



People v. Owens

2005 | Cited 0 times | California Court of Appeal | June 15, 2005

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In this appeal, defendant Tyrone Owens challenges the denial of his post-trial motion to represent himself in moving for a new trial on the charge of second degree robbery (Pen. Code, § 211). He further disputes the sufficiency of the evidence that he used force in the robbery, and he contends that a 911 call by a witness unavailable at trial should have been excluded as inadmissible hearsay and a violation of his right of confrontation. Finally, defendant seeks correction of the abstract of judgment to reflect the striking of an enhancement for a prior prison term. We will reverse the judgment and remand for further proceedings.

Background

Dawinder Singh was the owner of a Quik Stop liquor store in San Jose. Sometime after midnight on March 27, 2003, he and his wife were in the store when defendant entered. According to Singh, defendant went to the cooler at the back and took out a 24-ounce can of beer. As he removed the beer, he looked over his shoulder, which made Singh suspicious. Singh saw defendant move to an aisle, where he put the beer can inside his jacket. He then walked toward the exit, while continuing to look at the merchandise. When defendant reached the door, Singh stood in front of him and told him that he had to pay for the beer or else put it back. Singh told defendant that he could see the top edge of the beer can inside defendant's jacket. Defendant cursed Singh and turned to push the beer can further down. Singh continued to block defendant's path. Defendant tried to punch Singh, who backed up out of the way. Defendant then went outside and picked up his bicycle. Singh, however, grabbed the back wheel, and the two struggled over the bike while Singh called 911. At one point defendant stopped pulling and hit Singh, who fell to the ground but held on to the bike. After defendant left, Singh took the bicycle inside the store while he waited for the police.

Shortly thereafter, defendant returned and demanded his bicycle. Singh called 911 again and took a baseball bat outside. This time defendant did not have the beer can in his jacket. Singh tried to keep defendant out of the store, but defendant punched him three or four times and pushed past him into the store. Singh and his wife both went outside and held the door shut so that defendant could not get out while they waited for the police. During this time a bystander, Felino Pedery, called 911 to



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report "a big robbery going on," but he could not explain how he knew it was a robbery except that there was "yelling" and the person inside the store was "running around." While Pedery was talking to the 911 dispatcher, the police arrived and arrested defendant.

After the police took defendant into custody, Singh helped them look for the stolen beer. One of the officers found a can of Steel Reserve malt liquor, the type that was missing from the cooler. It was still cold and had moisture on the outside, as if it had just been in the refrigerator. The officers noticed bruising or redness on Singh's face and left ear. Defendant, who had continued to yell and curse through the entire encounter, had a small cut on one of his hands.

Defendant was charged by information with one count of second degree robbery with several prior convictions. He waived his right to a jury and testified at his court trial. Defendant said that he entered the Quik Stop to buy Budweiser beer, but when he opened the cooler he realized he had no money with him, having spent his last \$1.80 on telephone calls. Instead, he went outside. Singh then approached him and demanded the beer. Defendant explained that he had not taken any beer, and he then began walking down the street with his bicycle. Singh followed him, still demanding the beer, while defendant continued to insist he had no beer; he even opened the jacket to show Singh. After talking on his cell phone, Singh then knocked defendant off the bike and grabbed it from him. The two then struggled over the bike as the first 911 call recorded them. Singh took the bike back to the store.

Defendant had hurt his shin and had to wait a few minutes before he could get up. He was angry and returned to the store. Singh was outside holding a baseball bat. After another hostile exchange of words, Singh swung the bat. Defendant dodged the bat and ran inside the store, where he found his bike. The Singhs then shut the door and defendant remained inside until the police arrived. He never punched Singh, and he did not sustain a cut on his hand from this encounter. One of the officers must have taken the Steel Reserve from the store to incriminate him; he did not even drink malt liquor. During his testimony defendant repeatedly asked that the store's surveillance videotape be shown in court to prove that he did not steal any beer and that he did not have a physical encounter with Singh inside the store.

The trial court found defendant guilty of robbery and sentenced him to the lower term of two years, doubled under Penal Code section 667, subdivision (e), with a five-year enhancement under section 667, subdivision (a). The court struck the punishment for a prison prior, for a total prison term of nine years.

