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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.

ALVARO JOE FRIAS PEREYRA, JR.,,

Defendant and Appellant.

E058998

(Super.Ct.Nos. RIF1105355 &  
RIF1200715)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner,  
Judge. Affirmed.

John L. Staley, 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, Charles Ragland and Laura A.  
Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Alvaro Joeferias Pereyra, Jr., of two counts of infliction of pain on a child (Pen. Code, § 273a, subd. (a)<sup>1</sup>), two counts of evading a police officer (Veh. Code, § 2800.2), possession of a firearm by a felon (former Pen. Code, § 12021, subd. (a)(1)), and resisting arrest (Pen. Code, § 148). With enhancements and sentencing under the three strikes law (§ 667, subd. (e)), the trial court sentenced defendant to a total term of 16 years eight months and imposed various fines and fees.

On appeal, defendant contends the trial court erroneously denied his motion to represent himself under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*). We disagree and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

On October 7, 2011, two Riverside Police officers in a patrol car observed a van fail to stop at a stop sign. After the van drove through another stop sign without slowing, the officers activated their lights and siren and pursued the vehicle. The driver, whom one of the officers identified as defendant when testifying at trial, led the officers on a chase through heavy traffic on surface streets at speeds exceeding 80 miles an hour, sometimes driving on the wrong side of the road. By the end of the chase, which continued long enough that a helicopter assisted, defendant had failed to obey 22 stop signs and/or red lights. Even after striking another car, which contained a driver, defendant kept driving on surface streets at 80 to 90 miles an hour. Eventually, defendant

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<sup>1</sup> Unless otherwise specified, all statutory references are to the Penal Code.

struck another moving vehicle while driving against traffic at 50 to 70 miles an hour. At that point, he exited the van while it was still moving and began running away on foot. Multiple officers took defendant to the ground, but he continued to resist the four of them for approximately two minutes. A video, which the jury watched, captured large portions of defendant's interactions with police. Defendant was taken to the hospital pursuant to department policy governing suspects involved in vehicle collisions and because he exhibited abrasions to his face.

When officers examined the van defendant had been driving, they found two minor children, ages three and five to six, crying in the backseat, where they had been riding without car seats or child restraints. Officers also found a loaded semiautomatic firearm in the driver's seat, as well as eight empty syringes. At trial, the officers who initiated the pursuit testified that they would have immediately stopped had they known there were children in the van, because the rate of speed and way in which defendant drove was inherently dangerous.

In a second incident on March 3, 2012, defendant drove past an officer who recognized defendant from a flyer indicating that he was subject to an arrest warrant arising out of the above-described incident on October 7, 2011. Two marked vehicles began following defendant, who failed to stop even though both cars in pursuit activated their lights. Defendant again led officers on a high speed chase on surface streets. His speeds exceeded 80 miles an hour, and he again drove on the wrong side of the street at times and failed to obey multiple stop signs and/or red lights. One of the pursuing

officers testified that he struggled to keep up with defendant's van due to the excessive rate at which he drove, and that, except when necessary to navigate sharp turns, defendant never activated his brake lights during the entire chase.

The pursuit ended only after defendant drove through a fence enclosing a residence, with his van stopping only a foot away from the house. Defendant jumped a fence into a backyard, where he assumed a threatening stance as one of the pursuing officers approached him. This officer began trying to handcuff defendant, who ignored verbal commands to stop resisting. Only the effort of officers from both of the cars involved in the chase, one of whom had to strike defendant several times due to his attempts to escape their grasp, eventually resulted in his being taken into custody. Video recorders in patrol cars captured most of the March 3, 2012 incident, and the jury watched the recording.

Defendant walked of his own volition to a police car before receiving medical assistance. Officers at the scene observed no injuries on defendant but summoned medical aid because a traffic collision and a forceful encounter with the police had occurred.

