P. v. Green

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
JAHTON MYIKAILA GREEN,
Defendant and Appellant.

A126164

(Contra Costa County
Super. Ct. No. 081412-9)

I. INTRODUCTION

Jahton Green appeals from the judgment following a jury trial in which he was found guilty of residential burglary, robbery, false imprisonment, and assault. Appellant argues the prosecutor committed misconduct in his closing argument and the trial court erred in denying his *Faretta*[1] *motion*. He also raises several sentencing issues. We agree that the sentence on counts two and four should have been stayed and that the restitution fines should be recalculated as a result. We reject appellant's remaining contentions.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2009, the Contra Costa County District Attorney filed an amended information alleging that appellant committed residential robbery (Pen. Code, sections 211/212.5, subd. (a);[2] count 1), residential burglary (section 459/460, subd. (a); count 2), false imprisonment of an elder (section 368, subd. (f); count 3), assault by force likely to produce great bodily injury (section 245, subd. (a)(1); count 4), and inflicting injury on an elder (section 368, subd. (b)(1); count 5). It was also alleged as to counts 1, 2, and 4 that appellant reasonably knew that the victim was over 65 years of age (section 667.9, subd. (a)).

Seventy-two-year-old Larry Frenette testified that on September 17, 2008, he was on his usual 8:30 morning walk. He walked

through El Cerrito Plaza and onto a bicycle path underneath the BART tracks. He saw appellant, who was smoking a cigarette, approaching from the opposite direction. When appellant was about 10 feet away from Frenette, he threw down the cigarette and put it out with his foot. Appellant then kept walking and passed Frenette. Appellant was wearing a cloth jacket with green and brown squares, a white tee shirt and dark pants.

Frenette had a bad feeling that appellant was more interested in him than seemed normal. Frenette walked away and noticed that appellant was no longer going in the opposite direction, but was now walking parallel to Frenette on the pedestrian path that was separated from the bike path by shrubbery. After about 300 feet, where the paths crossed Brighton Avenue, Frenette stopped to see what appellant would do. Appellant crossed the street and sat down on a bench. No one else was around. Frenette did not want to cross the street because he was nervous about appellant's intentions. Frenette turned left and walked past a middle school and into an adult education center.

Appellant followed Frenette into the center, sat down in the lobby, and picked up a brochure. Frenette walked out quickly and headed back to the Plaza shopping center. He thought he had eluded appellant.

However, when Frenette reached the parking lot, he spotted appellant walking parallel and behind him. Frenette decided to go to the grocery store because there were more people around. He saw appellant again next to another store. Appellant had put the light gray hood of his jacket up over his head. It was about 9:30 a.m. when Frenette went into Lucky's. After a few minutes in the store, Frenette left and walked through the parking lot to San Pablo Avenue.

He was walking south toward Albany when he saw several police cars rush by with their sirens on, and he wondered if it had to do with appellant. Frenette saw the police cars parked at an intersection and saw appellant sitting with handcuffs on, surrounded by several police officers. At that time, appellant was wearing a white tee shirt and dark pants. Frenette contacted an officer and told him his story. It was a little after 10:00 a.m., less than half an hour since Frenette had seen appellant at El Cerrito Plaza. At trial, Frenette was not able to identify the jacket appellant was carrying when he was arrested.

That same morning, 66-year-old Suhlan Lai left her home at 309 Coronado Street in El Cerrito and went to Trader Joe's at El Cerrito Plaza. She was born in Taiwan, was a little over five feet tall, and weighed 120 pounds. She testified through an interpreter. She lived with her husband, daughter, and grandchildren, but they were all out of the house. She left for the store at around 9:30 a.m. by way of her back door and her back gate that opens onto the BART path.

A short time later, she returned down the BART path with two bottles of milk. As she walked, she saw an African-American man walking about 100 feet in front of her. The man made a right turn, and Lai turned left off the pedestrian path, went through her back gate and into her back yard.

She went into the house through the back door, went into the kitchen and put the milk down. As she opened the refrigerator, she suddenly noticed appellant standing in her kitchen. Lai was scared to death. Appellant asked, "Where's the money" Lai went to the dining room where her handbag was on a chair. Appellant followed her, took the handbag, and removed a little purse that was inside. Lai hurried to the front door, trying to get away. As she tried to open the door, appellant grabbed her left arm and punched her in the left eye with his fist. She fell to the ground. Lai got up quickly, but appellant and her handbag were gone.

