of a statement made by someone other than a witness testifying in court. (Evid. Code, § 1200, subd. (a).) An out-of-court statement is not hearsay, however, if it is admitted for a nonhearsay purpose and the nonhearsay purpose is relevant to an issue in dispute. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162.) An out-of-court statement is admissible if it is offered to prove that it “imparted certain information to the hearer and that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer’s reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.” [Citation.]” (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 (*Scalzi*), cited and quoted in *People v. Livingston*, at p. 1162.) Here, the information Peterson obtained from the cellular phone records and from his conversation with the hotel assistant manager was admitted for a nonhearsay purpose.

Defendant argues that the reasons for Peterson’s actions were not relevant, however, and that his statements were therefore inadmissible hearsay. (See *People v. Livingston, supra*, 53 Cal.4th at p. 1162 [to be admissible as nonhearsay, out-of-court statement must be relevant to issue in dispute].) *Scalzi* supports his position. In that case, a police officer, who entered an apartment to serve arrest and search warrants relating to suspected drug trafficking, answered a call to the apartment’s telephone. He testified that a woman asked to speak to “John” (the defendant’s first name). He told her that John was not there. The caller then asked if John had “gotten it bagged up,” meaning packaging narcotics for sale. Over objection, the trial court admitted this evidence as

nonhearsay evidence of the police officer's state of mind, i.e., his reason for arresting the defendant. (*Scalzi, supra*, 126 Cal.App.3d at pp. 903-907.)

The Court of Appeal held that the content of the telephone call was irrelevant because the officer's state of mind did not tend to prove or disprove any issue in the case. The court contrasted other situations in which a police officer's reaction to or actions based upon an extrajudicial statement was relevant to a contested issue: “[I]n [*People v. Duran* (1976) 16 Cal.3d 282, 295], it served to explain why he fled the crime scene; in [*People v. Roberson* (1959) 167 Cal.App.2d 429, 431], it served to bolster his contention that he did not sell to a known narcotic agent; and in [*People v. King* (1956) 140 Cal.App.2d 1, 9], it served to show that the officer had probable cause to search.” (*Scalzi, supra*, 126 Cal.App.3d at p. 907.)

The Attorney General contends, however, that Peterson's testimony *was* relevant to the central issue in this case—“whether Ashley and Cote could identify [defendant] as the person who lifted up his black ski mask and exposed his face . . .”—because it permitted the jury to assess the validity of the identification. We disagree. The information which led Detective Peterson to include defendant's photo in the lineup has no bearing on the credibility of Ashley's identification of defendant unless it was admitted for its truth, i.e., that a person who showed valid identification identifying himself as Fred Allen Nash did check into the Quality Inn driving a vehicle of the same make, model and color as the vehicle registered to Malaro, thus tending to confirm the correctness of the identification. Stripped of that connotation, the evidence is not relevant for the purpose the Attorney General suggests.

Although we agree with defendant that the evidence was not relevant for the purpose the court identified, it does not follow that his conviction must be reversed. Evidence Code section 353 provides, as relevant, “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and *so stated as to make clear the specific ground of the objection or motion . . .*” (Italics added.) A defendant’s failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable. (*People v. Partida* (2005) 37 Cal.4th 428, 433.) Here, when the trial court overruled defendant’s hearsay and foundation objections and stated that it would admit Peterson’s testimony for the limited purpose of showing how he went about compiling the lineup, defendant did not object on grounds of relevance.

Defendant contends that because relevance is essential to the admissibility of an out-of-court statement offered for a nonhearsay purpose, his hearsay objection necessarily included an objection that the evidence was not relevant. We disagree. In *People v. Partida, supra*, 37 Cal.4th 428, the court explained the reasons underlying the requirement, in Evidence Code section 353, for a specific objection:

“A century ago, long before the Evidence Code existed, we explained the need for a specific objection. ‘To require this is simply a matter of fairness and justice, in order that cases may be tried on their merits. Had attention been called directly in the court below to the particular objection which it is now claimed the general objection of appellant presented, that court would have had a concrete legal proposition to pass on, and counsel for plaintiff would have been advised directly what the particular complaint against the question was, and, if he deemed it tenable, could have withdrawn the inquiry or reframed his question to obviate the particular objection. *Trial judges are not supposed to have the numerous, varied, and complex rules governing the admissibility of evidence so completely in mind and of such ready application that under an omnivagant^[6] objection to a question they can apply with legal accuracy some particular principle of law which the objection does not specifically present.*’ [Citations].” (*People v. Partida, supra*, 37 Cal.4th at p. 434, italics added.)