The People filed two different felony complaints against defendant, one arising out of each of the incidents described *ante*. Each alleged that defendant was a well-known member of a gang, Arlanza 13. On September 10, 2012, the trial court granted the People's motion to consolidate the two cases, as well as a motion by defendant to continue trial from the date of the hearing to October 30, 2012. Defendant again

successfully moved to continue trial, this time from October 30, 2012, to December 6, 2012. In a motion heard on November 29, 2012, he also persuaded the court to dismiss one of the two gang-related counts alleged against him on the ground that he had been acting alone at the time of the October 7, 2011 incident.

On the same date, the court also denied defendant's motions to suppress evidence the People allegedly failed to preserve and to replace his appointed attorney.<sup>2</sup> Defendant based the latter request on a complaint that defense counsel had failed to move to strike defendant's prior convictions. The court noted that counsel had successfully had a charge stricken and indicated she was working hard on defendant's behalf. Before concluding the hearing, the court confirmed that the first day of trial would be on December 6, 2012.

Meanwhile, the court conducted an inquiry into whether defendant, who claimed to be aphasic<sup>3</sup> as a result of injuries caused by the officers who arrested him after the March 3, 2012 incident, should continue being able to use the telecommunications device for the deaf/telephone typewriter (TDD/TDY) phone the jail made available to people with certain types of speech or hearing impairments. On August 6, 2012, the court suspended defendant's right to use the TDD/TDY phone after hearing testimony from three custodial deputies with circumstantial evidence implying that defendant is feigning an inability to talk.

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

<sup>3</sup> In this context, "aphasic" means completely unable to speak.

More specifically, Alan DeWit described having seen defendant using the TDD/TDY machine like a regular phone while covering his mouth with his hand. Another deputy, Tiffany Thibodeaux, testified that she heard talking coming from the attorney booth, where defendant was using the TDD/TDY phone, even though he was the only person present in that location. Finally, Mitchell Jasso testified to having heard a discussion in defendant's cell over an intercom at a time when only defendant and his cellmate should have been present. Jasso acknowledged that sometimes a third inmate can get trapped in a two-person cell like the one defendant shared with another inmate and that he had not checked for the right kind of "marker" to see if anything of the sort had occurred the night he heard two men talking in defendant's cell. Still, the trial court found enough circumstantial evidence that it suspended defendant's TDD/TDY privileges. Defendant explicitly states that he does not challenge the court's finding about his aphasia on appeal.

When the parties appeared for trial on December 6, 2012, defense counsel informed the court that defendant would like to make another *Marsden* motion. For the first time, defendant indicated he would like to represent himself if the court refused to replace his appointed attorney. The court tentatively indicated it could not envision an accommodation that would allow defendant, who would not speak and cannot type, to communicate with the jury, but it stated it would look into the matter. Defendant provided a written time waiver because a trial continuance was necessary.

On December 10, 2012, the trial court gave defendant typewritten questions to which he could handwrite answers for purposes of his second *Marsden* motion. The court further indicated it had ascertained that it lacked equipment that would allow defendant to communicate with the jury, and also that allowing him to examine witnesses using written questions would “dramatically alter the nature of the proceeding.”

On January 2, 2013, the trial court granted defendant’s motion to strike the remaining gang-related count against him. Defendant, who had filed a formal request for a disability-related accommodation, provided another written time waiver. The trial court ordered defendant evaluated by a physician to see if it could acquire additional evidence about the veracity of defendant’s claim to aphasia and requested that the same officers who had previously testified that defendant could talk appear for additional testimony at a hearing on January 7, 2013.

At the resumed hearing on January 7, 2013, the trial court denied defendant’s second *Marsden* motion. Having already discussed offers by the People and a pretrial judge at the previous hearing, the court answered defendant’s complaint that his counsel was trying to make him take bad deals by emphasizing that an acquittal was unlikely given the video recordings of defendant’s traffic and foot chases and explaining that counsel would not be doing her job if she did not encourage defendant to accept an offer that would have him serve less time than he would if convicted of all charges and sentenced to the maximum terms authorized by law.