The police came within about 10 minutes. They drove her to the intersection where appellant was being detained. From the car across the street, Lai looked at appellant and told the police he was not the robber. Later, at a court hearing when she could see appellant face-to-face, she identified him positively. She explained that she had not recognized him at the intersection because his clothes were different and because she was at a distance from him.

Lai told the police that in her handbag there were checks for $9,400 and $300 for expenditures by her church as well as $650 in cash. In court, Lai identified several items that had been inside her handbag and had been recovered. These included the little purse, paperwork from Costco, and photographs. Lai also testified that, before the officers drove her to the in-field show-up, they called the number she gave them for her cell phone, and was told by an officer that a phone they had recovered was ringing.

Clarence Bailey testified that he lived on Brighton Avenue in Albany, a few blocks from the victim's house. On the morning of September 17, 2008, he was watching out the front window as his girlfriend returned home at about 9:10 a.m. from walking his children to school. He saw a Black man walking in the neighborhood who looked like he did not belong. The man, whom Bailey later identified as appellant, wore a sweatshirt/jacket with different colors, jeans with designs on them, and Nike Air Force One shoes that were tan and brown. Bailey took particular notice of the shoes.

When Bailey first saw him, appellant was walking up and down the street as if he were lost. He looked very suspicious. Bailey and his girlfriend observed appellant for about five to seven minutes. At around 9:25 or 9:30 a.m., Bailey left for Lucky's at El Cerrito Plaza, which was about a block from his home. On his way, he passed appellant, who was stopped on Evelyn Avenue in the middle of the block. Appellant was talking on a pink Razor cell phone.

Later, Bailey saw police cars driving up and down his street and asked what was going on. An officer told him that someone had been assaulted. He told the police about having seen appellant in the neighborhood, and the police drove him to where appellant was being detained. Bailey identified appellant at the scene as the person he had seen earlier, and also identified him at trial.

Anthony G. Aguilera lived with his brother, Anthony R. Aguilera, a few blocks from the victim's home. The two brothers were home on the morning in question. From different places in their house, they both saw a young Black man run into a neighbor's yard across the street and put something in the neighbor's trash can. The man took off a hooded black sweatshirt with colors on it; underneath it, the man was wearing a black tee shirt. The man stood at the trash can for about five to 20 seconds, dumping stuff into the can before running south on Evelyn Avenue. In his hand, he was carrying the sweatshirt he had just taken off. Anthony G. called the police.

Albany Police Officer Manuel Torres testified that on the morning of the robbery, shortly after 10:00 a.m., he drove past a man whom he later realized was appellant a few blocks from the victim's house. At 10:12 a.m., he was dispatched to the Aguilera brothers' house, where he interviewed the brothers and examined a wallet one of the brothers said he had found inside the trash can. The officer looked inside the trash can himself and saw photographs, a key chain, and some paperwork, some of which referred to 309 Coronado Avenue in El Cerrito. When Torres obtained a description of the man who had dumped the items, he realized it was the same man he had just seen walking nearby. That man had been wearing a white tee shirt and dark pants, and a sweater was tucked into his pants on