Defendant’s bare hearsay objection was not sufficient to satisfy these requirements. In the absence of any amplification, the court undoubtedly understood the objection merely to mean that Peterson’s testimony concerning what the hotel assistant manager told him was hearsay because it related an out-of-court statement made by someone other than a testifying witness. (Evid. Code, § 1200, subd. (a).) It was incumbent on defendant to point out to the court that the out-of-court statement was not

⁶ “Wandering everywhere.” (Oxford English Dictionary <<http://www.oed.com/view/Entry/131226?redirectedFrom=omnivagant#eid33491318>> [as of July 16, 2013].)

relevant to any disputed issue. Because defendant did not do so, the assertion that the evidence was not relevant is not cognizable on appeal.⁷

In any event, the erroneous admission of this evidence was not prejudicial. We review an error in the admission of evidence under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Livingston, supra*, 53 Cal.4th at p. 1163.) Here, if we could infer that jurors accepted Peterson’s testimony for the truth of the matters he learned from the cellular phone records and the hotel assistant manager, the improperly admitted evidence would bolster Ashley’s less-than-certain identification of defendant’s photo by showing a connection between defendant and Malaro, and the error would, most likely, be deemed prejudicial. However, the court admonished the jury twice that it could *not* accept the testimony as proof of any such connection. The general rule is that we

⁷ In *Scalzi, supra*, 126 Cal.App.3d 901, the court held that an objection on relevance grounds was not required to preserve the issue for appeal. It held that defendant’s “inadmissible hearsay” objection sufficed because the evidence had no arguable nonhearsay probative value and because, since the evidentiary point was previously argued in chambers, “a further ‘irrelevant’ objection would have been an idle act.” (*Id.* at p. 907.) The court’s conclusion that a relevance objection was unnecessary because the evidence was clearly irrelevant is contrary to Evidence Code section 353 and to abundant case law, as discussed in *People v. Partida, supra*, 37 Cal.4th at pages 433 through 435.

The court also held that a relevance objection was not necessary because “[t]he court and counsel had preargued the evidentiary point in chambers” and the court “simply erred after due deliberation in admitting the evidence for a nonhearsay purpose that had no probative value.” (*Scalzi, supra*, 126 Cal.App.3d at p. 907.) The opinion does not reveal exactly what argument took place in chambers. If the relevance of the evidence was argued and ruled upon in chambers but on the record, then an additional objection in open court was not necessary to preserve the issue for review. (See *People v. Hall* (2010) 187 Cal.App.4th 282, 290-294 [fully developed objection made during a sidebar on the record did not need to be renewed when witness’s testimony resumed].) That is not what happened in this case, however.

must presume that jurors follow the trial court's limiting instructions. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 598-599 and cases discussed therein.)⁸

Defendant does not provide any persuasive argument as to why this presumption should not be applied in this case. Rather, he contends that the jury's request to be allowed to examine the envelope containing the glove fragments and the DNA analysis report is sufficient to show that the jury "was concerned about the issues surrounding the [DNA] evidence." That some jurors may have had questions or concerns about the DNA evidence is not sufficient to show that the jury failed to abide by the trial court's admonition concerning Peterson's testimony. In the absence of any reason not to apply the presumption and in light of the limiting instructions, we must conclude that it is not reasonably probable that the outcome would have been more favorable to defendant in the absence of the error. (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

2.

THERE WAS NO CONFRONTATION CLAUSE VIOLATION

Defendant next contends that the erroneous admission of Detective Peterson's testimony concerning his process in deciding to create a lineup including defendant's photograph violated his Sixth Amendment right to confront an adverse witness, pursuant to *Crawford v. Washington* (2004) 541 U.S. 36.

