

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JARED GREEN,

Defendant and Appellant.

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B215691

(Los Angeles County Super. Ct.  
No. BA339793)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Frederick N. Wapner, Judge. Affirmed.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Zee  
Rodriguez and Laura J. Hartquist, Deputy Attorneys General, for Plaintiff and  
Respondent.

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The jury found defendant and appellant Jared Green guilty of assault by means likely to produce great bodily injury upon Yoon Chae Kim in violation of Penal Code section 245, subdivision (a)(1). The trial court found defendant suffered a prior serious or violent felony conviction within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and imposed a four-year sentence, consisting of the two-year low term, doubled as a second “strike.” In his timely appeal, defendant contends: (1) the trial court committed prejudicial error under California law and violated his federal due process rights by denying his request for funds to retain an eyewitness identification expert; (2) the trial court prejudicially erred by denying his pretrial motion to sever his trial from that of codefendant Bobby Lee Todd; and (3) the trial court prejudicially failed to obtain a second formal waiver of defendant’s right to counsel under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), after defendant elected to proceed in propria persona for the second time during the trial. Defendant also requests we review the sealed transcript of an in camera hearing with codefendant’s counsel. We affirm.

### **STATEMENT OF FACTS**

Kim worked at a 7-Eleven store on North Cahuenga Boulevard in Hollywood. On April 28, 2008, at 2:15 p.m., he was the cashier. A customer, Bobby Todd, requested a cup of ice. When Kim told him it cost 50 cents, Todd said he only had a quarter, which he threw on the counter. Kim replied that he could go to another store. Todd grabbed the coin, swore at Kim, and left the store slamming the front door on his way out and walked across the street. Kim did not realize Todd had broken the glass door, but discovered the damage shortly afterwards.

Kim was busy at the register and did not call the police, but he saw Todd across the street. Approximately 30 minutes later, when the store was less busy, Kim went across the street to confront Todd, leaving employee Braulio Rubio in charge. Kim told

Todd that he had broken the window. Todd denied it. As they spoke, Kim noticed that defendant was sitting down and playing guitar on an abandoned couch on the sidewalk, just behind Todd. Kim insisted that Todd had broken the window. When Kim said he intended to call the police, defendant stood up and punched Kim in the face. Todd punched him several times in the head and face. Kim tried to block the punches, but never fought back. When Kim tried to run away, Todd pushed him to the ground. While Kim was facing the ground, Todd choked him from behind and bit his right ear. Kim felt someone kick him on his side.

Kim managed to escape and received help from a passing motorist, who drove him back to the 7-Eleven. Kim entered the store and called the police. Defendant was across the street on the couch, playing the guitar. Kim had received injuries to his face and pain in his side, along with a severe headache and bruises on his hands and knees.

Alphy Hoffman was at the corner of Yucca and Cahuenga at the time of the incident. When Hoffman first noticed the disturbance, he saw defendant and another male hitting and kicking Kim, who was on the ground. Defendant kicked Kim several times. The incident lasted approximately 10 minutes. Hoffman reported the incident to the 911 operator as it happened. At one point, when a bus pulled up, Hoffman lost sight of defendant. On cross-examination, Hoffman testified that Cahuenga Boulevard was typically busy in terms of traffic at that hour. He viewed the incident from across Cahuenga; his view was slightly obstructed by passing vehicles.

Officer Othar Richey of the Los Angeles Police Department responded to the scene. He saw the abrasions to Kim's face above the left eye, as well as those to his hand and knee. He also saw the broken door or window at the 7-Eleven. Neither Todd nor defendant was injured.

## **Defense**

Rubio was working at the 7-Eleven at the time of the incident. He heard the door slam and saw the glass had been broken. Some five minutes later, Kim went outside to confront the person who broke it. Rubio did not see the altercation. Investigator Dean Deruise interviewed Rubio, who told him that when Rubio wanted to call the 7-Eleven corporate office to report the vandalism, Kim told Rubio to wait and give Kim “a couple of minutes.”

Hyun Joe was one of the owners of the 7-Eleven. Kim did not tell him who broke the window, but it had been replaced. Kim did not speak to him about the incident.