Defendant also complained that his attorney refused to relay messages or documents to his wife for him, instead saying she is not his secretary. The trial court encouraged counsel to use softer language when speaking to defendant, but it indicated that having her communicate with his family members was an unwise idea because violations of the attorney-client privilege might occur.

In response to defendant's accusation that his attorney was not adequately representing him because she had not yet filed a motion to strike his prior offense under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the court agreed with counsel's position that it was best to wait to see if the jury convicted defendant, because the prior strike would only be relevant at sentencing. It also emphasized that counsel had successfully obtained dismissal of the two gang-related counts against defendant because he complained that she refused to address these charges.

Finally, defendant accused his attorney of refusing to acquire video from the jail to prove that he is not feigning an inability to speak, to interview witnesses, or to have the gun that was found in his van examined for fingerprints. Based on counsel's representation that there appeared to be no such video, that she had been listening to audio recordings of phone calls in which defendant used others as intermediaries to speak for him in order to disprove the People's allegation that he was lying about being aphasic, that she had talked to witnesses and determined they would do more harm than good, and that the People gave no indication that anyone had fingerprinted the gun and was

prepared to cross-examine witnesses on that basis, the court found no inadequacies in the representation she had been providing.

The next hearing occurred on January 25, 2013. On that date, the same three custodial deputies who had testified on August 6, 2012, testified again about defendant's purported inability to speak. Their testimony matched what they had earlier told the court, except that Thibodeaux added a bit of extra detail about what she saw. Jasso testified that he had checked for markers and found none, confirming that defendant and his cellmate were the only people he could have heard conversing. Having considered this new testimony, the transcript from the previous hearing about TDD/TDY privileges, and a report from a physician who concluded that no "clinical evidence" or "objective abnormalities" were present to explain defendant's purported aphasia, the trial court concluded that defendant had the ability to speak but was refusing to do so.<sup>4</sup> The court then denied defendant's *Faretta* motion. In addition to expressing concern that allowing a speechless defendant to represent himself would "materially affect" trial, the court found that the motion, which necessitated a trial continuance, was untimely and that defendant was "perpetrating a fraud on the court" by continuing to pretend he could not talk. Defendant's response to the court's denying his *Farretta* motion was to turn his back on his attorney when she was trying to speak to him.

Even after these proceedings, defendant continued to assert his dissatisfaction with counsel. On February 14, 2013, which was scheduled as the first day of trial, defendant

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<sup>4</sup> Again, defendant does not attack this factual finding.

requested a continuance because he wanted to hire private counsel. At a return hearing on February 20, 2013, defendant appeared without private counsel and, against the advice of his appointed attorney, gave the court a handwritten note accusing his appointed counsel of “doing nothing” on the case because she still had not filed a *Romero* motion. He also indicated he did not want to go to trial. The trial court confirmed that a pretrial offer by a judge of approximately half the maximum sentence defendant could expect was still pending, but defendant rejected it.

A jury panel was present for voir dire on February 25, 2013. Nonetheless, defendant requested another one-week continuance to retain private counsel and made a third *Marsden* motion. This time, he accused his public defender of refusing to obtain evidence or look into cases that should apply to him and taking him to trial when he did not want to go. The court repeated that counsel had determined the witnesses defendant wanted her to call would be harmful rather than helpful and that a *Romero* motion would be premature before trial. The court explained that defendant was the one forcing a trial because he refused to accept settlement offers that were reasonable given that defendant had been filmed evading officers. Also, the court emphasized that counsel’s work had resulted in dismissal of a gang-related count. Ultimately, the trial court denied both the *Marsden* motion and the request for another continuance. Voir dire began immediately thereafter.

## ANALYSIS

Defendant asserts that his *Faretta* motion was timely, such that the trial court had no discretion to deny it. He also argues, whether the motion was timely or not, that the trial court violated the principles set forth in *Faretta* and *Godinez v. Moran* (1993) 509 U.S. 389, 399-400 (*Godinez*) by considering whether he had the ability to represent himself well when all it was allowed to consider was whether he was competent to waive counsel and whether he did so knowingly, voluntarily, and unequivocally.