his right hip.
Officer Torres went out to look for appellant. He found him at the bus stop at the corner of Solano and San Pablo Avenues at 10:44 a.m. Torres searched appellant and found a wad of money in appellant's waistband. He also found two cell phones.
That morning, Albany Police Lieutenant Daniel Adams searched an apartment on Washington Street, a few blocks from the victim's house. No one was home. Adams found legal documents in appellant's name and male clothing. During a perimeter search of the bottom hallway of the apartment building, El Cerrito Police Officer Gilbert Tang found the $9,400 check Lai identified as being in her purse when it was stolen.
El Cerrito Police Officer William Savko responded to Lai's home around 10:00 a.m. Lai's face was swollen. Officer Savko and El Cerrito Police Sergeant Scott Cliatt testified that, when Lai's daughter dialed her mother's cell phone number, the cell phone recovered from appellant rang and displayed, as the calling number, the number from which Lai's daughter had placed the call.
Tang testified that the victim identified as hers a cell phone recovered from the trash can across from the Aguilera brothers' house. The victim identified numerous items found in the trash can as hers.
Contra Costa County Sheriff's Department Crime Lab Fingerprint Examiner Stephanie Souza testified that a print taken from a Costco receipt found in the trash can matched appellant's right palm.
Appellant filed motions pursuant to section 995 and section 1538.5. Both motions were denied.
At the conclusion of the prosecutor's case, appellant moved pursuant to section 1118.1 for dismissal of all charges. The court denied the motion.
Appellant waived his right to testify and did not call any witnesses. On June 8, 2009, the jury found appellant guilty of counts 1 through 4, not guilty of count 5, and found not true the enhancements based on the victim's age.
After the trial, appellant wrote a letter to the court, complaining of ineffective assistance of counsel. On the same day as the sentencing hearing, the court held a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The court denied the *Marsden* motion.
After his *Marsden* motion was denied, appellant indicated directly to the court that he wanted to file a motion for a new trial.

Appellant's trial counsel informed the court that he had not filed such a motion because he did not believe any grounds existed but that he had advised appellant of his right to proceed in propria persona. The court treated appellant's request as one pursuant to *Faretta*, *supra*, 422 U.S. 806. The court denied the *Faretta* motion mainly on timeliness grounds, but also stated that the request may not have been unequivocal. The court then proceeded to sentencing.
On August 27, 2009, the court sentenced appellant to the midterm of four years on count 1[3] as the base term and to a consecutive one-year term (one-third of the midterm) on count 3,[4] for a total prison term of five years in state prison. The court assessed a restitution fine of $4,000 pursuant to section 1202.4, subdivision (b), calculated as $200 times the five-year prison sentence multiplied by the four counts of conviction. A parole revocation restitution fine in the same amount was imposed and stayed, pending any violation of parole, pursuant to section 1202.45. The court also imposed a $120 court security fee pursuant to section 1465.8 and a $120 assessment pursuant to Government Code section 70373. In addition, the court ordered that appellant pay $500 toward the cost of his representation pursuant to section 987.8.
On August 28, 2009, appellant filed a timely notice of appeal.

III. DISCUSSION

A. *Prosecutorial Misconduct*

Appellant contends the prosecutor committed misconduct during his closing argument by improperly shifting the burden of proof to appellant, thereby violating his right to a fair trial.
The issue in this case was identification of the robber. The defense strategy was to concede that appellant was in possession of stolen property, but to attempt to raise a reasonable doubt in the jurors' minds as to whether appellant actually robbed the victim. In his opening argument, the prosecutor discussed the evidence, in addition to possession of the stolen items, that appellant committed the robbery. He concluded by arguing: "And also we just have common sense. How else did the defendant get this property Did the tooth fairy give it to him Why would somebody commit a robbery and then immediately, ten minutes later, give it to Jahton Green who then is seen dumping it in the trashcan and keeping the proceeds Robbers don't rob and then immediately give it to someone else. That doesn't make any sense."
In turn, defense counsel argued the prosecution had failed to establish guilt of robbery beyond a reasonable doubt. He emphasized the inconsistencies in the witnesses' testimony and factors that rendered their identifications of appellant unreliable. Defense counsel argued: "At the end of the day, Mr. Green was in possession of stolen property. Mr. Green was trying to conceal from police officers the fact that he was in possession of stolen property. That's what you do when you're in possession of stolen property. It's not a good thing morally to be in possession of stolen property. We all agree on that. It doesn't make you a robber. It doesn't make you the vicious, bold culprit who scaled a barbed-wire fence without leaving a mark and assaulted Ms. Lai and left. It doesn't do that . . . . [Y]ou might convict Mr. Green of possession of stolen property. But it's not even close to proving beyond a reasonable doubt that Mr. Green was the individual in Ms. Lai's home."
During the prosecutor's rebuttal, the following colloquy ensued:
"THE PROSECUTOR: I appreciate the defendant admitting responsibility for receiving stolen property, but the reason they're doing that is because they can't explain it away. They cannot explain why the defendant has this stuff from the robbery so [close] in time to the –
"DEFENSE COUNSEL: I'm going to object. That's actually burden shifting. We don't have to explain away anything.
"THE COURT: I will remind the jury that I set the burden of proof in my instructions and you are to follow my instructions. [¶] Proceed.
"THE PROSECUTOR: If it's not the defendant, who is it The defendant has the property so close in time and place to the robbery. And in addition, there's other evidence tying him to the robbery. [¶] And let's go over that again . . . ."
The court had earlier instructed the jury that "[a] defendant in a criminal case is presumed to be innocent. This presumption requires