Discussion

1. Defendant's Competency to Represent Himself

Before trial defendant twice sought to replace his attorney. The court considered his motions under



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People v. Marsden (1970) 2 Cal.3d 118 and denied them. After trial defendant again attempted to remove counsel and then asked to represent himself with the goal of obtaining a new trial. The court admonished defendant about the risks of self-representation and questioned him about his educational and family background, his legal knowledge, and his mental health history. Defendant explained that he had reached the 10th grade and had learned some criminal law from the library. He also acknowledged that he had taken Wellbutrin for depression. In jail he was being given Wellbutrin and another medication. Upon the court's inquiry, defendant also admitted that 13 years earlier he had heard voices.

The court told defendant that an examination was necessary to ascertain that his medication would not affect his understanding of his waiver and its consequences. Defendant protested that he had been allowed to waive his jury trial.¹ The court asked defense counsel whether he had "ever entertained a doubt" about defendant's ability either to waive his right to a jury or to waive his right to counsel. Defense counsel responded that he had not doubted defendant's ability to waive a jury, but "it appears over the past period of time, post conviction, that there has been a degeneration of the mental state." The prosecutor maintained that defendant seemed to be articulate and able to understand the proceedings. As a precaution, however, the court ordered a mental status examination to determine whether defendant was competent to waive his right to counsel and represent himself.

In December 2003, after receiving reports from two psychologists, the court reconsidered defendant's request. One of the psychologists, Dr. Cohen, had found defendant "unequivocally" to be competent to understand the proceedings and discuss his case "cogently." Defendant showed no intellectual limitations or psychiatric problems that would prevent him from being able to act as his own attorney and direct the case. Dr. Jones, on the other hand, found defendant to be incompetent based on the "severity of his psychotic illness." Dr. Jones acknowledged that defendant was "lucid, coherent, cooperative, and oriented to time and place." Defendant would be able to understand the nature of the proceedings and consult with his attorney. Nevertheless, Dr. Jones believed that defendant suffered from "significant delusions of persecution" based on "deeply entrenched, rigidly held psychotic convictions" that he had been "railroaded" by the system, had not received a fair trial, and had actually been victimized by Singh when Singh snatched his bike. This "implausible train of thought" rendered defendant unable to conduct his own case in a rational manner. It also made defendant "much less likely to talk to his attorney and thus to cooperate in his own defense due to his marked distrust." If allowed to represent himself, because of his "psychotic disorder" defendant would "obvio[us]ly never consider" presenting a defense based on insanity or diminished capacity; instead, defendant was likely to present evidence, such as the store videotape, which would "obviously" not vindicate him. Defendant was also likely to "go off on irrelevant tangents" related to an "idiosyncratic, implausible quest for self-vindication."

The court again questioned defendant about his background and current medications; defendant repeated that he was taking Wellbutrin for depression and an anti-anxiety medication, Seroquel, to



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help him sleep.² When the court asked him about his being on a suicide watch, defendant said that he had been misunderstood. The court then ruled, "based upon the information supplied by the defendant about his medication, his history, and the report from the doctors, that this young man is not capable of representing himself. [¶] I don't think you have the mental capacity to do so. I worry that you do suffer from mental illness that prevents you from doing so effectively."

The Sixth Amendment to the United States Constitution gives a defendant in a criminal case the right to represent himself or herself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 819.) "A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. . . . Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial." (*People v. Welch* (1999) 20 Cal.4th 701, 729.) The determination of the first criterion, whether the defendant is competent to waive the right to counsel, must be made under the same test that applies to competency to plead guilty or to stand trial -- that is, the defendant must have a " 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and . . . "a rational as well as factual understanding of the proceedings against him" '" (*People v. Stewart* (2004) 33 Cal.4th 425, 513, quoting *Godinez v. Moran* (1993) 509 U.S. 389, 396; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1364.)

There is no issue before us as to whether defendant's waiver was knowing and intelligent; the record indicates that he understood the risks and disadvantages of self-representation-that is, he " '[knew] what he [was] doing and his choice [was] made with eyes open.' " (*Iowa v. Tovar* (2004) 541 U.S. 77, 88 [124 S.Ct. 1379, 1387].) The only question is whether the court properly found defendant incompetent to waive counsel after allowing him to waive his right to a jury trial.

"Although a defendant has a constitutional right of self- representation (*Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525]), the right is absolute only if asserted a reasonable time before trial begins; self-representation motions made after this time are addressed to the trial court's sound discretion." (*People v. Mayfield* (1997) 14 Cal.4th 668, 809.) In exercising that discretion, the trial court "should consider such factors 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 that reasonably might be expected to follow the granting of such a motion." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1365; see also *People v. Windham* (1977) 19 Cal.3d 121, 128-129.)