⁸ The court in *Scalzi, supra*, 126 Cal.App.3d 901, assumed without analysis that jurors would not be able to disregard the underlying truth of the officer's hearsay testimony, despite the trial court's admonition. (*Id.* at pp. 907-908.) We do not find this aspect of *Scalzi* persuasive.

Defendant did not object at trial to Peterson’s testimony on confrontation clause grounds. The Attorney General contends that because a hearsay objection does not preserve a Sixth Amendment confrontation claim, the contention has been forfeited. (*People v. Redd* (2010) 48 Cal.4th 691, 730.) Defendant responds that because the hearsay evidence was incontrovertibly testimonial in nature, the erroneous admission of the evidence necessarily violated his rights under the confrontation clause and may therefore be raised on appeal despite the lack of objection on that ground.

The confrontation clause applies only to testimonial hearsay; it “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” (*Crawford v. Washington, supra*, 541 U.S. at p. 59, fn. 9.) As we have discussed in the previous section, the evidence defendant objects to was not admitted for the truth of the matters asserted. Consequently, notwithstanding the lack of relevance of the evidence, there was no confrontation clause violation.

3.

DEFENDANT’S REQUEST TO REPRESENT HIMSELF FOR THE PURPOSE OF
FILING A MOTION FOR NEW TRIAL WAS PROPERLY DENIED

Defendant was represented by retained counsel, Laurence Young, during the trial. On the date set for sentencing, Young told the court that defendant was unhappy with his representation and wanted him to be relieved so that defendant could represent himself or have counsel appointed. Defendant confirmed that he was unhappy that Young had not employed the strategies that he and Young had agreed on, and that he did not agree with Young that “a typo,” apparently referring to the discrepancy in the DNA test reports,

would form the entire basis of his defense. Young had also erroneously led him to believe that two separate labs had conducted DNA testing and that the defense could not have the gloves retested because the original test procedure had washed all the evidence off the gloves. He asked to represent himself for the purpose of filing a motion for a new trial or an appeal based on the issues he had mentioned concerning Young's representation. He told the court he would need "four to six months, four months, probably" to prepare the motion.

Defendant now contends that the trial court violated his rights to discharge and replace his retained counsel and move for a new trial. We reject that argument because defendant did not ask to replace his retained attorney with another attorney. Rather, he sought exclusively to represent himself.⁹

Defendant contends, however, that the court had an obligation to advise him that he had a right to have counsel appointed to assist him in presenting a new trial motion. A defendant may request appointment of a new attorney to prepare a new trial motion based on the claim that the trial attorney provided inadequate representation, and it is within the trial court's discretion to do so upon an adequate showing. (*People v. Smith*

⁹ Defendant appears to state in his reply brief that he initially requested appointment of counsel and that he only requested to be allowed to represent himself after the trial court told him that he would be entitled to appointed counsel on appeal but failed to tell him that he was also entitled to appointed counsel for the purpose filing a new trial motion. The record shows, however, that *before* the court mentioned the availability of appointed counsel for an appeal, defendant stated, "I'm not happy, at all [with counsel's representation, for enumerated reasons]. *So I wanted to ask the court if I could go pro per and work on an appeal or a motion for a new trial.*" (Italics added.) Defendant repeated his request to "go pro per" after the court made its comment about defendant's right to appointed counsel on appeal.

(1993) 6 Cal.4th 684, 690-696; *People v. Stewart* (1985) 171 Cal.App.3d 388, 393-399.)¹⁰ However, defendant has not cited any authority that the trial court is required to proffer the appointment of new counsel if a defendant specifically asks to represent himself. Accordingly, he has not met his burden of demonstrating that it was error for the trial court not to suggest the appointment of new counsel. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610 [appellant has burden to demonstrate error].)

Under the same caption, defendant's argument that the court violated his right to discharge his retained attorney and obtain new counsel morphs into the argument that the trial court violated his right to self-representation pursuant to *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).¹¹ He relies on *People v. Miller* (2007) 153 Cal.App.4th 1015 (*Miller*).