that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." The court also instructed the jury on the meaning of proof beyond a reasonable doubt, that the jury was responsible for deciding the facts using only evidence that was presented in court, and that evidence is the sworn testimony of witnesses, exhibits admitted into evidence, and anything else the court said to consider. In addition, the court instructed the jury that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence."

Appellant contends the prosecutor's statement that "[t]hey cannot explain why the defendant has this stuff from the robbery so quickly in time" improperly advised the jury that appellant bore some burden of proof or persuasion. The trial court not only failed to correct the misstatement, appellant argues, but also impliedly overruled defense counsel's objection, which confirmed to the jury that appellant indeed had to " 'explain it away.' "

" 'The applicable federal and state standards regarding prosecutorial misconduct are well established. " 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." ' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' " (*People. v. Espinoza*, *supra*, 3 Cal.4th at p. 820.)' (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

"Regarding the scope of permissible prosecutorial argument, ' " 'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation.] . . . " (*People v. Wharton* [(1991)] 53 Cal.3d [522,] 567-568.)' (*People v. Williams* (1997) 16 Cal.4th 153, 221.)" (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.) A reviewing court must consider the allegedly objectionable statements "in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22 (*Doolin*).)

Appellant's claim has no merit. It was a fair comment to call the jury's attention to the lack of evidence or reasonable inferences to support the defense theory that someone else committed the robbery. (See, e.g., *People v. Frye*, *supra*, 18 Cal.4th at p. 973 [prosecutor's reference to defense failure to call an expert it suggested would testify was fair comment on a weakness in the defense theory of the case].) Such an argument is permissible and is distinct from an argument that the defense is obligated or bears a burden to present evidence. In addition, the trial court instructed the jury that appellant was presumed innocent until proven guilty and that this presumption required that the People prove guilt beyond a reasonable doubt. Defense counsel emphasized this point in his closing argument and, in response to defense counsel's objection, the court reminded the jury that it had been instructed on the burden of proof. Nothing the prosecutor said suggested that the defense was required to put on evidence, as distinguished from argument that the defense theory was unsupported and unreasonable.

Appellant's reliance on *People v. Woods* (2006) 146 Cal.App.4th 106 (*Woods*) is misplaced. In *Woods*, the prosecutor stated in closing argument that defense counsel was "obligated" to put on evidence. (*Woods*, *supra*, at p. 112.) The appellate court concluded that this was misconduct: "This statement went far beyond a mere comment on the failure of the defense to present evidence proving misconduct by [the testifying officer]. The assertion that the defense had an 'obligation' to present evidence expressly and erroneously advised the jury that appellant bore some burden of proof or persuasion. The court not only failed to correct this misstatement, but overruled appellant's objection, thereby implying that the 'obligation' to which [the prosecutor] referred actually existed. It is inconceivable that the jury would understand this uncorrected, implicitly approved statement to mean anything other than appellant carried a burden of proof or production." (*Id.* at pp. 113-114.) *Woods* has no application here. The prosecutor did not suggest, either expressly or by implication, that the defense had an "obligation" to present evidence. (*Id.* at p. 113.) The prosecution merely commented on the state of the evidence. We discern no error.

B. *The Faretta Motion*

Appellant next contends the trial court erred when it denied his *Faretta* motion. The request was timely, appellant asserts, and as such, he had an absolute right to represent himself at sentencing.

In a letter to the trial court dated August 6, 2009, and postmarked August 10, 2009, appellant asked that his trial counsel be removed due to having provided ineffective assistance: "I do not want [defense counsel] to have anything further to do with me, my case, my motion(s), nor [sic] my sentencing." He asked to be heard on the matter prior to August 27, 2009, the date of his sentencing hearing. He did not indicate that he wanted a new attorney or that he wanted to represent himself. Appellant's letter was faxed from the court to the prosecutor and defense counsel on August 19, 2009, with the note "EX PARTE COMMUNICATION FROM DEFENDANT TO JUDGE MADDOCK." The court did not set a separate date for hearing appellant's concerns about his attorney. Instead, it heard the matter on the date set for sentencing, August 27, 2009.