The People do not disagree with defendant that he was "fully competent" to waive counsel in October 2003 when he made his *Faretta* motion.³ Presumably, they agree with defendant that if he was in fact incompetent in October 2003, then the court must have erred in July 2003 by failing to inquire about his competency to waive his right to a jury trial. (See *Godinez v. Moran*, *supra*, 509 U.S. at p. 401, fn. 13 [competency determination is necessary only when a court has reason to doubt



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defendant's competency].) Or they may be impliedly conceding that the court answered the wrong question when it found defendant "not capable of representing himself" rather than determining his competency to waive counsel.

Although their appellate brief indicates some confusion about the nature of the proceedings,⁴ the People acknowledge that the court "applied the incorrect standard" to defendant's Faretta motion; they argue only that the error was harmless. In their view, it is not reasonably probable that the court would have granted defendant's motion for a new trial "considering that the court was the trier of fact and [had] already deemed the evidence sufficient." This argument misses the point. The reason defendant wanted a new trial was not to reconsider the evidence already presented, but to bring in evidence his attorney had declined to introduce, evidence he believed would exonerate him. Whether the evidence the court did receive was found sufficient to convict is immaterial. Likewise, it is irrelevant that the court ultimately gave defendant a sentence more lenient by two years than the probation officer had recommended.

The People do not suggest that any other factors justified denial of defendant's Faretta motion. Instead, their position seems to be that the court "abused its discretion by failing to consider appellant's post-trial Faretta motion and denying it instead on competency grounds." This statement is not helpful. If the court abused its discretion by failing to exercise it, as they contend, then the remedy would be to remand for an exercise of discretion. But the People do not argue that the factors the court would have considered would have led it to a denial of the motion.

Nevertheless, the determination of a Faretta motion at this stage rests within the trial court's sound discretion, and it is not for us to say that the motion had to be granted in the circumstances before the court. We must therefore remand this matter to allow the court to exercise its discretion on defendant's Faretta motion. We remind defendant, however, that if he succeeds in waiving counsel and then makes his new-trial motion, the trial court's ruling on that motion will be "so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion." (People v. Hayes (1999) 21 Cal.4th 1211, 1260-1261.)⁵

2. Sufficiency of the Evidence

In the event that defendant declines to move for a new trial or moves unsuccessfully, his contention that insufficient evidence supports the robbery verdict will remain unresolved. Defendant argues that the prosecution failed to prove that he used the amount of force necessary to constitute robbery. We disagree. While defendant acknowledges the standard of review, his argument is based on what was not presented as evidence rather than what was. Instead of playing the surveillance videotape, the prosecutor showed still photographs taken from that videotape. They do not show defendant holding a beer in his hand or attempting to conceal a beer or physically confronting Singh. According to defendant, no assault is reflected in the photographs only because "Singh lied about such an assault taking place."



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Defendant concedes that the testimony of a single eyewitness is sufficient to sustain a conviction. In his view, though, Singh's testimony was inherently unbelievable or improbable. The facts that defendant relies on to support this position, however, do not invalidate his conviction, since Singh also testified that defendant hit him after leaving the store, while trying to escape on his bicycle. (Cf. *People v. Pham* (1993) 15 Cal.App.4th 61, 65 [force used during asportation sufficient for robbery when defendant struggled with the victims and prevented them from immediately recovering their goods]; *People v. Estes* (1983) 147 Cal.App.3d 23, 28 [use of force to prevent security guard from retaking property].) In any event, the court believed Singh's account of defendant swinging at Singh inside the store and Singh stepping out of the way to avoid being hit. We will not reweigh this evidence and engage in speculation to reach a contrary factual finding based on what was not among the photographs shown at trial. As substantial evidence supports the verdict, defendant is not entitled to reversal on this ground.

3. Admission of Witness's 911 Call

Defendant next contends that he was denied his Sixth Amendment right to confront an adverse witness when the 911 call from a bystander was introduced at trial. According to defendant, the bystander's report of a "big robbery going on" at the Quik Stop was inadmissible hearsay and was testimonial in nature, thus compelling reversal in accordance with *Crawford v. Washington* (2004) 541 U.S. 36, 124 S.Ct. 1354. Defendant adds that the evidence was not harmless beyond a reasonable doubt, because without it, the court "would have doubted the credibility of Singh, backed, as it was, by no videotaped or audiotaped or photographed evidence. The court would, therefore, have acquitted appellant of robbery and convicted him at most of petty theft."