A “defendant in a state criminal trial has a federal constitutional right to represent himself without counsel if he voluntarily and intelligently elects to do so.” (*People v. Windham* (1977) 19 Cal.3d 121, 124 (*Windham*)). If a defendant knowingly and voluntarily waives the right to counsel in an unequivocal fashion, his right to self-representation is absolute. (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) On appeal, the reviewing court will independently examine the record for evidence that the *Faretta* request was knowing, voluntary, and unequivocal. (*Ibid.*) However, these rules govern only when a *Faretta* motion is timely under the rules we describe in section 1, *post*; if a request for self-representation is untimely, “it is thereafter within the sound discretion of the trial court to determine whether such a defendant may dismiss counsel and proceed *pro se*.” (*Windham, supra*, 19 Cal.3d at p. 124.) In addition, a trial court possesses discretion to deny a request for self-representation by a defendant it finds to be disruptive and unable to abide by courtroom protocols. (*People v. Welch* (1999) 20 Cal.4th 701,

734-735 (*Welch*.) “[T]he exercise of that discretion ‘will not be disturbed in the absence of a strong showing of clear abuse.’ ” (*Id.* at p. 735.)

In this case, we hold that, although defendant knowingly and voluntarily waived the right to be represented by an attorney, the trial court acted within its discretion in determining both that defendant’s motion was untimely and, alternatively, that granting a *Faretta* request by this particular defendant would have caused undue disruption. We address the timeliness of the motion and the reasonableness of the trial court’s exercise of discretion *post*. We then consider the likely effect on the proceedings of allowing a defendant who was feigning a disability that affected his communicative abilities to represent himself at trial.

1. *The trial court had discretion to deny defendant’s Faretta motion as untimely*

As already established, the timeliness of defendant’s *Faretta* motion is one of the factors that determines whether the trial court had discretion to deny a right that is absolute when properly invoked. Here, the trial court correctly determined that defendant’s *Faretta* motion on the first day of trial was untimely. Having drawn this conclusion, it also properly exercised discretion regarding whether to grant or deny the request.

a. *Defendant’s Faretta motion was untimely*

Our Supreme Court has not fixed “any particular time at which a motion for self-representation is considered untimely, other than that it must be [made] a reasonable time before trial.” (*People v. Clark* (1992) 3 Cal.4th 41, 99; see *People v. Lynch* (2010) 50

Cal.4th 693, 723 (*Lynch*), abrogated on other grounds by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-644.) In fact, “[w]hen California Supreme Court authority has been applied, motions for self-representation made on the day preceding or on the trial date have been considered untimely. (*People v. Burton* [(1989)] 48 Cal.3d [843] at p. 852; *People v. Moore* (1988) 47 Cal.3d 63, 79-81; *People v. Douglas* (1995) 36 Cal.App.4th 1681, 1689.)” (*People v. Rudd* (1998) 63 Cal.App.4th 620, 626.) The state high court has squarely rejected the federal rule, which is that a request for self-representation is timely if made before the jury is empanelled. (See, e.g., *People v. Burton, supra*, 48 Cal.3d at pp. 853-854 (*Burton*)). Instead, it has preferred a flexible approach under which trial courts are to consider the totality of the circumstances when deciding whether a *Faretta* request is timely. (*Lynch, supra*, 50 Cal.4th at p. 726.) Criteria useful to drawing a conclusion regarding timeliness include “not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance or availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation.” (*Ibid.*)

As discussed *ante*, the proximity of a *Faretta* motion to the trial date is one of the most important factors in deciding whether the motion was timely. While a jury may not have been empanelled in this case until much later, defendant cannot deny that December 6, 2012, which is when he first told the court he wanted to represent himself if he could not obtain replacement appointed counsel, was the date set for trial. There was therefore

no “time between the motion and the scheduled trial date,” such that the first of the *Lynch* factors weighs in favor of finding the motion untimely.