On August 27, 2009, with reference to the letter, appellant's counsel stated, "I believe … that it's Mr. Green's desire to pursue a *Marsden* and/or [*Faretta*][5] motion at this point." The court cleared the courtroom and held the *Marsden* hearing.

Back on the record, the court announced that the *Marsden* motion had been denied and proceeded to sentencing.

Appellant interrupted the proceedings, stating, "I still want to file my motion for a new trial." Appellant's counsel stated that he had not filed such a motion because he did not believe there were sufficient grounds. Appellant stated that he wanted to file a new trial motion and that if his attorney would not do it, then he would do it himself. The trial court asked appellant if he was saying that he wanted to have his attorney discharged and to represent himself, and appellant replied in the affirmative. The court announced a brief

recess to retrieve the necessary paperwork for a *Faretta* waiver, and allowed appellant and defense counsel time to discuss the issues involved.

After the noon recess, the trial court once again asked whether appellant wanted to represent himself, and appellant answered that he did. The court asked appellant if he would be prepared to proceed with sentencing if the court granted his motion, and appellant replied that he would not. Appellant explained that he would not be ready because he wanted to file a new trial motion and had not yet begun to organize his documents and his argument. He had been planning on having another attorney help him with it, "but since you denied my motion, I guess I'm going to have to do it myself. I wasn't prepared for that."

The trial court ruled as follows: "Well, Mr. Green, the procedure we go through when a [*Faretta*] is requested, the court must determine whether it's an unequivocal request and second whether it's timely. [¶] The cases do hold [that] if it's made immediately following a *Marsden* motion, oftentimes it's due to frustration and not necessarily unequivocal. This was made immediately following a *Marsden* motion and may well be based on frustration from the results of that, as well as frustration of the results of the trial. [¶] Second thing is whether it's timely. The motion is being made today at the date and time and place of sentencing. And because you're going to be requesting a continuance in the sentencing, the court is inclined to deny this motion based on both it not being completely unequivocal as well as it not being timely. [¶] The courts have the availability of filing motions with the calendar department, the felony calendar department at any time, but waiting until the day of the trial – excuse me – the day of the sentencing puts everything behind and is not as they say timely. [¶] So while I have accepted your [*Faretta*] waiver form and it will become part of the record, I'm going to deny your request based on timeliness, and we're going to proceed with the sentencing. But you've made your record. You've given the statements which are in the record for the *Marsden*, which are confidential, but are available to the Court of Appeal. You have also indicated that you may well have a basis for writ of habeas corpus later if there was evidence that should have been presented that wasn't. That is preserved, and you can deal with that. [¶] . . . [¶] So I am going to as I say deny the [*Faretta*] motion, and we will proceed directly to sentencing at this time."

Appellant raised the fact that he sent his letter on August 10 and that it included a request that the court consider setting an earlier hearing on those issues. The court replied that the letter was an ex parte communication and that the court could not review the letter until it was sent to both counsel. The court stated that once the letter was faxed, the court did look at it, but saw nothing in it requesting self-representation: "I didn't read anything into my quick review of that that it was a request for a [*Faretta*] motion." Appellant replied, "It wasn't necessarily a [*Faretta*] motion," but was an attempt to bring appellant's issues to the court's attention as soon as possible. The court advised appellant that he was not allowed to contact the court in an ex parte manner, and appellant conceded that he had not asked his attorney to bring the *Marsden* issue to the court's attention. The court stated that it had considered appellant's *Marsden* and *Faretta* motions, that both motions were denied, and that it would proceed with sentencing.

"A defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so. (*Faretta*[*,supra,*] 422 U.S. 806.) In order to invoke an unconditional right of self-representation, the defendant must assert the right 'within a reasonable time prior to the commencement of trial' " (*People v. Burton* (1989) 48 Cal.3d 843, 852 (*Burton*). A trial court must grant an unequivocal and timely request for self-representation that is also knowing, voluntary, and intelligent. (*People v. Lynch* (2010) 50 Cal.4th 693, 721.) An untimely request "is addressed to the sound discretion of the trial court." (*Burton*, *supra*, 48 Cal.3d at p. 852.)