In *Miller*, after the verdict and after the denial of a motion for new trial, the defendant sought to represent himself at sentencing. On the date set for sentencing, the parties moved to continue sentencing for two months for reasons unconnected to defendant's request to represent himself. After the continuance had been granted, the

¹⁰ *People v. Stewart, supra*, 171 Cal.App.3d 388, was disapproved in *People v. Smith, supra*, 6 Cal.4th 684, to the extent that the language employed in *Stewart* "implies a different rule than that of [*People v.*] *Marsden* [(1970) 2 Cal.3d 118]." (*People v. Smith*, at p. 694.) Both *Smith* and *Stewart* apply only in the context of substitution of one appointed attorney for another; they do not apply in the context of substitution of appointed counsel for retained counsel, nor do they apply in the context of a request to discharge retained counsel in favor of self-representation.

¹¹ Defendant reiterates this contention under a separate heading, incorporating his prior argument by reference.

defendant asked to represent himself at sentencing. He told the court that he would be ready to represent himself on the continued sentencing date. The court denied the motion, in part because the court viewed it as untimely. (*Miller, supra*, 153 Cal.App.4th at pp. 1019-1020.)

A defendant has a constitutional right to represent him- or herself, if he or she voluntarily and intelligently elects to do so. (*Faretta, supra*, 422 U.S. at pp. 818-819, 835.) The right is absolute if the motion is made within a reasonable time prior to the commencement of the trial. If it is not made within a reasonable time prior to the commencement of the trial, the right is not absolute but is within the discretion of the trial court. (*People v. Windham* (1977) 19 Cal.3d 121, 128 (*Windham*).) In *Miller*, the appellate court held, however, as a matter of first impression, that the rule that a motion for self-representation must be made within a reasonable time before trial commences in order for the defendant's right to self-representation to be absolute (assuming the defendant otherwise qualifies to represent him- or herself) does not apply to a posttrial request for self-representation at sentencing. Sentencing is a posttrial proceeding and not part of the trial itself. Accordingly, the timeliness of the motion depended upon whether it was made a reasonable time before the sentencing hearing. Miller's motion, made two months before the sentencing hearing, was clearly timely; accordingly, his right to represent himself was absolute, and the trial court's denial of his motion was reversible per se. (*Miller, supra*, 153 Cal.App.4th at pp. 1021-1024.)

Like sentencing, a motion for new trial is a posttrial proceeding. A new trial motion must be made before judgment and is timely even if it is made orally on the date of sentencing. (*People v. Braxton* (2004) 34 Cal.4th 798, 807-808 & fn. 2.) Applying the rationale stated in *Miller*, then, a *Faretta* motion for the purpose of filing a motion for new trial is timely if it is made within a reasonable time before the sentencing hearing. What constitutes a reasonable time depends, in part, on whether the defendant will require a continuance in order to represent him- or herself. (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5.)

Here, defendant made his *Faretta* motion on the date of sentencing and requested at least a four-month continuance. Based on those two facts, the motion could easily be seen as untimely. In *Windham*, however, the court cautioned that the reasonable time requirement must not be used as “a means of limiting a defendant’s constitutional right of self-representation.” (*Windham, supra*, 19 Cal.3d at p. 128, fn. 5, italics omitted.) The court explained that although a defendant should not be permitted to wait until the day preceding trial before he moves to represent himself and requests a continuance in order to prepare for trial, “[w]hen the lateness of the request and even the necessity of a continuance can be reasonably justified the request should be granted.” (*Ibid.*)

Here, as the trial court acknowledged, because the sentencing hearing was the first opportunity defendant had to make his request, it was arguably timely. Nevertheless, the court did not abuse its discretion in implicitly finding the motion untimely based on defendant’s request for a four- to six-month continuance. Defendant did not explain why he needed so much time to prepare his new trial motion, and in the absence of any

justification for the delay, the trial court reasonably concluded that the lengthy delay would interfere with the orderly administration of justice. Accordingly, there was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.