A second important factor *Lynch* directs us to examine is the extent to which defense counsel was ready for trial, which overlaps with defendant’s own readiness to proceed on his own behalf. Defendant had already made one unsuccessful *Marsden* motion and successfully moved to continue trial on at least two occasions<sup>5</sup> before he first told the court that he wished to represent himself if he could not obtain a different appointed attorney. (Cf. *People v. Tyner* (1977) 76 Cal.App.3d 352, 354-355 (*Tyner*) [*Faretta* motion made on the first day of trial should have been granted because the defendant did not request a continuance]; see *People v. Herrera* (1980) 104 Cal.App.3d 167, 174-175 [finding *Faretta* request timely under *Tyner* because the defendant indicated he did not need a continuance].) Furthermore, on the day of trial, the trial court stated that during a conversation in chambers defense counsel had offered to have

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<sup>5</sup> On September 6, 2012, defendant moved to continue trial from September 10, 2012, to October 30, 2012. Because the two felony cases against him had not yet been consolidated, he filed one motion in each case, but the motions were set for the same hearing date and request identical relief. The record also contains a motion by defendant to continue trial from October 30, 2012 to November 29, 2012, which indicates it was filed on October 25, 2012. However, a second motion by defendant to continue, also from October 30, 2012 to November 29, 2012, is present in the record as well, although this one is file-stamped October 30, 2012. Both motions provide a hearing date of October 30, 2012, and both request the same relief. We infer that the October 25 and October 30, 2012, filings are actually the same motion, and that defendant therefore filed two sets of motions to continue trial. Although the minute order from the October 30, 2012 proceeding makes no mention of a request to continue trial, the day of the hearing was the day previously set for trial, and the court’s only orders were to schedule a trial readiness conference for November 29, 2012, and jury trial for December 6, 2012. It therefore appears that defendant’s October 2012 motion to continue trial was successful.

defendant waive time, and defendant in fact executed a written waiver to that effect on that day. The fact that defense counsel was not ready for trial weighs in defendant's favor because it indicates a continuance would have been necessary even without the *Faretta* motion, but defendant's own failure to prepare cuts heavily against him. (Cf. *Tyner, supra*, 76 Cal.App.3d at p. 354 [defendant had prepared 50 questions for witnesses and was ready to proceed with trial even without counsel].) This factor, then, is neutral at best.

Next, we consider a third *Lynch* factor, namely, the extent to which “any ongoing pretrial proceedings” may have been pending or otherwise relevant to the trial court's determination regarding timeliness, all of which speaks to the complexity of the case. (*Lynch, supra*, 50 Cal.4th at p. 726.) The record on appeal demonstrates that little pretrial motion work occurred in this action. Defendant's attorney filed motions to dismiss gang-related counts alleged against defendant and to dismiss the case on the ground that the People failed to preserve evidence of statements defendant's wife made to arresting officers.<sup>6</sup> However, both had already been adjudicated prior to the December 6, 2012, trial date. In fact, the only significant pretrial work that remained on December 6, 2012, consisted of defendant's requests for new counsel, self-representation if the former failed, and a disability-related accommodation. Because the only pretrial motions that remained after defendant first invoked *Faretta* rights were ones made by defendant in an effort to

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<sup>6</sup> *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*).

change his representation status, this factor weighs in favor of our affirming the trial court's deeming the motion untimely.