Officer Juan Corona testified that defendant and Todd offered no resistance to arrest. They seemed angry, but were not argumentative. Kim told the officer that Todd had broken the store window.

## **DISCUSSION**

### **Expert Witness**

Defendant contends the trial court committed prejudicial error under California law and violated his federal due process rights by denying his request for funds to retain an eyewitness identification expert. We find no abuse of discretion and no due process violation because defendant failed to show the requested expert witness expenditures were reasonably necessary to insure an effective defense.

Defendant, having already been granted pro se status, filed a motion for funds to retain the services of an expert to impeach the anticipated testimony of prosecution witness Hoffman, specifically as to the witness’s “ability to [per]ceive, precon[ei]ved notions, and believability.” When the trial court sought clarification as to why defendant needed an eyewitness expert witness, defendant explained that although his defense was

not misidentification, he planned to use the expert to impeach Hoffman's eyewitness testimony. The expert would "question the witness' ability to perceive from his location and also the reliability of the witness in a situation like this as he looked across the street . . . to see a fight." With an impaired ability to perceive accurately, the witness would testify "based on his expectations."

The trial court responded that an eyewitness expert typically gave testimony as to reasons why a witness might mistakenly identify a person as being involved in a crime—but that did not appear to be what defendant had in mind. Defendant agreed that the expert would not testify that defendant was misidentified as being present during the altercation. Rather, defendant wanted the expert to explain how Hoffman, from his vantage point, might have confused defendant's actions with those of Todd during the incident. The court denied the motion, finding that the anticipated impeachment did not appear to require expert testimony. Defendant had failed to explain why special expertise was needed to support the inference that a person looking at an altercation from across a busy street might have been confused as to who did what.

To support the due process aspect of his claim, defendant relies on the general principle set forth in *Ake v. Oklahoma* (1985) 470 U.S. 68, 77 (*Ake*) "that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense" and that "fundamental fairness entitles indigent defendants to 'an adequate opportunity to present their claims fairly within the adversary system,' [citation]." (*Ibid.*) Along similar lines, the California Supreme Court has long recognized "that the right to counsel guaranteed by both the federal and state Constitutions includes, and indeed presumes, the right to effective counsel [citations], and thus also includes the right to reasonably necessary ancillary defense services." (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319, fns. omitted.)

As a matter of California evidence law, "Evidence Code section 730 authorizes the trial court to appoint an expert to render advice and to testify as a witness, and Evidence

Code section 731 and Government Code section 29603 state that the county must pay for those court-ordered expenses.” (*People v. Gaglione* (1994) 26 Cal.App.4th 1291, 1303-1304, fn. omitted, disapproved on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) “The decision on the need for the appointment of an expert lies within the discretion of the trial court and the trial court’s decision will not be set aside absent an abuse of that discretion.” (*People v. Gaglione, supra*, at p. 1304.) Further, the trial court’s “order is presumed correct; all intendments are indulged in to support it on matters as to which the record is silent, and error must be affirmatively shown.” (*Corenevsky, supra*, 36 Cal.3d at p. 321.)

There is no constitutional requirement “that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy.” (*Ake, supra*, 470 U.S. at p. 77.) Instead, no right to ancillary defense services will arise unless the defendant “demonstrate[s] the need for such services by reference to “the general lines of inquiry he wishes to pursue, being as specific as possible.” [Citations.]” (*Corenevsky, supra*, 36 Cal.3d at p. 320, fn. omitted.) Motions for such ancillary defense services “can be granted only if supported by a showing that the investigative services are reasonably necessary.” (*Ibid.*) In that regard, our Supreme Court has pointed out that a trial court’s exercise of discretion in regulating the use of such testimony is rarely disturbed because “[e]xpert testimony on the psychological factors affecting eyewitness identification is often unnecessary.” (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 995.)