Appellant contends that his *Faretta* motion was timely and that the court was obligated to grant it. The court should have continued the date for sentencing, a delay which would cause "very little prejudice" to the parties or the court, according to appellant, so that he could prepare his motion for a new trial. He cites *People v. Miller* (2007) 153 Cal.App.4th 1015 (*Miller*), which held that a sentencing hearing is a proceeding separate from trial and that an unequivocal *Faretta* motion made in advance of a sentencing hearing should be granted as a matter of right if the defendant is mentally competent to knowingly and intelligently waive his right to counsel. (*Miller*, *supra*, 153 Cal.App.4th at p. 1024.)

Appellant's reliance on *Miller* is unavailing, for the reasons discussed in *Doolin, supra,* 45 Cal.4th 390. In *Doolin* (a capital case), on the day of sentencing, the defendant made a *Marsden* motion, which the court denied. The defendant then made a *Faretta* motion, which was also denied. The Supreme Court acknowledged that it had not addressed the timeliness of a request for self-representation made after the penalty phase verdict but before sentencing, but determined that it need not do so in the case before it because the defendant's request was "manifestly untimely." (*Id*. at p. 454.) The *Doolin* court explained: "[Defendant] never requested self-representation during the guilt or penalty phase. He appeared on the day set for sentencing and sought, not to act as his own counsel, but to replace his appointed lawyer with a new one and to secure a continuance. Only when this approach failed did defendant seek self-representation . . . . He was not prepared to proceed and could not provide a reasonable estimate of when he would be ready. The trial court's ruling was well within the scope of its discretion." (*Id*. at pp. 454-455, fn. omitted.) In a footnote, the *Doolin* court observed: "The circumstances of defendant's posttrial request for self-representation are in stark contrast to a recent Court of Appeal decision that held such a motion in a noncapital case is timely if made 'a reasonable time prior to commencement of the sentencing hearing.' (*People v. Miller, supra,* 153 Cal.App.4th 1015, 1024.) In *Miller*, the defendant moved for self-representation after the jury rendered its verdict and a new trial motion was made and denied, but more than two months before the scheduled sentencing hearing. At the time he made his motion, the defendant indicated to the court he planned to conduct his own investigation and that he would be prepared on the date the court had set. (*Id*. at pp. 1020, 1024.) In holding the trial court erred by denying the defendant's motion as untimely, the court observed that concerns about trial delay or disruption do not apply to separate sentencing hearings. (*Id*. at p. 1024.) Because the defendant's request was timely, he 'had an absolute right to represent himself at sentencing and the trial court was required to grant his request for self-representation, which was unequivocal, as long as he was mentally competent and the request was made "knowingly and intelligently, having been apprised of the dangers of self-representation." ' (*Ibid*., quoting *People v. Welch* [(1999)] 20 Cal.4th [701], 729.) In this case, for the reasons stated, defendant's right to self-representation at sentencing was not absolute but subject to the court's discretion." (*Doolin*, *supra*, 45 Cal.4th at p. 455, fn. 39.)

In the present case, appellant waited until two months after trial (the jury returned its verdict on June 8, 2009; appellant's ex parte letter was postmarked on August 10, 2009) to express dissatisfaction with his counsel, and did not raise the issue of self-representation until the day of the sentencing hearing. Under these circumstances, we conclude the trial court correctly determined that appellant's motion

the day of the sentencing hearing. Under these circumstances, we conclude the trial court correctly determined that appellant's motion was untimely. Thus, the decision whether to grant or deny the motion was within the discretion of the trial court. Appellant does not argue in the alternative that, if the motion was untimely, the trial court abused its discretion, and thus we need not consider the issue. In any event, having reviewed the record ourselves, we find no abuse of discretion.

C. *Sentencing Issues*

1. Consecutive Sentencing on Counts One and Three.

Appellant contends the trial court should have stayed the sentence on the false imprisonment conviction pursuant to section 654 because his "offense of false imprisonment of an elder involved conduct indivisible from the force and acts of the robbery for which he was convicted." According to appellant, his only purpose in hitting and restraining the victim was to accomplish the robbery. Appellant's use of force, he contends, was "part and parcel of the robbery." We disagree.