The last applicable *Lynch* factor concerns whether defendant neglected to avail himself of opportunities to inform the court sooner of his intention to represent himself. Defendant offers no reason why he did not raise or could not have raised issues regarding counsel's handling of the case at an earlier time. (*Lynch, supra*, 50 Cal.4th at p. 726 [trial court to consider "whether the defendant had earlier opportunities to assert his right of self-representation"].) Like the defendant in *Lynch*, he failed to mention self-representation despite having filed a *Marsden* motion that was denied before his first mention of *Faretta* rights. (*Id.* at p. 728.) Consequently, defendant "offered no justification for his untimely request to represent himself," and another *Lynch* factor weighs against him. (*Ibid.*)

As for the remaining *Lynch* factors, we have no information regarding what witnesses were required at trial or whether it was difficult to assure the presence of any of these individuals. Similarly, because neither party discusses what transpired during trial or what the parties' respective positions were, we draw no conclusions about whether the level of complexity warranted allowing defendant additional time.

Having found that several of the *Lynch* factors weigh against defendant and that the remaining ones are no better than neutral, we find no abuse of discretion in the trial court's determination that defendant's *Faretta* motion was untimely.

b. *The trial court did not abuse its discretion in denying defendant's untimely motion*

Having determined that the trial court did not err in deeming defendant's *Faretta* motion untimely, we next consider whether it abused its discretion in denying the request for self-representation. (See *Windham*, *supra*, 19 Cal.3d at pp. 127-128.) Trial courts faced with untimely *Faretta* requests are to consider factors such as "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Id.* at p. 128.) We give "considerable weight" to a trial court's decision to deny a defendant's request for self-representation using these criteria. (*People v. Ruiz* (1983) 142 Cal.App.3d 780, 792.)

As for the quality of defense counsel's advocacy, in this case, the court had already twice denied *Marsden* motions on the ground that defense counsel's representation of defendant was adequate by the time it reached defendant's *Faretta* motion. Aside from some complaints about the way counsel spoke to him, defendant's main substantive issue with her handling of the case was that she had not yet filed a *Romero* motion to strike his prior offense. We have no quarrel with the conclusion of both defense counsel and the trial court that such motions are best brought after trial and only if a conviction occurs and sentencing is necessary. The first *Windham* factor offers no help to defendant.

As for defendant's previous attempts to substitute counsel, we note that, in the trial court, defendant asserted no reason for his *Faretta* motion other than his dissatisfaction with counsel, which the trial court determined to be unfounded. Defendant's briefs on appeal also provide no particular reason why defendant insisted on representing himself if he could not obtain new counsel. This *Windham* factor also weighs against defendant.

Another factor *Windham* instructs courts to analyze is the stage of the proceedings, which we have already discussed. Defendant first moved to represent himself on the day of trial, and after the court had already denied his first *Marsden* motion. His filing three *Marsden* motions, asking for continuances to get private counsel, and stating that he did not want to go to trial support a conclusion that what he really intended was to cause delay. Like the first two criteria we discussed, the "length and stage of the proceedings" factor weighs heavily against defendant. (*Windham, supra*, 19 Cal.3d at p. 128.)

The final *Windham* factor, namely, the potential for delay, also supports the trial court's position rather than defendant's. As discussed *ante*, defendant needed more time to prepare, and the trial court in fact commented that it had "continued the trial in order to have [the *Faretta*] hearing." Delay was likely if the trial court granted defendant's motion.

As we have shown, the *Windham* factors weigh against defendant. We consequently find the trial court did not abuse its discretion when it denied defendant's *Faretta* request.

Rather than discussing the *Lynch* and *Windham* criteria directly, defendant's main strategy on appeal is to assume that the real reason the trial court denied his *Faretta* motion was because it decided he could not represent himself well if he refused to speak. Defendant is correct that an inquiry into the adequacy of the representation he would provide for himself is improper in the context of the right to self-representation. (*Godinez, supra*, 509 U.S. at pp. 399-400 [“defendant’s ‘technical legal knowledge’ is ‘not relevant’ to the determination whether he is competent to waive his right to counsel”]; *Faretta, supra*, 422 U.S. at p. 836.) However, we are hard-pressed to see what bearing *Godinez*, which addresses the standard for competency to waive counsel, has on whether defendant's motion was timely or whether the trial court properly applied the *Windham* factors after determining that his request was tardy. Using *Lynch*, we have determined that the motion was not timely, and we find the trial court committed no abuse of discretion when applying the *Windham* factors to the facts of this case once it found the motion untimely. We see no evidence that the trial court's decision was motivated by concerns prohibited by *Godinez*, and we discern no abuse of discretion in the denial of defendant's untimely *Faretta* request.