As the trial court found, such was the case here. Defendant has never offered any credible basis to think an eyewitness expert would have brought any helpful specialized insight to bear on the question of Hoffman’s ability to place defendant at the scene as one of the two assailants. (See *People v. Goodwillie* (2007) 147 Cal.App.4th 695, 725 [the defendant “has not established that the proffered expert testimony would have had significant probative value in this case” and “the trial court’s ruling did not prevent [the defendant] from presenting a defense that the eyewitnesses were mistaken in their identification of him.”].) Through direct and cross-examination, it was established that

Hoffman did not see how the confrontation began, and that Hoffman viewed the altercation from across a busy multi-lane street. Hoffman admitted that his view was partially impaired due to traffic and, at one point, completely blocked by a bus. Moreover, defendant did not rely on a mistaken identity defense. His primary theory was that Kim was the initial aggressor and that defendant's actions were taken to defend Todd and himself.

Defendant's interrelated claims of federal constitutional and state law violations fail because he does not show how the expert testimony "would have made a difference" in his trial. (*People v. Lewis and Oliver, supra*, 39 Cal.4th at p. 995.) That is, "[t]he record does not show what additional exculpatory inferences could have been drawn if an expert had testified." (*Id.* at p. 996.) In sum, "defendant has failed to establish he was deprived of a fair trial or otherwise suffered prejudice from the denial of his request for funds. (*People v. Mendoza* (2000) 24 Cal.4th 130, 159.)" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1086.)

## **Severance**

Defendant contends the trial court prejudicially erred by denying his pretrial motion to sever his trial from that of codefendant Todd. We note that although defendant frames this contention in terms of state and federal constitutional errors, he neither identifies the constitutional right at issue nor presents any constitutional authority in support of his contention. We summarily reject that aspect of the claim because it is asserted in perfunctory fashion without adequate supporting legal authority. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1132.) In any event, defendant shows neither why severance was required nor how its denial prejudiced him.

Our Legislature has expressed a preference for joint trials. (*People v. Lewis* (2008) 43 Cal.4th 415, 452; *People v. Boyde* (1988) 46 Cal.3d 212, 231.) Section 1098 provides

in pertinent part: “When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.” Joint trials are preferred because they promote economy and efficiency and because they serve the interests of justice by avoiding possibly inconsistent verdicts. (E.g., *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) A joint trial is particularly appropriate where, as here, multiple defendants are charged with common crimes involving common events and victims. (*People v. Lewis, supra*, at pp. 452-453.) On the other hand, the trial court is afforded discretion to order separate trials (*People v. Coffman and Marlow, supra*, at p. 40), and severance may be appropriate “in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony.” (*People v. Massie* (1967) 66 Cal.2d 899, 917, fns. omitted.)

We review a trial court’s denial of a severance motion for abuse of discretion based on the facts as they appeared when the court ruled on the motion. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) If we conclude the court abused its discretion, reversal is required only if it is reasonably probable that the defendant would have obtained a more favorable result at a separate trial. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 41; *People v. Keenan* (1988) 46 Cal.3d 478, 503.) If the court’s joinder ruling was proper when it was made, however, we may reverse a judgment only on a showing that joinder ““resulted in “gross unfairness” amounting to a denial of due process.”” (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Here, defendants were charged with having committed a common crime involving common events and the same victim. (See *People v. Keenan, supra*, 46 Cal.3d at p. 500.) The trial court accordingly was presented with a classic case for a joint trial. (*People v. Coffman and Marlow, supra*, 34 Cal.4th at p. 40; *People v. Keenan, supra*, at pp. 499-500.) Defendant nevertheless asserts severance was mandated based on his

representation to the court that Todd told defendant he would offer exonerating testimony in defendant's favor, but not if Todd had to testify in a joint trial.

Our review of the record discloses nothing indicative of an abuse of discretion. To the contrary, it appears the trial court made every reasonable effort to accommodate defendant's concerns regarding Todd's testimony. When defendant requested severance to permit Todd's testimony, the court pointed out there was no guarantee Todd would choose to testify—but, if he did, he could testify in a joint trial. Moreover, if Todd refused to testify, there would be no point ordering severance. When defendant countered that he believed it likely Todd would enter a guilty plea before trial, the court responded that, in that case, severance would be unnecessary. Finding no basis for granting severance, the court denied the motion.