For the robbery conviction, the court imposed a base term of four years; for false imprisonment of an elder, the court imposed a consecutive one-year term. In imposing the consecutive term, the court stated: "I am satisfied that I can [sentence] consec[utively] the false imprisonment. . . to the crime of robbery. It was not necessary to restrain her attempt to flee here as part of the robbery. That was an additional choice the defendant made. [¶] The robbery could have been completed with her gone or with her there but, by holding her there, that was an additional step he took and an additional crime to restrain the elder. I find this separate and apart from the home invasion robbery that he conducted."

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 prohibits multiple punishment when an indivisible course of conduct results in the violation of multiple criminal statutes accomplished with a single intent and objective. (*People v. Hester* (2000) 22 Cal.4th 290.) If all the offenses were incidental to one objective, the defendant may be punished for any one of the acts but not for more than one. (*People v. Castro* (1994) 27 Cal.App.4th 578, 582-584.)

"The divisibility of a course of conduct depends upon the intent and objective of the defendant. If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.] The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) Ascertaining a defendant's intent and objective is a question of fact for the trial court whose express or implied finding that the crimes were divisible will be sustained on appeal if supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) We review the trial court's findings " 'in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085, quoting *People v. Holly* (1976) 62 Cal.App.3d 797, 803.)

Although the crime of robbery is not complete until the perpetrator "has won his way to a place of temporary safety" (*In re Jesse F.* (1982) 137 Cal.App.3d 164, 171, quoting *People v. Carroll* (1970) 1 Cal.3d 581, 585), not every act committed by the robber before making his getaway is incidental to the robbery. Once the fruits of the robbery have been obtained and escape is assured, a gratuitous act that is not necessary to effectuate the robbery is separately punishable. (*In re Jesse F.*, *supra*, 137 Cal.App.3d at p. 171, and cases cited therein.)

Thus, courts have held that gratuitous acts of violence against an unresisting victim or an additional crime to facilitate escape or to discourage the reporting of a crime, may be separately punishable. In *People v. Foster* (1988) 201 Cal.App.3d 20 (*Foster*), the court upheld consecutive sentences for robbery and false imprisonment where the defendant and an accomplice robbed a convenience store and, after obtaining the money, forced the victims into the store cooler and blocked their exit. Rejecting the defendant's claim that the false imprisonment was merely incidental to the robbery, the appellate court explained: "The imprisonment of the victims occurred *after* the robbers had obtained all of the money, and therefore was not necessary or incidental to committing the robbery. Locking the victims in the store cooler was potentially dangerous to their safety and health. It is analogous to a needless or vicious assault committed after a robbery, which has long been held separately punishable and distinguishable from an assault which is merely incidental to robbery." (*Foster*, *supra*, 201 Cal.App.3d at pp. 27-28; see also *People v. Saffle* (1992) 4 Cal.App.4th 434, 438-449 [holding false imprisonment was not incidental to the commission of sex offenses where, after the sex offenses were completed, the defendant threatened the victim with a knife to her throat to prevent her from reporting the incident]; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 [rejecting defendant's argument that store clerk had been shot after being robbed and while lying on the floor to eliminate him as a witness or to facilitate escape].)

Here, appellant entered the victim's home and asked, "Where's the money, the money" The victim, who was "scared to death," went toward the dining room to get her handbag. Appellant followed her and saw the handbag on a chair. As he was going through her handbag, the victim made no attempt to resist but did try to get out the front door. Before she could open the door, appellant grabbed her arm and punched her in the eye, knocking her to the ground. She got up quickly, but appellant and her handbag were gone. Appellant could have fled immediately upon obtaining the victim's property. Instead, he pulled her away from the front door and punched her in the face before fleeing, apparently out the back door. As for appellant's argument that it was necessary to stop the victim "so that she would not interfere with the robbery that was in process by escaping to raise an alarm," the trial court could have drawn that conclusion. However, the court could also have concluded that this was an act of violence and restraint committed after the victim's property had been obtained and was not necessary to facilitate the robbery. (See *Foster*, *supra*, 201 Cal.App.3d at pp. 27-28.) Under the circumstances presented here, we conclude there is substantial evidence to support the trial court's finding that appellant's intent and objective in committing the robbery was distinct from his intent and objective in committing the false imprisonment. Thus, section 654 does not bar separate punishment.