2. *Self-representation by a defendant who feigns an inability to speak would disrupt trial proceedings*

As an alternate basis for our affirming the judgment and, even in the face of defendant's contention that the trial court was acting on fears the trial court may not consider under *Godinez*, we find that the trial court properly denied defendant's *Faretta*

motion even if it was timely. This is because the court made findings that defendant's aphasia was not genuine, that it possessed no technology that could allow him to readily communicate with the judge or the jury, and that allowing such an individual to represent himself would be unduly disruptive.

“[A]n accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel *and that he is able and willing to abide by rules of procedure and courtroom protocol.*” (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 173, italics added; see *Faretta, supra*, 422 U.S. at p. 834, fn. 46 [“The right of self-representation is not a license to abuse the dignity of the courtroom”].) Even after *Godinez*, the California Supreme Court has confirmed that a trial court may deny a *Faretta* request by a defendant whose conduct is disruptive, and that such an order would not violate *Godinez* by conditioning the right to represent oneself on the defendant's ability to do so effectively. (*Welch, supra*, 20 Cal.4th at pp. 734-735.) As a corollary to this approach, a court may deny self-representation to a defendant who lacks the physical capacity to communicate with the court and the jury, because such a defendant lacks the ability to follow regular courtroom procedure. (*People v. Watkins* (1992) 6 Cal.App.4th 595, 599-600 (*Watkins*).)

In this case, we again emphasize that defendant does not challenge the trial court's finding that he was feigning an inability to speak.<sup>7</sup> He also does not dispute that the trial

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<sup>7</sup> Because the record here supports the trial court's conclusion that defendant was pretending to have aphasia, we draw no conclusions about how trial courts should address  
[footnote continued on next page]

court had no equipment or other accommodation that would have allowed him to communicate with the judge or the jury, especially given that he cannot type and does not know sign language. Defendant offers no suggestions regarding how the trial court could have allowed him to represent himself in silence without making the proceedings unduly disruptive and, given the absence of technology that would have allowed him to communicate quickly and directly even though he refuses to speak, we are unaware of any such accommodations. (Cf. *People v. Poplawski* (1994) 25 Cal.App.4th 881, 891, fn. 1 (*Poplawski*) [*Faretta* motion wrongly denied because, in part, using an interpreter to overcome defendant’s insufficiency in the English language was preferable to “deprivation of the constitutional right at issue”].)

Defendant also exhibited some disruptive courtroom behavior, such as turning his back on counsel out of dissatisfaction with the court’s denying his *Faretta* request such that her only option was to tell the court that she “believe[d defendant was] done with [the day’s] proceedings.” This problematic conduct does not rise to the level of that exhibited by the defendant in *Welch*, who not only turned his back on the court but also repeatedly interrupted the judge, refused to obey instructions to stop speaking, accused the court of trying to mislead him, and “belligerently denied awareness of a calendar date that was set in his presence.” (*Welch, supra*, 20 Cal.4th at p. 735.) Still, the coupling of a feigned inability to speak with problematic conduct supports the trial court’s conclusion

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[footnote continued from previous page]  
*Faretta* requests by defendants with proven disabilities affecting their communicative skills.

that defendant was aiming to cause disruption and would have essentially obtained free rein to engage in such conduct had he been allowed to represent himself.

On these unique facts, we hold that allowing defendant to represent himself would have so disrupted trial that the court had the authority to deny his *Faretta* motion even though the right to self-representation is ordinarily considered absolute. (*Doolin, supra*, 45 Cal.4th 390, 453.) We therefore affirm the judgment.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ  
P. J.

We concur:

McKINSTER  
J.

CODRINGTON  
J.