Before the prosecution examined its first witness, the trial court held a hearing with Todd outside the jury's presence on the question of whether he would testify. At that point, Todd had entered a guilty plea, but the court had not sentenced him. Todd's counsel advised him against testifying for defendant. The court advised Todd there was a possibility his testimony might affect his sentence—if the court perceived that he was giving testimony that was obviously false, the court would not look favorably on it. Todd said he did not have a good memory of the underlying event and could not, therefore, give accurate testimony as to what defendant was doing at the relevant time. Todd's attention was focused on Kim. Todd had “no memory of [defendant] during that time when Mr. Kim approached or after he left.” At that point, Todd formally invoked his Fifth Amendment right not to incriminate himself.

Later that day, defendant told the trial court that while in custody, Todd again said he would testify on behalf of defendant. According to defendant, Todd would say that Kim instigated the confrontation, Todd acted in self-defense, and defendant's involvement was “to break up the confrontation.” The court ruled that defendant could not refer to Todd's potential testimony in opening statement because it was not known whether Todd would actually change his mind and testify.

On the second day of testimony, after the prosecution had rested its case, the trial court asked Todd if he had conferred with counsel on that question and whether Todd wanted to testify. Todd stated that he did not want to testify.

Thus, as the trial court found, it was a matter of pure speculation whether Todd would have testified if the trial had been ordered severed. Indeed, there is no reason to think the question of severance had any significant bearing on Todd's decision. By pleading guilty, Todd effectively gave defendant a separate trial, but he nevertheless refused to testify and instead invoked his constitutional right not to incriminate himself. Moreover, given his representations that he did not recall what defendant was doing at the critical times during the incident, there is no reason to think his testimony would have been helpful to defendant. Defendant therefore fails to show the joinder resulted in gross unfairness amounting to a denial of due process. (*People v. Mendoza, supra*, 24 Cal.4th at p. 162.)

### **Second *Faretta* Waiver**

Defendant's final contention—that the trial court prejudicially failed to obtain a second formal waiver of defendant's right to counsel under *Faretta*—fares no better than defendant's other contentions.

Before trial began, defendant requested permission to discharge appointed counsel and proceed in propria persona. The trial court trailed the matter to the following day so that defendant could read a form detailing his rights and responsibilities in that regard. At that time, the court told defendant that self-representation usually turned out badly for defendants because they do not know the law or “what they're doing.” Defendant said he understood.

The following day, defendant told the trial court that he signed, dated, and understood the waiver of counsel form. Nevertheless, the court orally advised defendant of his right to appointed counsel and related trial rights, which defendant said he

understood. The court also established that defendant had no legal education, although he had almost attained a college degree. The court further advised defendant that without legal acumen, it was possible that defendant would lose legal motions that a competent attorney would win. In addition, defendant's custodial status would be an impediment in terms of contacting witnesses, accessing legal materials, and moving about the courtroom. The court cautioned that defendant would be held to the same standards as counsel during trial. Defendant, however, stated that he understood the court's advisements but had good reasons for representing himself. The court granted the *Faretta* request.

Defendant represented himself throughout the trial. After the jury rendered its verdict, however, defendant requested to give up his self-representation rights and have counsel assigned. The trial court granted the request and ordered the public defender reassigned for purposes of the trial on his recidivist allegation and sentencing. At the next hearing, however, defendant stated that he had changed his mind and wanted to represent himself again. The court granted the request and ordered the public defender relieved. At that point, the public defender had not made any preparations for defendant's case. Defendant said he did not realize that he had in fact given up his in propria persona status. Indeed, he had prepared motions to file that day.

Relying on *People v. Crayton* (2002) 28 Cal.4th 346 (*Crayton*), defendant asserts that once defendant gave up his self-representation right and counsel was reassigned following the guilty verdict, the Sixth Amendment required a new *Faretta* waiver prior to defendant's resuming his in propria persona status and, further, that the failure to obtain a second *Faretta* waiver amounted to structural error, requiring reversal without an inquiry into prejudice. Neither *Crayton* nor any proffered authority by the California or federal Supreme Court supports those assertions.