But the alternative scenario defendant portrays is one that questions Singh's account of the events occurring after defendant returned to the store. He does not suggest that the 911 call refuted Singh's description of the struggle that occurred immediately after defendant left the store-nor could it, since the caller, Felino Pedery, was reporting events taking place at the time the police arrived, which was after defendant had completed the robbery. Moreover, Pedery acknowledged to the 911 operator that he knew only that there was fighting going on inside and never could support his initial description of the altercation as a robbery. We must conclude, therefore, that even if Pedery's call was inadmissible hearsay which was testimonial in nature, its use at trial was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.)

4. Abstract of Judgment

Defendant's last contention is that the abstract of judgment must be corrected to reflect that a one-year enhancement for a prior prison term was stricken, not stayed. Although the document contains a notation that the punishment was "Stricken Purs[uant] to [Penal Code section] 1385," the document makes it clear that stricken allegations should not be listed. We will order the trial court to



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file a corrected abstract in the event that the court reinstates the judgment.

Disposition

The judgment is reversed, and the matter is remanded to permit the court to conduct a new hearing and exercise its discretion on defendant's motion to represent himself in a motion for new trial or sentencing. If the court grants the motion for self-representation, it shall vacate the sentence and proceed accordingly. If defendant's motion for self-representation is denied or he decides not to waive counsel, the judgment shall be reinstated. If the court reinstates the judgment it shall file an amended abstract of judgment which deletes the reference to the stricken enhancement, and it shall forward a certified copy of the amended abstract to the Department of Corrections.

WE CONCUR: RUSHING, P. J., PREMO, J.

1. When defendant waived jury trial in July 2003 he informed the court that he was taking one medication for depression and "one for voices." The court asked him whether it affected his ability "to understand what you're doing," and defendant answered, "I understand." The court accepted the waiver.

2. Both psychologists described Seroquel as a medication used for psychotic symptoms as well as agitation and sleep problems.

3. Their concession is consistent with Dr. Cohen's opinion that defendant was "unequivocally" competent to represent himself, having shown no signs of psychosis or evidence of a psychiatric history. Dr. Cohen's opinion goes even beyond what is necessary under Faretta, which is merely the competency to waive counsel; the ability to represent oneself "has no bearing upon [a defendant's] competence to choose self-representation." (Godinez v. Moran, supra, 509 U.S. at pp. 399-400; People v. Welch, supra, 20 Cal.4th at p. 733.) Dr. Jones's opinion that defendant was incompetent was based not on any manifestation or reports of visual or auditory hallucinations, but on defendant's mistrust of his attorney, his belief that he had not received a fair trial, and his belief that the victim had wrongly attacked him. This picture led Dr. Jones to characterize defendant's complaints as "paranoid delusions of persecution." Defendant's test results indicated no impairment on the scale associated with the ability to understand the proceedings and communicate with his attorney. Instead, Dr. Jones relied on defendant's "implausible" position that he was being treated unfairly, that the victim had lied, and that he would be more likely to be acquitted if he had a fair trial with the introduction of the surveillance videotape (which Dr. Jones stated would be "completely self-defeating," since the store's videotape "would obviously not vindicate him as he so firmly believes." Dr. Jones also made a number of irrelevant predictions—for example (this, with apparent sarcasm), that defendant was less likely to admit to being guilty " 'because the crime did not occur! It did not occur at all! ' -and that defendant's distrust of his attorney would make it "much less likely that he would talk to his attorney and thus to cooperate in his own defense." Contributing his own misunderstanding of the law, Dr. Jones further anticipated that if allowed to represent himself defendant "would obvio[us]ly never consider any defenses regarding his own mental instability, such as . . . insanity or diminished capacity." If ever there were a case for insufficient evidence of incompetency to waive counsel, this would be it. That question, however, is not before us.



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4. In conceding error the People state that "the court erred in applying different standards in assessing appellant's competence to waive the right to counsel and his competence to stand trial." Defendant's competency to stand trial was never evaluated; it was his waiver of the right to a jury that the court accepted, without soliciting expert opinions. The People do not argue or even suggest that a different standard is applicable for evaluating waivers of jury trial.

5. Alternatively, defendant may forgo his motion for a new trial, in which case he should be given the opportunity to waive his right to counsel and represent himself at a new sentencing hearing.