2. *Concurrent Sentencing on Counts Two and Four.*

Appellant contends the trial court improperly imposed concurrent terms on count 2, residential burglary, and count 4, assault with force likely to produce great bodily injury. He argues that these sentences violate the section 654 proscription against multiple punishment and that the terms should have been stayed rather than made concurrent. Respondent agrees.

Where section 654 applies, concurrent terms are inappropriate. (*People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028.) Moreover, the imposition of a concurrent term for a count that should be stayed is an unauthorized sentence, which can be corrected by this court. (*People v. Hester, supra,* 22 Cal.4th 290, 295.) Here, the residential burglary in count 2 appears to be indivisible from the residential robbery sentenced in count 1. Similarly, the assault in count 4 appears to be indivisible from the false imprisonment in count 3. Thus, the concurrent terms for counts 2 and 4 should have been stayed under section 654. We will direct that the judgment be modified accordingly.

3. *Restitution Fine and Parole Revocation Restitution Fine.*

Appellant contends, and respondent concurs, that the restitution fine and the corresponding parole revocation restitution fine imposed by the trial court should be recalculated if any of the terms challenged above are ordered stayed pursuant to section 654.

At sentencing, the trial court stated: "The Court will also assess . . . the restitution fine in the amount of $4,000. That's computed as $200 times the five-year prison sentence times four counts of which he was convicted." The court ordered a parole revocation fine in the same amount and stayed it pending "any violation or revocation of parole."

In calculating the restitution fine, the court applied the formula suggested in section 1202.4, subdivision (b)(2). However, and as acknowledged by respondent, because the sentences on counts 2 and 4 should have been stayed, the trial court was not authorized to include those sentences in calculating the fine. In *People v. Le* (2006) 136 Cal.App.4th 925, the court held that the section 654 ban on multiple punishments applies to restitution fines imposed under section 1202.4 because those fines are criminal penalties and thus a form of punishment. (*Le*, *supra*, 136 Cal.App.4th at p. 933, citing *People v. Hanson* (2000) 23 Cal.4th 355, 361-362.) The *Le* court concluded: "[W]e determine that the section 654 ban on multiple punishments is violated when the trial court considers a felony conviction for which the sentence should have been stayed pursuant to section 654 as part of the court's calculation of the restitution fine under the formula provided by section 1202.4, subdivision (b)(2)." (*Id.* at p. 934.) Accordingly, the restitution fine and the corresponding parole revocation restitution fine must each be reduced to $2,000 (i.e., $200 multiplied by five years, multiplied by two counts). (§ 1202.4, subd. (b)(2).)

IV. DISPOSITION

The judgment is ordered modified to (1) correct the description of the crime for count 1 on the Abstract of Judgment to indicate first degree residential robbery; (2) stay the sentences on count 2 (residential burglary, §§ 459/460, subd. (a)) and count 4 (assault with force likely to produce great bodily injury, § 245, subd. (a)(1)); (3) reduce the amount of the restitution fine imposed pursuant to section 1202.4, subdivision (b)(2), from $4,000 to $2,000; and (4) reduce the amount of the suspended parole revocation restitution fine imposed pursuant to section 1202.4 from $4,000 to $2,000. As so modified, the judgment is affirmed. The superior court is ordered to send a certified copy of the corrected Abstract of Judgment to the Department of Corrections and Rehabilitation.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Richman, J.

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[1] (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).)

[2] All further unspecified statutory references are to the Penal Code.

[3] The description of the crime for count 1 on the Abstract of Judgment incorrectly reads "1st Deg. Resid. Burg." It should indicate first degree residential robbery instead. We will direct that the Abstract of Judgment be corrected.

[4] On counts 2 and 4, the court imposed concurrent midterm sentences of four years and two years, respectively.

[5] "*Faretta*" is repeatedly misspelled in the Reporter's Transcript. In quotations from the transcript, we have replaced the misspelling with [*Faretta*].