The general constitutional guidelines are well established. "The Sixth Amendment right to the assistance of counsel applies at all critical stages of a criminal proceeding in which the substantial rights of a defendant are at stake. (*Mempa v. Rhay* (1967) 389 U.S. 128, 134.) The right to counsel may be waived by a defendant who wishes to proceed in

propria persona. (*Faretta v. California, supra*, 422 U.S. 806, 807.) By such waiver, a defendant surrenders ‘many of the traditional benefits associated with the right to counsel.’ (*Id.* at p. 835.) In view of these consequences, a knowing and intelligent waiver of the right to counsel is required before a criminal defendant is permitted to proceed in propria persona. [Citation.]” (*Crayton, supra*, 28 Cal.4th at p. 362.) It is undisputed that defendant’s initial waiver of counsel was knowing, intelligent, and voluntary.

As we explain, the *Crayton* decision is wholly unavailing to defendant’s constitutional claim. In *Crayton*, the defendant represented himself at the preliminary hearing and at trial, having waived his *Faretta* rights at his municipal court arraignment. Contrary to statute, however, the trial court failed to readvise the defendant and obtain a new waiver of the right to be represented by counsel at the defendant’s arraignment in the superior court. (*Crayton, supra*, 28 Cal.4th at p. 360.)

Our Supreme Court rejected the argument that the Sixth Amendment mandated readvise. “[T]he instant matter involves a defendant who *was* clearly and fully admonished of the risks involved in representing himself at both the preliminary hearing and trial stages and who nonetheless elected to represent himself throughout the proceedings; the only error that occurred was the superior court’s failure to *readvise* defendant of such risks prior to the commencement of trial. Under these circumstances we conclude that the trial court’s error was not of federal constitutional magnitude, and that the prejudicial error standard applicable to federal constitutional error does not apply.” (*People v. Crayton, supra*, 28 Cal.4th at p. 363.) More specifically, the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 applies when reviewing the failure to comply with the statutory readvise rule, not the “reversible per se rule” that “may apply under California Constitution, article VI, section 13, when a defendant erroneously is denied the right to counsel or never has knowingly or voluntarily waived that right.” (*People v. Crayton, supra*, at p. 364.)

Defendant acknowledges that the statutory directive at issue in *Crayton*, section 987, subdivision (a), has no application to his appeal. Nevertheless, he points to a statement in the *Crayton* opinion which, he asserts, implies the existence of a constitutional requirement of *Faretta* advisement: “A competent election by the defendant to represent himself and to decline the assistance of counsel once made before the court carries forward through all further proceedings in that case *unless appointment of counsel for subsequent proceedings is expressly requested by the defendant* or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings.” (*Crayton, supra*, 28 Cal.4th at p. 362, quoting *Arnold v. United States* (9th Cir. 1969) 414 F.2d 1056, 1059, emphasis added.) Such reliance is misplaced. The mere conclusion that a defendant’s *Faretta* election will be deemed effective until revoked implies nothing about the necessity to advise a defendant who previously made a knowing and intelligent waiver of his or her right to counsel.

In *People v. Goodwillie, supra*, 147 Cal.App.4th at page 723, our colleagues in the Fourth District rejected an analogous argument: “The judge who arraigned Goodwillie adequately advised him of his right to counsel and established that he was waiving that right knowingly and voluntarily. No further waiver was necessary. To rule otherwise would impose on the trial court a duty to give *Faretta* warnings prior to every hearing or proceeding in cases in which the defendant is representing himself. The Sixth Amendment does not require such a rule[.]”

Advisement would have been particularly unnecessary in defendant’s situation. Not only did he waive his right to counsel after receiving exhaustive written and oral advisements, but his request for reassignment of counsel was obviously made with full knowledge of his constitutional right to counsel. In fact, according to defendant, he never thought he had made a final and effective invocation of his right to counsel. Defendant makes no attempt to demonstrate how the failure to give a second set of *Faretta* advisements resulted in prejudice. Our review of the record discloses nothing indicative of prejudice under any recognized legal standard.

## **In Camera Hearing**

Defendant requests we independently review the sealed transcript of the August 11, 2008 in camera hearing conducted by the trial court with only counsel for codefendant Todd present. The Attorney General does not object. We have conducted that review and find nothing bearing favorably on any appellate issue raised and nothing to indicate any additional appellate issue for defendant.

### **DISPOSITION**

The judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.